UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MHANY MANAGEMENT INC., VIC DEVITA, FRANCINE MCCRAY and NEW YORK COMMUNITIES FOR CHANGE, INC.,	:	
Plaintiffs,	:	
v.	:	Case No. 05-cv-2301 (ADS) (WDW)
COUNTY OF NASSAU, GARDEN CITY BOARD OF TRUSTEES, AND INCORPORATED VILLAGE OF GARDEN CITY,	:	
Defendants.	:	

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

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Plaintiffs MHANY Management, Inc. ("MHANY"), New York Communities for Change, Inc. ("NYCC"), Vic DeVita and Francine McCray (collectively, "Plaintiffs") respectfully submit this memorandum of law in opposition to the motions for summary judgment of defendants Incorporated Village of Garden City, Garden City Board of Trustees ("the Board") (together, "Garden City" or the "Village") and County of Nassau ("Nassau County" or "the County") (collectively, "Defendants").

PRELIMINARY STATEMENT

This discrimination case involves one of the most persistent obstacles to integrated housing in America today: the use of exclusionary zoning to block affordable housing which would likely be occupied by minority residents. In 2004, the Village of Garden City, located in Nassau County, New York, enacted an exclusionary zoning ordinance on County-owned property after the County announced its plans to sell the property for development as multi-family housing. The zoning ordinance was enacted in direct response to residents' fierce, explicit and racially animated opposition to the prospect of an affordable housing development in the Village and the tenants who might inhabit such housing. Because affordable housing in Nassau County is disproportionately occupied by minority populations, the exclusionary zoning had a disparate impact on those populations. Though Nassau County's highest elected official, former County Executive Suozzi, recognized that Garden City's zoning enactment was motivated, at least in part, by opposition to affordable housing borne of racial animus, the County supported the Village's actions and promised to place restrictive covenants on its land to preclude the possibility of affordable housing there.

Garden City has long been a white enclave surrounded by majority-minority communities, a text-book example of the extreme segregation that persists in Nassau County. It is no secret that Nassau County is one of the most segregated counties in this country. This is in large part

because white communities in Nassau County, such as Garden City, have historically resisted the development of affordable housing – likely to be occupied by non-white minorities – within their borders. Yet Nassau County and Garden City have consistently capitulated to their white residents' resistance to integration: Garden City has blocked other affordable housing proposals, and Nassau County exclusively targets high-minority areas for affordable housing projects.

This case has been pending since 2005. Defendants now claim that the case is moot because Nassau County has conveniently "decided" not to sell the property and instead plans to build a new family court building there. These plans do not moot the case – Plaintiffs have been injured by discriminatory actions that disproportionately impacted minority populations, and Plaintiffs ask this Court to redress those injuries. The problem of racial segregation persists, and this Court can redress Plaintiffs' injuries, whether a family court building is constructed on the site or not.

There is substantial evidence demonstrating that Garden City and Nassau County acted with discriminatory intent in depriving Plaintiffs of the opportunity to develop or live in affordable housing; that minority populations in Nassau County were disproportionately impacted by those actions, for which there was no legitimate governmental interest; that those actions served to increase segregation in Nassau County and between Garden City and its neighbors; and that Nassau County – by these actions, and by its historic failure to administer federal housing funds in a desegregative manner – has violated its duty affirmatively to further fair housing. Defendants cannot show an absence of material issues of fact as to any of Plaintiffs' claims. Indeed, Garden City even disputes many of the facts recited in its co-defendant Nassau County's Statement of Material Facts as to which Nassau County claims there is no dispute. Therefore, Defendants' summary judgment motions should be denied.

STATEMENT OF FACTS

The facts are fully set out in Plaintiffs' Amended Statement of Additional Material Facts pursuant to Local Rule 56.1, dated May 9, 2011 ("SAMF"). A summary of the most salient facts follows; additional facts will be incorporated within Plaintiffs' argument.

A. The Parties

Plaintiff Francine McCray is an African-American woman who seeks to live in a racially integrated Nassau County. (Amended Complaint for Declaratory Judgment and Injunctive Relief, dated November 30, 2005, Dkt. 24 ("Amended Complaint") ¶ 7.) Ms. McCray desires to live in Garden City because it is a safe community in close proximity to public transportation. (*Id.*) Plaintiff Vic DeVita is a white man who resides in Garden City and desires his community to be more integrated. (*Id.* ¶ 4.) Plaintiff MHANY is a not-for-profit community-based developer of affordable housing, formerly known as New York ACORN Housing Company, Inc. ("NYAHC"). (*Id.* ¶ 12.) Intervenor-Plaintiff NYCC is a not-for-profit membership organization devoted to improving the quality of life for members of low income communities in New York. (Complaint in Intervention, dated June 30, 2010, ¶ 1, Dkt. 250.) NYCC has the same mission and goals as prior-plaintiff, the now-disbanded ACORN (The New York Association of Community Organizations for Reform Now). (*See id.* ¶ 6). Defendant Incorporated Village of Garden City is a municipal corporation located within Defendant Nassau County, a municipal corporation in the State of New York. (Amended Complaint ¶¶ 15, 16.) Defendant Garden City Board of Trustees is an elected governing body in Garden City. (*Id.* ¶ 17.)

B. Garden City: An Enclave of White Surrounded by Majority-Minority Communities Within Segregated Nassau County

At the time the complained-of events occurred, Nassau County was (and still is) one of the most segregated counties in the country. (SAMF ¶¶ 10-11.) It ranked in the top one-half of

one percent of all counties in the United States for segregation of African Americans, and in the top ten percent for segregation of Hispanic people. (*Id.*) Garden City is an extreme example of segregation in the County; its population was 97.4% white, in stark contrast with many of the majority-minority communities immediately bordering Garden City. (*Id.* ¶¶ 2, 4-5.) Most affordable housing units in the County are located in areas in the County with the highest minority populations, who make up a disproportionate share of very-low income households in the County. (*Id.* ¶¶ 242, 268.) Garden City contained no affordable housing units. (*Id.* ¶¶ 168, 203; Declaration of Stanley J. Brown in Opposition to Defendants Incorporated Village of Garden City's, Garden City Board of Trustees' and Nassau County's Motions for Summary Judgment, dated August 31, 2011 ("Brown Decl."), submitted herewith, Ex. 89 at NASSAU COUNTY 026953.) Thus, the development of any affordable housing units in Garden City would have reduced the racially homogenous nature of the Village and the level of segregation between Garden City and its majority-minority neighbors. (SAMF ¶¶ 28, 169.)

C. In Response to Racially Animated Pressure from Village Residents, Garden City Enacted Zoning to Preclude Affordable Housing, and the County Acquiesced

In 2002, Nassau County adopted a Consolidation Plan to sell a number of its real property holdings, including a 25-acre parcel of land located in Garden City on County Seat Drive (the "Social Services Site" or "Site"). (SAMF ¶¶ 17-18.) Because the County's goal in selling the Social Services Site was to maximize revenue, the County wished to sell the Site for residential, multi-family housing development, which would garner the highest sales price. (*Id.* ¶¶ 20-25.) At the time, the Social Services Site was zoned "P," for public use only. (*Id.* ¶ 19.)

The County requested that the Board rezone the Site to allow for multi-family residential development. (*Id.* ¶ 26.) Multi-family zoning facilitates the development of affordable housing. (*Id.* ¶ 27.) The then-mayor of Garden City and the Board appointed a committee of three

Trustees, the "P-Zone Committee," to make recommendations in connection with the sale of the Site. (*Id.* ¶¶ 29, 31-32.) Garden City hired the firm of Buckhurst, Fish and Jacquemart ("BFJ"), a planning and zoning consultant, to recommend appropriate rezoning for the Site (*id.* ¶¶ 29-30, 32, 34) in accord with the County's expressed request for high density, multi-family zoning (*see id.* ¶¶ 24, 32) and Garden City's list of planning and zoning principles (*id.* ¶¶ 35-37).

BFJ recommended borrowing from existing regulations in Garden City's Zoning Code, and further recommended that the P-Zone Committee not "depart[] radically" from the existing code. (*Id.* ¶ 38.) During 2003 and at the beginning of 2004, BFJ created a number of reports and memoranda, all of which recommended the adoption of a Residential Multifamily ("R-M") zoning classification for the residential portion of the Site. (*Id.* ¶ 40.) R-M zoning would have permitted multi-family housing (and thus affordable housing), townhouses and single-family dwellings as-of-right. (*Id.* ¶¶ 40, 45, 55, 59.) R-M zoning would have allowed for a total of 311 residential units. (*Id.* ¶ 47, 59.) Trustee Bee "felt the recommended zoning changes were appropriate." (*Id.* ¶ 65.)

In early 2004, the Board and BFJ presented the proposed R-M zoning at several public hearings and property association meetings. (*Id.* ¶¶ 60-94.) At the public hearings, residents of Garden City stridently voiced their opposition to the development of multi-family and low income housing at the Site. (*Id.* ¶¶ 61-62, 68-70, 73-74, 77-78, 82-83, 86-88; Brown Decl. Ex. 54, ACORN002401, "people in Garden City . . . are yelling at" former County Executive Suozzi.) Residents demanded assurances that only "upscale" housing would be built at the Site, rather than affordable housing, claiming they were concerned about maintaining the "character" of Garden City. (SAMF ¶¶ 69, 83.) Trustee Negri later testified that housing occupied by low-income minorities is not consistent with the "character" of Garden City. (*Id.* ¶ 84.) A flyer was

distributed urging Garden City residents to oppose affordable housing at the Social Services Site. (*Id.* ¶ 86.) The flyer warned that affordable housing might bring those who did not earn "Garden City incomes" to town and rallied residents to attend the public meetings and "stall the process." (*Id.*) When Trustee Bee stated that "neither the County nor the Village is looking to create a so-called affordable housing at that spot," a resident demanded of Trustee Bee, "Can you guarantee that, that it won't be in that building?" (*Id.* ¶ 87.)

Some Garden City residents couched their opposition to multi-family housing development at the Site in purported concerns over perceived increased traffic congestion, potential overcrowding of schools and increased taxes. (*Id.* ¶¶ 62, 70, 73-74, 77-78, 82.) But BFJ explained in detail, in reports and at the hearings, that all such concerns were groundless. (*Id.* ¶¶ 71, 75, 79.) Trustees Bee and Negri, and former Nassau County Executive Suozzi, did the same (*id.* ¶¶ 72, 76, 80-81, 93-94), and Suozzi even chastised Garden City residents for being "irrational" in their unfounded concerns. (*Id.* ¶ 85.) Yet when confronted with these explanations, Garden City residents nonetheless continued to oppose multi-family housing. (*Id.* ¶¶ 73, 77, 82.)

In response to this public outcry, former County Executive Suozzi immediately agreed that there would be no affordable housing in Garden City at the Social Services Site. (*Id.* ¶¶ 103-09.) He told Garden City residents that while "there is a great need for affordable housing" in the County, "Garden City is not the location." (Brown Decl. Ex. 54 at ACORN002391.) Suozzi promised that Nassau County, as the landowner, would specifically covenant to exclude affordable housing at the Site and would put deed restrictions in place so that the Site would only be "upscale." (SAMF ¶¶ 104, 107.) Suozzi gave Garden City residents repeated assurances – in response to their demands – that the County would abide by their will with regard to rezoning

and selling the Site. (*Id.* ¶¶ 106-09.) These promises were made despite Suozzi's subsequent admission that, in his view, racism was a motivating factor in Garden City's very vocal opposition to affordable housing at the Social Services Site. (*Id.* ¶ 110.) Possible racist motivation "was not [Suozzi's or the County's] concern." (*Id.* ¶ 111.)

After a year and a half and numerous reports by BFJ recommending the R-M zoning – recommendations that had been endorsed by the P-Zone Committee and the Trustees – Garden City responded to its residents' heated opposition to zoning that would have allowed for development of multi-family housing, and thus the possibility of affordable housing, with a complete about-face. Jettisoning nearly eighteen months of planning effort, Garden City deviated from BFJ's recommendation that the Village not "depart[] radically" from the existing code, and at the last minute created a brand-new zoning classification for the Social Services Site, designated "R-T," for "Residential Townhouse." (*Id.* ¶¶ 114-18.) Trustee Lundquist could not, or at least would not, explain at his deposition why the originally proposed R-M zoning was not adopted. (*Id.* ¶ 124.) The Village submitted the new zoning to the Nassau County Planning Commission for review, and the County commended the Village for its creation of "a new residential use at the 101 County Seat Drive property," though it asked that the Village consider not entirely eliminating the "P" zone designation from the new zoning ordinance. (Declaration of Ralph J. Reissman in Support of Defendant Nassau County's Motion for Summary Judgment, dated July 29, 2011 ("Reissman Decl.") Ex. AQ at 1.)

On June 3, 2004, Garden City adopted Local Law No. 2-2004, "A Local Law to Amend the Code of the Village of Garden City, to Delete the Public P District, add the Co-5 and R-T Districts, Amend the CO-4 District and Define "Open Space" and Townhouse." (SAMF ¶ 122; Brown Decl. Ex. 35.) The new R-T zoning classification – with set back restrictions and large

minimum floor area requirements – effectively and intentionally prevented the construction of multi-family, and thus affordable, housing on the Site. (SAMF ¶¶ 116-20, 123; Defendant County of Nassau's Memorandum of Law in Support of Motion for Summary Judgment, dated July 29, 2011 ("NC Br.") at 4-5.) Under the new R-T zoning, multi-family housing was permitted on less than 15% of the Site, and then only after obtaining a special permit from the Board, the very group that had bowed to the discriminatory animus of its residents in the first place. (SAMF ¶¶ 117, 120.) The zoning enactment also eliminated the public "P" zone, which the County had opposed. (*See* Reissman Decl. Ex. AQ at 1.)

D. The County Rejected Plaintiffs' Affordable Housing Proposals

In July 2004, Nassau County issued a Request for Proposals ("RFP") for the development of the Social Services Site using the newly created and exclusionary R-T zoning. (SAMF ¶¶ 128-31.) In September 2004, predecessor-plaintiff NYAHC contacted Nassau County with a proposal to develop affordable housing on the Site pursuant to the originally recommended R-M zoning. (*Id.* ¶¶ 134-37.) Because the new R-T zoning made it effectively impossible for any affordable housing to be constructed on the Social Services Site (*id.* ¶¶ 116-18, 123; NC Br. at 4-5), it was futile for Plaintiffs (or anyone else) to submit an affordable housing response to the RFP that complied with the new zoning. (*See id.* ¶¶ 132, 143-45.) As a result, the affordable housing proposal that NYAHC submitted did not comply with the R-T zoning or with the RFP's requirements. (*Id.*) But NYAHC was prepared to submit a bid to construct affordable housing on the Site. (*Id.* ¶¶ 134-37.) Had it been permitted, NYAHC would have, and could have, submitted a development proposal for at least the $30 million asking price, and would have been able to construct approximately 78 affordable units as part of a 311-unit development. (*Id.* ¶ 138.) NYAHC also could have paid $150 million over 30 years, or $67 million in present value return to the County, more than the bid the County ultimately accepted. (*Id.* ¶¶ 139-40.)

In May 2006, a year after this action was commenced, Nassau County announced that it intended to sell another piece of land in Garden City (the "Ring Road Site") for the purpose of developing affordable housing in Garden City. (*Id.* ¶ 191.) The County asked the Board to rezone the parcel from commercial to multi-family residential. (*Id.* ¶ 193.) NYAHC submitted a proposal for an affordable housing development. (*Id.* ¶ 194.) But the County's announcement that it wished to build affordable housing in Garden City once again raised a flurry of objections from Garden City residents. (*Id.* ¶¶ 195-200.) Former County Executive Suozzi's office received many hostile – and some openly racial – communications regarding its proposal, which included the following statements: "people who cannot afford to live somewhere should not be able to. TRS [Suozzi] is catering to ACORN and black people;" "Stop trying to destroy Garden City! . . . We would much prefer to see Family Court moved to our eleven acres, not rental properties or affordable (low income) housing;" "I am disgusted when I . . . read about how you still want to destroy our beautiful village by forcing in affordable housing . . . If you must sell off county land to raise money for Nassau County, sell it to a developer who will bring big money, not someone who will build affordable housing;" "Please do not pursue this low income housing in GC . . . Everyone has a 'right' to live where they want . . . they don't have a 'right' to get things they do not deserve or work for. Please do not turn GC into Hempstead, Roosevelt, etc [neighboring majority-minority towns] . . . It will only lead to property values decreasing, schools negatively impacted." (*Id.*) Confronted once again by the racially animated opposition of Garden City residents, the County did not further pursue the Ring Road project and accepted no proposals for development of the Ring Road Site at that time. (*See id.* ¶ 194.)

E. Racism is a Serious Obstacle to Affordable, Racially Integrated Housing in Nassau County

Nassau County has a dire, persistent and well-documented need for affordable housing that continues to this day. (*Id.* ¶¶ 236-41; Brown Decl. Ex. 93, Declaration of Peter Marcuse, dated September 12, 2008 at 10-12.) The County is well aware that racism and local opposition are serious obstacles to affordable housing in the County and that "government has been ineffective in dealing with the problem." (SAMF ¶¶ 243-53.) Patrick Duggan, former Deputy County Executive for Economic Development, testified that "people who don't want people of different races living in their communities . . . elect their elected officials to do the will of the people" (*id.* ¶ 245), and the County admits that communities with low numbers of minorities often use zoning to maintain the segregation status quo. (*Id.* ¶ 247.) In addition, Rosemary Olsen, Director of the Nassau County Office of Housing and Intergovernmental Affairs, explained that communities in the County "are concerned [that] if they develop multi-family housing in their communities that they will attract people that are different from themselves." (*Id.* ¶ 253.) Former County Executive Suozzi agreed that "pervasive structural and institutional racism spanning centuries remains omnipresent in Long Island" and that "exclusionary zoning and lethargic government fair-housing enforcement of today" allows the situation to persist. (*Id.* ¶ 250.) *See also Acevedo et al. v. Nassau Cnty. et al.*, 369 F. Supp. 1384, 1389 (E.D.N.Y. 1974), *aff'd,* 500 F.2d 1078 (2d Cir. 1974) (in Nassau County "the most objectionable form of housing has been low-income family housing. . . .community opposition to this form of housing has been racially motivated. . . . As can be expected such heated opposition has not been ignored by the elected officials of Nassau. There is evidence of more than one housing proposal being dropped because of vehement community opposition").

F. Nassau County's Affordable Housing Policies Increase Segregation

For decades, Nassau County has played an active role in perpetuating the segregation between racially homogenous white communities such as Garden City and the lower-income, majority-minority communities that surround it. (SAMF ¶¶ 225-35; 254-63.) Rather than address the racism that presents a basic impediment to fair housing, the County has consistently bowed to racially animated community opposition to affordable housing. This has resulted in a longstanding segregative County policy of directing its federal housing assistance funds to acquire or support the development of affordable housing in communities predominantly populated by minorities, to the specific exclusion of predominantly white communities. (*Id.*)

The County's 1995, 2000, 2005 and 2010 Consolidated Strategy and Plans (documents the U.S. Department of Housing and Urban Development ("HUD") requires federal housing fund grantees to prepare) expressly state that: "Nassau County currently targets its comprehensive community development efforts in . . . lower income and minority areas such as Roosevelt, Inwood, Hempstead Village, New Cassel and Freeport [Elmont as well, in 2010]. Housing rehabilitation activities, constructions [sic] of affordable housing and housing redevelopment activities have been, and will continue to be, targeted to these areas." (*Id.* ¶¶ 232, 234.) For example, as of 2006, the County claimed to have been involved in the construction or rehabilitation of 1,565 units of affordable housing, but almost two-thirds of those units were located in municipalities with minority shares that were over twice the County average, and *all* of those units designated as "new construction" were located in such municipalities. (*Id.* ¶ 229.)

The County official who administers its federally-funded Community Development Block Grant ("CDBG") program testified that the County never evaluated the impact of CDBG and HOME Investment Partnership ("HOME") expenditures on racial or housing segregation, nor did it examine how the County's explicit policy of targeting affordable housing in minority

communities would be an impediment to fair housing. (*Id.* ¶ 258.) This official further testified, in response to questions about this policy, that the County is "not supposed to look at racial demographics" in allocating CDBG funds to help create new, affordable housing. (*Id.* ¶ 255.) Some five years after this lawsuit was filed, the County finally listed "discrimination" as an impediment to fair housing in its 2010 Analysis of Impediments and Fair Housing Plan (a document it must prepare in order to receive HUD funding) (*id.* ¶ 258), but the Analysis of Impediments makes little effort to describe actions the County plans to take in the future to combat discrimination in the housing market. (*Id.* ¶ 259.)

G. Procedural Background

In May 2005, Plaintiffs commenced a lawsuit against Garden City and Nassau County alleging that both Defendants violated § 3604 (a) of the Fair Housing Act ("FHA"), 42 U.S.C. § 3604(a); the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982 and 1983; the Equal Protection Clause of the Fourteenth Amendment; and the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; and that the County violated § 3608 of the FHA, 42 U.S.C. § 3608 (the "Affirmatively to Further Fair Housing" provision). (Dkt. 1.) Plaintiffs filed an Amended Complaint on November 30, 2005. (Dkt. 24.) Defendants moved to dismiss the Amended Complaint in 2006. (Dkt. 30, 34.) This Court (Hon. Joseph F. Bianco) denied Defendants' motions, rejecting Defendants' challenge to Plaintiffs' standing and finding that Plaintiffs had adequately alleged discrimination. (Dkt. 37.)

The parties engaged in a lengthy discovery exchange during which Plaintiffs were forced to make many motions to address Defendants' consistent failure to adequately respond to Plaintiffs' requests. (*See*, *e.g.*, Dkt. 58, 80, 116.) In fact, discovery from Nassau County remains outstanding. Magistrate Judge Wall recently ordered Nassau County to supplement its prior discovery responses, but the County has failed to do so. (Dkt. 276.)

Defendants first filed motions for summary judgment on March 31, 2009. (Dkt. 147, 148.) The motions were fully briefed and argued before Judge Bianco. (Dkt. 169, 172, 176, 183.) Judge Bianco then recused himself on March 2, 2010 (Dkt. 211), and the matter was assigned to Judge Spatt for all further proceedings. (Dkt. 213.) On March 15, 2010, Judge Spatt dismissed all pending motions without prejudice and with leave to re-file. (Dkt. 214.) As former plaintiff ACORN had since disbanded, NYCC, an organization with the same goals and mission as ACORN, moved to intervene to replace ACORN, and the motion was granted on June 15, 2010. (Dkt. 225, 246.) NYCC filed its Complaint in Intervention on June 30, 2010. (Dkt. 250.) Defendants correctly note that the Complaint in Intervention omitted previously pled claims under 42 U.S.C. § 1983 and the Equal Protection Clause. These omissions were inadvertent (the Complaint in Intervention is virtually identical to the Amended Complaint in all other respects), and NYCC has moved to amend the Complaint in Intervention to correct this oversight. (Dkt. 290.) This motion is currently pending before the Court.

Defendants filed their summary judgment motions on July 29, 2011, alleging that no material issues of fact exist as to Plaintiffs' claims. (Dkt. 278, 283.) Plaintiffs and Defendants agree that, should this matter proceed to trial, the case is to be tried by the Court, not a jury.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment "may not be granted unless 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1223 (2d Cir. 2000) (*quoting* Fed. R. Civ. P. 56(c)). The moving party bears the burden of showing that there is no genuine issue of material fact. *See Gallo*, 22 F.3d at 1223. In considering a motion for

summary judgment, "all reasonable inferences and any ambiguities are drawn in favor of the nonmoving party." *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir. 1990). "Summary judgment is sparingly used," especially in discrimination cases "where intent and state of mind are at issue . . . because . . . careful scrutiny of the factual allegations may reveal circumstantial evidence to support the required inference of discrimination." *Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000); *see also Gallo*, 22 F.3d at 1224.

Because Plaintiffs show that there is an extensive array of genuine issues of material fact regarding both Garden City's and Nassau County's discriminatory intent, the disparate impact of their actions, and whether Nassau County has violated its duty affirmatively to further fair housing, Defendants' motions for summary judgment should be denied. Indeed, Garden City submitted with its letter requesting a pre-motion conference (Dkt. 265 at 81-172) a sixty-five page document in which it disputed nearly all of Plaintiffs' Statement of Additional Material Facts, and a twenty-five page document in which it disputed many statements within its *co-defendant* Nassau County's Statement of Material Facts. By raising so many disputed issues of fact, Garden City has already demonstrated that summary judgment is inappropriate.

II. THE CASE IS NOT MOOT

This case is not moot. Defendants assert that "since the County decided in 2010 to retain the Site for governmental use by constructing a Family and Matrimonial Court Complex on the Site, the relief sought by plaintiffs is no longer available, the case has been rendered moot, and the Court now lacks subject matter jurisdiction over the action." (NC Br. 8; *see also* Defendants' Incorporated Village of Garden City and Garden City Board of Trustees Memorandum of Law in Support of Motion for Summary Judgment, dated July 29, 2011 ("GC Br.") 14.) Defendants refer only to the portions of Plaintiffs' Prayer for Relief that directly mention the Social Services Site, using this as their basis for claiming, disingenuously, that the relief Plaintiffs seek is "no

longer available" and that this Court no longer has the power to redress the injuries caused by Defendants' overt discriminatory acts. (NC Br. 8; GC Br. 14.) Defendants are wrong.

Even if a new family court building had already been built on the Social Services Site (or if, for that matter, a meteor fell from the sky and destroyed the Site), this case would not be moot. The record shows that Defendants committed discriminatory acts in violation of federal law and the Constitution; that those acts are capable of repetition, and indeed, have been repeated since Plaintiffs brought this action; that the effects of those acts have had and continue to have a discriminatory impact; and that the County's failure to affirmatively further fair housing as required by the FHA goes beyond the discriminatory acts related to the Social Services Site. The relief sought by Plaintiffs in their Prayer for Relief includes relief for these actions, and this Court can fashion relief to redress the wrongs that Defendants have perpetuated against Plaintiffs.

A case will only be moot if "an event occurs during the course of the proceedings or on appeal 'that makes it impossible for the court to grant *any effectual relief whatever* to a prevailing party.'" *United States v. Quattrone*, 402 F.3d 304, 308 (2d Cir. 2005) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)) (further citation and internal quotation marks omitted) (emphasis added). Defendants represent to this Court that the relief Plaintiffs request only involves the sale of the Social Services Site, with the corollary that if the Social Services Site is not for sale, there is no relief available to Plaintiffs. This representation is false. The Amended Complaint demands several forms of relief that make no reference at all to the Social Services Site, including a declaratory judgment; an injunction preventing Defendants "from engaging in any other discriminatory acts that perpetuate or contribute to segregation in the Garden City and Nassau County;" and an order that Defendants "take and/or fund affirmative steps, supervised by this Court, to overcome the effects of past discriminatory practices,

including the funding of remedial activities necessary to overcome the perpetuation of segregation in Nassau County and Garden City." (Amended Complaint at 29-31.) Further, this Court can fashion appropriate relief – if not by ordering that Defendants facilitate the provision of affordable housing on the Social Services Site itself (either instead of, or in conjunction with, a family courthouse project), then, for example, by ordering that Defendants facilitate the provision of open, integrated affordable housing elsewhere in Garden City (for example, at the Ring Road Site) and throughout Nassau County. Thus, because this Court can grant Plaintiffs relief for the injuries they have sustained, the case is not moot. *See Quattrone*, 402 F.3d at 308.

This Court's mootness inquiry need go no further. Nevertheless, because both Garden City and Nassau County attempt tortured arguments as to why an exception to the mootness doctrine would not apply here, Plaintiffs submit that, were application of an exception necessary, an exception to the mootness doctrine undoubtedly applies. Defendants acknowledge that when a case might otherwise be rendered technically moot, a court will not consider the case moot if the harm at issue is "capable of repetition, yet evading review." (NC Br. 9; GC Br. 15.) The proponent of a mootness defense has a "formidable burden," especially where, as here, the proponent claims that the matter is moot because it has voluntarily ceased the challenged activity. *Seidemann v. Bowen*, 499 F.3d 119, 128-29 (2d Cir. 2007); *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 327 (2d Cir. 2003). Even if the Court accepted Defendants' blatantly false proposition that there is no longer any relief available to Plaintiffs, Defendants must show that "(1) there is no reasonable expectation [the challenged conduct] will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of" the acts of which the plaintiffs complain. *Seidemann,* 499 F.3d at 128-29. Defendants cannot make this showing.

Not only can Defendants not guarantee that the challenged conduct will not recur; *it has*

already recurred. Nassau County announced in 2006 – a year after this lawsuit was commenced – that it intended to sell the Ring Road Site in Garden City for development of affordable housing. (SAMF ¶ 191.) Once again, Garden City and Nassau County capitulated to Garden City residents' racially animated opposition to affordable housing in the Village, and the Ring Road project is still stalled, five years later. (*See id.* ¶¶ 194-200.) Moreover, neither Nassau County nor Garden City has given Plaintiffs any assurances that the challenged conduct will not recur. *See Seidemann*, 499 F.3d at 128-29 (union's voluntary refund of challenged agency fees did not moot case because union did not demonstrate "that its prior unlawful conduct [was] unlikely to recur"); *Whitman*, 321 F.3d at 327 ("promises" in state's letter of commitment to bring environmental program into compliance through actual and proposed changes, while "indicative of a degree of good faith," were insufficient to carry "the formidable burden" of making it "absolutely clear" that challenged conduct could not reasonably be expected to recur); *Eureka V LLC v. Town of Ridgefield*, 596 F. Supp. 2d 258, 266 (D. Conn. 2009) (defendant-town's claim that it voluntarily negated conduct violative of FHA because zoning commission reversed its challenged stance did not make it "absolutely clear" that conduct could not reasonably be expected to recur). Defendants have made *no* commitment to Plaintiffs that they will promote affordable, integrated housing within Garden City and Nassau County, nor have they taken any affirmative steps toward doing so; they have not even made the sort of promises or taken the sort of position reversal considered *insufficient* in *Whitman* and *Eureka*. In fact, Defendants have done quite the opposite, as the Ring Road situation demonstrates. Nassau County's announcement that it intends to build a family court building on the Social Services Site rather than sell it to a developer could not be further from the sort of ameliorative action that courts have found truly moots a case. *See*, *e.g.*, *Alive v. Hauppauge Sch. Dist.*, No. 08-cv-1068

(NGG)(CLP), 2009 WL 959658 (E.D.N.Y. April 6, 2009). Plaintiffs and this Court have no reassurance whatsoever that if this lawsuit were dismissed, Nassau County and Garden City would cease their patterns of discriminatory conduct, which serve to promote segregation in Nassau County. *See Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 574 (2d. Cir. 2003).

Defendants also cannot demonstrate that "interim relief or events have completely and irrevocably eradicated the effects of the [acts of which the plaintiffs complain]." *See Seidemann*, 499 F.3d at 128-29. As Plaintiffs demonstrate below at Section IV, Defendants' actions had a disparate impact on minority populations in Nassau County and neither Defendant makes a serious attempt to refute the discriminatory and segregative effects their actions have caused. A new family court building on the Social Services Site does nothing toward redressing that wrong, and Defendants have pointed to no interim relief or events that have *irrevocably eradicated* the effects of their discriminatory acts.

Finally, where, as here, a defendant's "voluntary cessation" efforts appear specifically designed to avoid judicial resolution of the challenged conduct, courts are particularly skeptical of allowing those efforts to moot a case. *See United States v. New York City Transit Auth.*, 97 F.3d 672, 676 (2d Cir. 1996); *Yassky v. Kings Cnty. Democratic Cnty. Comm.*, 259 F. Supp. 2d 210, 215 (E.D.N.Y. 2003). The record shows that Nassau County has been aware of the need for a new family courthouse since at least 2004. (Affidavit of Robert Walker in Support of Defendant Nassau County's Motion for Summary Judgment, dated February 18, 2011 ("Walker Aff.") ¶¶ 6, 10.) The record also shows that, over the years, the County has considered several options for relocating the family courthouse. (Brown Decl. Ex. 123, Deposition of Carl Schroeter, taken September 28, 2010, at 36:21-37:3; 38:11-13) The County's sudden decision, on the eve of its summary judgment motion, to move full-steam-ahead with relocating the family

court building specifically to the Social Services Site smacks of impropriety. And the County has completely obscured its decision-making process, consistently stonewalling Plaintiffs' attempts to conduct meaningful discovery regarding this issue. (*See* Brown Decl. Ex. 126; Dkt. 276.)

For all of these reasons, the case is not moot.

III. THERE ARE TRIABLE ISSUES OF FACT AS TO WHETHER, THROUGH THEIR IMPROPER DISCRIMINATORY INTENT, DEFENDANTS VIOLATED THE FAIR HOUSING ACT

In 1968, Congress enacted the FHA to "provide . . . for fair housing throughout the United States." 42 U.S.C. § 3601. Under the FHA, it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." *Id.* at § 3604(a). The phrase "otherwise make unavailable" includes discriminatory zoning enactments. *See Le Blanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir. 1995); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988). An FHA violation may be established either by proof of intentional discrimination or by proof of disparate impact on members of a protected group. *See Forest City Daly Hous., Inc. v. Town of North Hempstead*, 175 F.3d 144, 151 (2d Cir. 1999); *Le Blanc-Sternberg,* 67 F.3d at 425; *Huntington*, 844 F. 2d at 934-35.

To establish a prima facie case of intentional discrimination, a plaintiff must demonstrate that race was "a motivating factor in the [defendant's] decision." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). This requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. Discriminatory intent may be inferred from the totality of the circumstances. *See Washington v. Davis*, 426 U.S. 229, 242 (1976). In examining all the evidence, the court considers: (1) whether the challenged law bears more heavily on one group than another; (2) the historical background

of the decision; (3) the specific sequence of events leading up to the challenged decision; (4) departures from normal procedural sequences; and (5) departures from normal substantive criteria. *Arlington Height*s, 429 U.S. at 266-68. A plaintiff's "initial burden of production" on the issue of discriminatory intent is "minimal." *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir. 2002) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001)).

Once a plaintiff shows that the challenged decision was at least partially motivated by a racially discriminatory purpose, the burden shifts to defendant to establish a legitimate, nondiscriminatory reason for the decision. *See Reg'l Econ. Cmty. Action Program*, 294 F.3d at 49; *United States v. Yonkers Board of Educ.*, 837 F.2d 1181, 1217 (2d Cir. 1987) ("*Yonkers III*"). A defendant's justification is scrutinized to determine whether it is pretextual, because "if the motive is discriminatory, it is of no moment that the complained-of conduct would be permissible if taken for nondiscriminatory reasons." *LeBlanc-Sternberg*, 67 F.3d at 425. The evidence in this case is more than sufficient to create triable issues of fact as to Defendants' discriminatory intent.

A. The Exclusionary Zoning Was Enacted as a Result of Defendants' Improper Discriminatory Intent

Garden City argues that there is no direct or circumstantial evidence of Garden City's discriminatory intent in connection with its decision to reject its planning and zoning consultant's original recommendation and rezone the Social Services Site to exclude multi-family, and by extension affordable, housing. (GC Br. 19-32.) Nassau County argues that the County had no intent to discriminate because its original intent in selling the Social Services Site was to raise revenue for the County and that it actually objected to and did not "consent" to Garden City's adoption of the exclusionary zoning. (NC Br. 13-19.) The evidence shows

otherwise.

1. Defendants Capitulated to the Discriminatory Animus of Their Constituents

The sequence of events preceding the challenged decision or action is important in determining discriminatory intent. *See Arlington Heights*, 429 U.S. at 276. When Nassau County announced its intention to sell the Social Services Site in 2002, it anticipated a high-density multi-family housing development of at least 400 units, and initiated the rezoning process for the Site by requesting that it be rezoned for residential use. (SAMF ¶¶ 24, 26.)

Garden City established the P-Zone Committee and hired BFJ to provide the Board with a recommendation for re-zoning of the Site. (*Id.* ¶¶ 29-34.) Throughout the spring and fall of 2003, BFJ issued reports and made presentations to Garden City in which it recommended zoning the residential portion of the Social Services Site under existing R-M zoning controls, which would have permitted a development of 311 multi-family units. (*Id.* ¶¶ 40-59.) This recommendation was intended to comport with the goals and parameters set forth in Garden City's existing Zoning Code. (*Id.* ¶¶ 37-38.) The R-M zoning classification would have permitted construction of multi-family housing, townhouses and single-family dwellings as-of-right. (*Id.* ¶ 45.) The P-Zone Committee approved BFJ's recommendation as appropriate, and sent it to the Board. (*Id.* ¶¶ 64-67.)

Garden City held several public meetings in early 2004 at which the Board and BFJ presented the proposed zoning. (*Id.* ¶ 60.) The County participated in this process. (*Id.* ¶¶ 76, 80-81, 85, 89-95, 98-111.) The issue of affordable housing quickly came to the forefront of these discussions. At the public meetings, residents of Garden City vehemently expressed their opposition to the possibility of a multi-family housing development, especially an "affordable" multi-family housing development, on the Social Services Site. (*Id.* ¶¶ 61-62, 68-70, 73-74, 77-

78, 82-83, 86-88.) Residents demanded assurances that only "upscale" housing would be built at the Site, rather than affordable housing. (*Id.* ¶ 69.) They claimed that they were concerned about maintaining the "character" of Garden City. (*Id.* ¶ 83.) Trustee Negri later testified that housing occupied by low income minorities is not consistent with the "character" of Garden City. (*Id.* ¶ 84.) Few admissions could be more revealing of true intent. Former County Executive Suozzi juxtaposed "upscale housing" with "affordable housing:" while "upscale housing" was "in the character of Garden City and would be appropriate there," affordable housing was not. (Brown Decl. Ex. 54 at ACORN0002391.) A flyer was distributed urging Garden City residents to oppose affordable housing at the Social Services Site. (SAMF ¶ 86.) The flyer warned that affordable housing might bring those who did not earn "Garden City incomes" to town and urged residents to attend the March 18th Trustees' Meeting at Village Hall, rallying them to "stall the process." (*Id.*) When Trustee Bee stated that "neither the County nor the Village is looking to create a so-called affordable housing at that spot," a resident demanded of Trustee Bee, "Can you guarantee that, that it won't be in that building?" (*Id.* ¶ 87.) Another resident compared his idea of the specter of multi-family housing in Garden City to the "full families living in one bedroom townhouses, two bedroom co-ops," "overburdened and overcrowded" schools and "overrun" sanitation that he and his wife had intended to leave behind when they moved out of Queens County. (Brown Decl. Ex. 54 at ACORN002414-15.)

Former County Executive Suozzi later admitted that he believed racism to be a motivating factor behind the public outcry. (SAMF ¶ 110.) Despite this belief and in direct response to this public outcry, Suozzi immediately agreed with Garden City residents that there would be no affordable housing in Garden City at the Social Services Site. (*Id.* ¶¶ 103-111.) Garden City then created a brand-new zoning classification for the Social Services Site,

designated "R-T," for "Residential Townhouse." (*Id.* ¶¶ 114-18, 122.) The new R-T zoning classification – with set-back restrictions and large minimum floor area requirements – effectively and intentionally prevented the construction of multi-family, and thus affordable, housing on the Site. (*Id.* ¶¶ 116-20, 123; NC Br. 4-5.) Multi-family housing was reserved for only a small portion of the Site, and it was not permitted as-of-right. (SAMF ¶¶ 117, 119-21.)

Unsurprisingly, Garden City residents did not publicly reveal that their opposition to multi-family or affordable housing was race-based. But many courts have found that:

> Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct 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); *see also Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (discrimination may manifest itself in "subtle forms"). Here, though overtly racist comments were not uttered at the public meetings, even former County Executive Suozzi recognized that Garden City's opposition to multi-family housing was tied, at least in part, to residents' racist attitudes. (*See* SAMF ¶¶ 110, 243, 246, 250.)

It is well established that euphemisms – or code words – for race-based bias in housing situations, such as "affordable housing," "multi-family," "not in the character," "not upscale," and "school crowding," can demonstrate discriminatory intent; indeed, the use of such code words in connection with housing has been held by many courts to impute discriminatory intent to decision-making authorities. *See*, *e.g.*, *Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 42 (2d Cir. 1997) (citizens' "fears of jeopardized safety and falling property values" found to be euphemisms for discrimination against residents of an alcohol treatment center),

rev'd on other grounds; *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066-67 (4th Cir. 1982) (citizens' concerns about "dilut[ion]" of public schools and "undesirable[]" new residents "in a different context might not illustrate racial bigotry, but, against the background of a housing project in Clarkton and the considerable opposition to it, were interpreted by the trial court as 'camouflaged' racial expressions"); *Sunrise Dev. v. Town of Huntington*, 62 F. Supp. 2d 762, 768, 775 (E.D.N.Y. 1999) (concerns about decreased property values, increased burdens on community services, and the "appearance and activity" of a proposed senior housing development that a town resident stated would "alter the residential character of Dix Hills" were found to be euphemisms for discrimination); *see also Yonkers III*, 837 F.2d at 1192, 1226 ("It is sufficient to sustain a racial discrimination claim if . . . there is evidence to support the finding[] that racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker is knowingly responsive"). In the *Yonkers* cases, residents made "frequent references to the effect that subsidized housing would have on the 'character' of the neighborhood." *Yonkers III*, 837 F.2d at 1192 (holding local government liable for capitulating to racially-charged opposition of its residents).

Plaintiffs' expert Dr. Peter Marcuse echoes these courts' conclusions about the sorts of euphemisms for race-based opposition to multi-family housing that were employed in this case. (SAMF ¶¶ 265-67.) Garden City challenges this portion of Dr. Marcuse's expert report, but has reserved its right to move to exclude Dr. Marcuse's report until after the Court determines this motion. (GC Br. 27-29.) Plaintiffs will therefore address Garden City's challenges if and when such a motion is made.

Garden City stubbornly ignores Plaintiffs' evidence and well-established case law, and repeatedly asserts – hoping that repetition will make it so – that "[t]here simply is no evidence of

discriminatory intent." (GC Br. 19.) To reinforce its assertion, Garden City relies on three cases from other circuits, but its reliance is misplaced. Unlike in *White Oak Prop. Dev., LLC v. Washington Township*, 606 F.3d 842 (6th Cir. 2010), the public opposition here involved much more than isolated "inquiries about affordable or Section 8 housing." (GC Br. at 19, quoting *White Oak*). Rather, Garden City residents continuously opposed multi-family housing over a period of several months, at public meetings and in community literature. (SAMF ¶¶ 61-62, 68-70, 73-74, 77-78, 82-83, 86-88.) Moreover, as Garden City acknowledges (GC Br. at 18-19), the *White Oak* plaintiff provided no evidence that minority populations – who would have been impacted by a prohibition on multi-family housing – existed in the township or the surrounding area in that case. *See White Oak*, 606 F.3d at 851. Thus, the court specifically distinguished *White Oak* from Sixth Circuit precedent involving an "all-white community within metropolitan Cleveland, an area where an extreme condition of racial segregation exists." *Id.* (citations and quotation marks omitted). The record in this case establishes that there is a dire need for affordable housing in Nassau County, that Nassau County's minority populations disproportionately occupy the County's existing affordable housing, that there is no affordable housing in Garden City, that affordable housing in Garden City would be attractive to minorities, and that the lack of affordable housing in Garden City significantly impacts minorities and perpetuates existing segregation. (*See*, *e.g.*, Brown Decl. Ex. 124, Deposition Transcript of Diane Goins, taken Feb. 1, 2011, at 42:6-16 and Ex. 89 at NASSAU COUNTY 026953; SAMF ¶¶ 2, 4-5, 10-11, 168, 203, 242, 268.)

Garden City's reliance on *Hallmark Developers, Inc. v. Fulton Cnty., Georgia*, 466 F.3d 1276 (11th Cir. 2006) is similarly inapposite. In that case, only one board member was privy to the community's racist opinions, and the plaintiff could not show that the other board members

knew of these improper motivations. *Id.* at 1284. Here, the Board held multiple public meetings during which the Board, Garden City's mayor, and former County Executive Suozzi all heard and responded to comments from Garden City residents. (SAMF ¶¶ 61-94.) The residents' opinions were well-publicized and a matter of public knowledge. (*Id.* ¶¶ 175-76, 190.) Defendants cannot rest on a claim of blissful ignorance when even Magistrate Judge Wall noted that it was "hardly a secret that there was community opposition to a zoning change in Garden City that would allow the affordable housing project to be built." (*Id.* ¶ 118; Dkt. 142.)

Garden City also cites *R.J. Investments. v. Board of County Commissioners for Queen Anne's County, Maryland*, 414 F. App'x 551 (4th Cir. 2011), in which the proposed affordable housing development would have been built in a "rural agricultural county" that lacked the necessary sewage facilities. *Id.* at 553. The county in that case expressed reservations at public hearings solely with respect to the limited sewage facilities. *Id.* The court thus found that "there [was] not a scintilla of evidence that the Board . . . acted with racially discriminatory intent." *Id.* at 554 (internal citation omitted). Here, by contrast, the Village's claims that its school system would have been burdened or that traffic would have increased as a result of a multi-family housing development on the Site were shown – by the Village's own zoning consultant – to have been completely groundless.

Rather, this case is more closely analogous to *Rivera v. Village of Farmingdale*, No. 06 CV 2613(DRH)(ARL), 2011 WL 1260209 (E.D.N.Y. Mar. 30, 2011). There, the court denied the defendant-village's motion for summary judgment, finding that issues of fact existed as to whether the village's approval of a plan to renovate an apartment building that housed mostly Hispanic residents (thus displacing those residents) reflected racial animus that had been expressed in town meetings and on the internet, and whether the village departed from normal

procedures by failing to enforce permit approval policies related to building code violations and land valuations. *Id.* at *14-16. Although the record in *Rivera* showed that the animus expressed by village residents was directed at Hispanic day-laborers, rather than the Hispanic residents of the apartment building at issue, the court held that a reasonable juror could find that such animus tainted the village's conduct with an "anti-Hispanic element." *Id.* at *14. The record here shows that the exclusionary zoning enactment was made in direct response to strong, racially-tinged opposition to the likely tenants of affordable housing in Garden City.

Garden City claims that Plaintiffs have "cherry pick[ed] immaterial facts . . . in an effort to create claims where none exist." (GC Br. 3.) Garden City then selects a few quotes from the February 5, 2004 public hearing on the proposed re-zoning (the hearing at which the most heated opposition was expressed) and labels them "rather sterile," and "not in any way analogous to those made in the cited FHA cases in which actual, strong community opposition was found." (*Id.* at 26.) But Garden City's description of this intense and vocal opposition to zoning that would have allowed multi-family housing to be developed at the Site as "inane, innocuous and sterile" (*id.* at 23) is disingenuous at best. Plaintiffs have no need to "cherry pick." In fact, the hostile and heated nature of Garden City residents' opposition to multi-family zoning is best experienced through reading those comments in full context.

Plaintiffs therefore invite the Court to scan through, as an example, the complete transcript of the February 5, 2004 public hearing in Garden City's Village Hall; it is Exhibit 54 to the Brown Declaration, and the community comments begin at page 29 of the transcript (ACORN002391). The heated nature of Garden City residents' opposition to multi-family housing is quite clearly evidenced in the transcript by residents attempting to speak over each other and the mayor having to cut speakers off; applause at certain residents' comments,

including one instance of applause at a resident's unfounded comment regarding traffic, to which former County Executive Suozzi responded "[y]ou may want to clap for that, but that's irrational," and another instance of applause egging on a resident's repetition of "[s]ingle family;" Suozzi commenting that his young child wonders why "people in Garden City . . . are yelling at him;" residents continuing to demand a guarantee against multi-family housing and express their objections to multi-family housing *after* Suozzi had already stated that he would abide by Garden City's desire to block multi-family housing in the Village; and Suozzi, exhausted after a long evening spent contending with the ire of so many Garden City residents, finally having to "request that I go home" and expressing his final opinion that "[t]he best thing that I believe when weighing all the factors together for the Village of Garden City and for the County is [the multi-family zoning] I was proposing originally. I'm willing to completely abandon that based upon what the people have said here tonight. It's fine, it's your community you decide what's best." (Brown Decl. Ex. 54 at ACORN002391-2433, 002393-94, 002407, 002401, 002417.)

The evidence thus shows that the Board rejected its consultant's proposal as an accommodation to Garden City residents' opinions, which were born of manifestly groundless justifications and specious reasoning, and that the County also gave in to this animus. When Defendants were presented with community resistance to the perceived threat of minority residents and neighbors that a multi-family, and possibly affordable, housing project might trigger, they immediately capitulated to the community's discriminatory opposition. Thus, there is significant evidence that discriminatory intent animated Defendants' actions and decisions. *See Innovative Health Sys.*, 117 F.3d at 49 ("[A] decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decision makers

personally have no strong views on the matter"); *Yonkers III*, 837 F. 2d at 1226 ("It is sufficient to sustain a racial discrimination claim if it has been found, and there is evidence to support a finding, that racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker is knowingly responsive."). At the very least, there are serious and substantial triable issues of fact regarding Defendants' discriminatory intent, and summary judgment is inappropriate.

2. The Zoning Decision Most Heavily Impacted Minority Populations

As is more fully discussed below at Section IV, the record shows that the exclusionary zoning effectively eliminated the possibility of affordable housing in Garden City, disproportionately impacting minority populations and perpetuating segregation by preserving the Village as a virtually all-white enclave within Nassau County.

3. There Was a Pattern and Practice of Discrimination in Garden City

Historical background factors into a discriminatory intent analysis, "particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. The history of discrimination and racial animosity in Garden City reveals such a pattern and practice; Garden City's re-zoning of the Social Services Site was not the first time the Village blocked the construction of affordable multi-family housing, nor was it the last. Garden City's exclusionary zoning enactment was preceded and succeeded by other incidents that illustrate a deep-seated, racially animated opposition to affordable housing.

In the late 1980s, Garden City imposed a moratorium on new construction in order to gain tighter control over housing development. (SAMF ¶ 213.) Opportunely-timed building moratoria aimed at prohibiting affordable housing have been found to be evidence of discriminatory intent. *See Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563 (E.D. La. 2009); *Kennedy Park Homes Assoc. v. City of Lackawanna*, 318

F. Supp. 669, 696 (W.D.N.Y. 1970), *aff'd*, 436 F.2d 108 (2d Cir. 1970). At a public hearing regarding the extension of the moratorium, residents of Garden City overwhelmingly supported the extension, with one resident expressing concern about low income housing, and another resident warning about an increase in crime, stating "Once you let in the road of high density in a small town, you create another set of problems." (SAMF ¶ 214.) During this moratorium, which lasted from 1979 to 1989, it was well-publicized that the Village effectively prevented development of an affordable housing project on what is known as the Doubleday Site. (*Id.* ¶¶ 177-80.) Several years later, the residents of Garden City successfully filed a lawsuit blocking the lease of the Village-acquired St. Paul's School site to an assisted living facility. (*Id.* ¶ 181.)

More recently, in 2006, Garden City residents accused Nassau County Executive Suozzi of "catering to ACORN and black people" after he proposed building affordable housing on the Ring Road Site in Garden City. (*Id.* ¶¶ 191, 199.) Garden City residents' communications to County Executive Suozzi and to local media regarding the Ring Road Site underscore the extent of the Village's general hostility toward affordable housing. (*Id.* ¶ 200) ("Please do not pursue this low income housing in GC. . . . Everyone has a 'right' to live where they want . . . they don't have a 'right' to get things they do not deserve or work for. Please do not turn GC into Hempstead, Roosevelt, etc. . . . It will only lead to property values decreasing, schools negatively impacted"); (*Id.* ¶ 196) ("Stop trying to destroy Garden City! . . . We would much prefer to see Family Court moved to our eleven acres, not rental properties or affordable (low income) housing."); (*Id.* ¶ 197) ("I oppose the useage [*sic*] of prime real estate in the County for low income housing."); (*Id.* ¶ 198) ("I am disgusted when I . . . read about how you still want to destroy our beautiful village by forcing in affordable housing"); (*Id.* ¶ 175) ("[K]eep affordable housing out of Garden City . . . My fears are increased crime, drug traffic and a transient

population. . . .That's the future I see with affordable housing"). Five years later, the Ring Road project remains stalled as a result of yet another Village and County surrender to racial animus. (*See id.* ¶ 194.) Meanwhile, that same year, Garden City increased the amount of residential space available in its H (hotel) district to allow for more development of luxury condominiums. (*Id.* ¶ 202.)

Garden City argues that these events are "irrelevant and unrelated." (GC Br. 29.) But these events are entirely relevant, reflecting an ingrained culture of racial exclusion and housing discrimination. Garden City can cite to no examples of affordable housing projects in the Village – because they do not exist. (SAMF ¶¶ 168, 203; Brown Decl. Ex. 89 at 2.) Indeed, Garden City has chosen not to join the Nassau County Consortium, members of which are eligible to receive federal money in order to further affordable housing opportunities within their communities, thus avoiding federal scrutiny of its housing practices. (SAMF ¶¶ 205-07.)

The racial discrimination at the root of affordable housing opposition and exclusion in Garden City can be traced back through its history of discrimination in general. In 1969, the Unitarian Universalist Church of Central Nassau requested a permit to open a subsidized daycare center in Garden City, in which the majority of children served would be black. (*Id.* ¶ 208.) Garden City residents reacted with lawsuits and petitions claiming that the center would increase traffic, depreciate property values, and change the "character" of the neighborhood. (*Id.* ¶ 209.) One resident commented, "[I]t's the beginning of integration in Garden City [and] I certainly don't think that's good" because "if they brought all the colored children in it would decrease property values." (*Id.* ¶ 210.) The New York State Supreme Court overruled Garden City's rejection of the permit, but the program was effectively quashed when Nassau County denied the daycare's application for funding due to community opposition, once more bowing to the

prejudices of Garden City residents. (Brown Decl. Ex. 93 at 5.)

While overtly discriminatory comments such as those made in reaction to the proposed day care center are far less common forty years later, more subtle – and thus more invidious – discrimination still persists in Garden City. In 2003, in response to complaints of discrimination by prospective tenants against local realtors, prior-plaintiff ACORN conducted investigative testing of several realty offices in and around Garden City that had reportedly engaged in a consistent pattern of housing discrimination. (SAMF ¶ 219.) One set of these tests, conducted at Anne Hagen Village Realty of Garden City, showed that white testers were more than twice as likely to be shown apartments in Garden City than were minority testers. (*Id.* ¶ 222.) Another set of tests, conducted at Garden City Properties, Inc., showed that white testers were 34% more likely to be shown apartments than were minority testers. (*Id.*) ACORN filed four lawsuits against these and other realtors in 2005, and the parties settled. (*Id.* ¶¶ 223-24.)

In 2004, the New York State Attorney General launched an investigation into the treatment of racial minorities in Garden City parks, which confirmed that Garden City park attendants routinely questioned black non-residents about their residency and refused them entry into the parks, while permitting white non-residents to enter and use the parks without questioning their residency. (*Id.* ¶¶ 215-16.) Attorney General Spitzer stated that "[e]nforcing park access rules in a racially discriminatory manner is both offensive and illegal." (*Id.* ¶ 218.) Garden City was forced to change its practices in its parks. (*See id.* ¶ 217.) These incidents, far from "irrelevant," as Garden City argues, constitute evidence that an exclusionary, anti-minority culture remains active in Garden City.

Garden City does not even *attempt* to refute Plaintiffs' evidence regarding the day care center, the parks, the realtors, and the building moratorium. Its sole and feeble attempt to rebut

evidence of decades of discrimination in Garden City – including incidents that occurred during the same time period as the zoning action at issue in this case – is to question the admissibility of Plaintiffs' evidence regarding the Doubleday Site and the Ring Road Site (GC Br. 29-31), while grossly mischaracterizing the Doubleday Site incident as the "cornerstone" of Plaintiff's case. (*Id.* 13.) First, Garden City questions the admissibility of contemporaneous newspaper articles submitted by Plaintiffs to document the Doubleday Site incident. (*Id.* 29-30; SAMF ¶¶ 176-80). But these newspaper articles are admissible; they are self-authenticating and are over twenty years old, thereby meeting the ancient documents exception to the hearsay rule. *See* F.R.E. 803(16) and 902(6); *see also Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 643 (2d Cir. 2004) (two letters properly admitted into evidence as ancient documents where letters were over twenty years old and were authenticated); *Bailey v. Black Entm't Television*, No. 3:09CV787, 2010 WL 1780403, at *3 (E.D. Va. May 3, 2010) (newspaper article from 1981 was self-authenticating and an ancient document), *aff'd,* 393 F. App'x 971 (4th Cir. 2010). Notably, F.R.E. 803(16) renders admissible the articles themselves *as well as statements contained therein*. *See Langbord v. U.S. Dep't of Treasury*, No. 06-5315, 2011 WL 2623315, at *17 (E.D. Pa. July 5, 2011); *Bailey*, 2010 WL 1780403, at *3. *See also Lambert v. Fulton Cnty., Ga.*, 253 F.3d 588, 595-96 (11th Cir. 2001) (in racial discrimination case against county, newspaper articles regarding failures to respond to prior discrimination complaints had probative value, which exceeded any unfair prejudice to defendants).

Next, Garden City makes the claim – with no legal support – that comments sent by Village residents to the County in opposition to affordable housing at the Ring Road Site are inadmissible at trial because they "do not disclose the addresses or names of the senders." (GC

Br. 31.) This argument makes no sense. Nassau County redacted the names and addresses of the senders to protect their identity during discovery, and most of the senders state or clearly imply that they are Garden City residents. (*See* Ex. 63 to Brown Decl.)

The evidence concerning Garden City's discriminatory exclusion of affordable housing in this case, particularly when viewed in the context of Garden City's pattern and history of discrimination, strongly supports a finding of intentional discrimination, and at the very least raises triable issues of fact as to Garden City's motivation.

4. There Is a History of Segregation in Nassau County

Nassau County's long history of segregation, which is in part attributable to entrenched affordable housing policies, also informs this Court's consideration of discriminatory intent. To avoid repetition, Plaintiffs refer the Court back to Sections D and E of the Statement of Facts, *supra*. (*See also* SAMF ¶¶ 225-63.) Indeed, thirty-seven years ago, this Court found in *Acevedo et al. v. Nassau County et al.*, 369 F. Supp. 1384, 1389 (E.D.N.Y. 1974), *aff'd,* 500 F.2d 1078 (2d Cir. N.Y. 1974), that "it is clear from all the evidence that community opposition to [affordable] housing [in Nassau County] has been racially motivated."

5. Garden City Departed from Normal Procedural Sequences and Substantive Criteria

The last two *Arlington Heights* factors are whether the decision-making party has departed from normal procedural sequences and substantive criteria. *See Arlington Heights*, 429 U.S. at 267. Garden City's new R-T zoning enactment eliminated the possibility of multi-family housing on all but 3.3 acres of the 25-acre Social Services Site, allowing multi-family housing only by special use permit on a small plot of land to the west of County Seat Drive. (SAMF ¶ 117; NC Br. 4-5.). Garden City argues that the new R-T zoning classification "compli[ed] with Normal Sequences and Procedures" because it "encourage[d] an array of housing options

(including one [townhomes] not previously built in the Village)" and "addresse[d] citizen concerns over traffic and school-children." (GC Br. 31-32.)

Garden City's first argument is merely a *post hoc* excuse, and contradicts Garden City's own admission that the R-M zoning classification allowed for townhouses, as well as single-family and multi-family homes, as-of-right. (SAMF ¶ 45.) The only possible reason to create a new zoning classification just for townhouses was to effectively eliminate any possibility of affordable multi-family housing on the Social Service Site. BFJ's original recommendation of R-M zoning for the Social Services Site had allowed for a much greater flexibility and "array of housing options" (GC Br. 31) than did the R-T zoning. Tellingly, Trustee Lundquist could offer no explanation for why the recommended R-M zoning was not adopted by the Board. (SAMF ¶ 124.)

As to Garden City's second argument, the evidence shows that virtually every one of the Board's stated goals would have been as-well, if not better, facilitated by R-M zoning than by the new R-T zoning:

- The Board aimed to create open space, but multi-family housing would have allowed for more open space than single-family housing. (SAMF ¶ 93.)
- The Board considered the issue of overcrowding in Garden City's schools and concluded that multi-family housing would have had less of an impact on the schools than single-family housing. (*Id.* ¶¶ 71-72.)
- The Board considered the issue of depreciation in value of surrounding property, but multi-family housing would not have depreciated values. (*Id.* ¶ 94.)
- The Board considered the issue of traffic, but multi-family housing would have greatly reduced the traffic that the government buildings on the Site generated at

the time. (*Id.* ¶¶ 75-76.)

Indeed, when residents of Garden City couched their opposition to R-M zoning in concerns over perceived increased traffic congestion, potential overcrowding of schools and increased taxes (*id.* ¶¶ 62, 70, 73-74, 77-78, 82), BFJ explained that all such concerns were groundless. (*Id.* ¶¶ 71, 75, 79.) Several Trustees and former Nassau County Executive Suozzi did the same, and Suozzi openly chastised Garden City residents for being "irrational" in their unfounded concerns. (*Id.* ¶¶ 72, 76, 80-81, 85, 93-94.) It is ironic, to say the least, that Garden City now relies on the very issues that its own consultant rejected to defend against claims of discrimination. Far from following normal procedures, Garden City did the opposite, departing from its consultant's recommendation in light of its residents' racially charged opposition and then developing a new zoning classification for the very purpose of blocking any possibility of affordable housing. The Village's arguments are not just without merit; they are the essence of hypocrisy.

In short, the evidence supports a finding of discriminatory intent, or at the very least, demonstrates that significant questions of material fact remain as to the true motivation behind the Board's decision, and whether Garden City's explanation for its actions is a mere pretext for prohibited discrimination (as will be more fully discussed below at Section IV.C).

B. Nassau County's Attempts to Disclaim Responsibility for the Discriminatory Zoning Fail

For its part, Nassau County does not even try to refute Plaintiffs' voluminous evidence demonstrating Defendants' discriminatory intent. Instead, the County attempts to escape liability by pointing its finger at Garden City, claiming that the County "has no zoning power in Garden City," and that the County did in fact object to Garden City's exclusionary zoning, but that its hands were tied, and thus no discriminatory intent can be imputed to it. (NC Br. 2; 13-17.)

These arguments are flat-out wrong, both legally and factually. New York law is clear that a county is not powerless, but rather, will be immune from zoning implemented by a town or city within its borders if the county's land use, on balance, better furthers the public interest of the county as a whole. *See Matter of Cnty. of Monroe (City of Rochester)*, 72 N.Y.2d 338, 343-44, 530 N.E.2d 202, 204-05, 533 N.Y.S.2d 702, 704-05 (1988). And the County's claim that it objected to Garden City's zoning is plainly contradicted by the evidence. The record shows that though Nassau County desired to market the Social Services Site for multi-family housing development – and would have generated more money for the County by doing so – the County quickly retreated from that position in response to Garden City's vocal and racially motivated opposition. (SAMF ¶ 100; Brown Decl. Ex. 54 at ACORN002417.) These circumstances give rise to material issues of fact regarding the County's discriminatory intent.

1. Nassau County Was Not Constrained by Garden City's Zoning Decision

Nassau County is correct that pursuant to New York Village Law § 7-700 (McKinney 2011), Garden City is empowered to enact zoning ordinances within its borders. But the County's legal support for its argument that it had no "authority" to override Garden City's exclusionary zoning enactment ends there. Garden City's zoning power pursuant to § 7-700 does not supersede the County's authority to act in the best interests of the residents of Nassau County. *See Monroe*, 72 N.Y.2d at 343-44, 530 N.E.2d 202, 204-05, 533 N.Y.S.2d 702, 704-05. In *Monroe*, the New York Court of Appeals held that Monroe County was exempt from land use oversight by the city of Rochester when Monroe County sought to expand an airport within the city's borders without first gaining site plan approval from the city. The Court of Appeals employed a "balancing of public interests" approach, *id.*, 72 N.Y.2d at 341, 530 N.E.2d at 203, 533 N.Y.S.2d at 703, reasoning that the city's land use policies should not be permitted to "foil

the fulfillment of the greater public purpose of promoting intra- and interstate air commerce," and concluding that the county was therefore immune from land use oversight by the city. *Id.*, 72 N.Y.2d at 344-45, 530 N.E.2d 202, 204-05, 533 N.Y.S.2d at 704-05.

Thus, under New York law, Nassau County is empowered to ignore – and challenge, if necessary – a local municipality's zoning ordinance when the public interest in a particular land use outweighs the local municipality's interests in preventing that land use. *See*, *e.g.*, *Crown Commc'n N.Y., Inc. v. Dep't of Transp. of N.Y.*, 4 N.Y.3d 159, 824 N.E.2d 934, 791 N.Y.S.2d 494 (2005) (installation of antennae by private communications company on two state-owned telecommunications towers within Town of New Rochelle not subject to application for special permit from Town where public benefit from proposed use of towers outweighed Town's interest in enforcing its zoning laws, even though private parties would benefit as well), *cert. denied*, 546 U.S. 815 (2005); *Town of Caroline v. Cnty. of Tompkins*, No. 2001-0788, 2001 WL 1422152, at *4 (Sup. Ct. Tompkins Cnty. Sept. 20, 2001) (public works facility proposed by county was in the public interest, and county established a paramount interest over the town, which could not show "a countervailing local interest of substance and significance"); *Westhab, Inc. v. Vill. of Elmsford*, 151 Misc. 2d 1071, 1074, 574 N.Y.S.2d 888, 891-92 (Sup. Ct. Westchester Cnty. 1991).

In *Westhab*, the court applied the *Monroe* balancing of public interests test and held that Westchester County was exempt from compliance with local building codes. The plaintiff, which had contracted with the county to convert a motel into a homeless shelter within the Village of Elmsford, sought to enjoin the Village from prosecuting it for building code violations. *Westhab*, 151 Misc. 2d at 1072, 574 N.Y.S.2d at 888. The court, acknowledging that "the plight of the homeless is one of society's most pressing social problems" and that "the need to provide

housing for our homeless brethren is of crucial importance," agreed with the plaintiff that this public interest was paramount, and that the county – and not the Village – should therefore exercise control over the facility for the benefit of the health and welfare of county residents. *Id.*, 151 Misc. 2d at 1073, 1076, 574 N.Y.S. 2d at 888.

Here, the public interest in combating segregation and providing affordable housing is clearly paramount to any of Garden City's local interests in the R-T zoning classification (which in any case are pretexts for discrimination, *see supra* at Section III and *infra* at Section IV.C). *See Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973); *Young v. Pierce*, 544 F. Supp. 1010, 1018 (E.D. Tex. 1982); *Hart v. Cmty. Sch. Bd. of Brooklyn, N.Y. Sch. Dist. No. 21*, 383 F. Supp. 699, 754 (E.D.N.Y. 1974) (the duty to integrate, arising under the Constitution and the FHA, takes precedence over a local government's other policies and procedures). Certainly the County cannot claim otherwise. The County acknowledges its residents' dire and persistent need for affordable housing. (SAMF ¶¶ 236-41.) It even acknowledges that racism is an obstacle to affordable housing in the County, and that racism was, at least in part, a motivating factor behind Garden City's enactment of the exclusionary R-T zoning. (*Id.* ¶¶ 110; 243-53.) But when confronted with Garden City's discriminatory opposition to more inclusive zoning that would have permitted the construction of affordable housing within the Village, the County did nothing. Instead of asserting its paramount interests in promoting affordable housing and combating discrimination and segregation (either publicly or in court), the County merely bowed to Garden City's discriminatory, restrictive zoning. (*Id.* ¶¶ 103-09; Brown Decl. Ex. 54 at ACORN002391.) The County's deliberate inaction – racist motivation, after all, "was not [Suozzi's or the County's] concern" (SAMF ¶ 111) – thus constituted impermissible discriminatory intent. *See United States v. City of Yonkers*, 96 F.3d 600, 617-18 (2d Cir. 1996)

("Government officials, whether city or state, are not permitted to engage in deliberate conduct or deliberate omissions that have the foreseeable effect of perpetuating known segregation, where their acts or omissions are undertaken in response to and in accordance with the segregative wishes of the others that are known to be racially motivated.").

And then the County went further, promising to use deed restrictions to prevent "anything but upscale housing" from being built on the Site. (SAMF ¶¶ 104, 107.) If the County believed it had "authority" to place such deed restrictions on the Site to *prevent* affordable housing for the benefit of Village residents, surely it had authority to place such restrictions on the Site to *promote* affordable housing for the benefit of residents of the entire County.

Moreover, the County's position that it had no "authority" with regard to the zoning of the Social Services Site is particularly disingenuous now, as the County recently *acknowledged* its authority to ignore the Village's zoning of the Site. The County claims that it has begun the process of building a new family and matrimonial court complex on the Social Services Site, despite the fact that the Site is no longer zoned "P," for public, governmental use, and the R-T zoning precludes non-residential uses. (Brown Decl. Ex. 35 at NYAHC000671-73.) The County's present use of the Site thus violates the Village's zoning ordinance. But the County is not concerned that it has flouted the Village's "exclusive zoning power" (NC Br. 16) when it comes to its decision to locate a new courthouse there, especially when the courthouse project is part of the County's gambit to prematurely end this litigation. Rather, the County takes the position that "we have the authority to take one of our buildings and use it for a government use." (Brown Decl. Ex. 123, Deposition of Carl Schroeter, September 28, 2010, at 124:16-17.)

2. Nassau County Did Not Object to the Discriminatory Zoning

The County speaks out of both sides of its mouth, simultaneously arguing that it could do nothing and that it did all it could. (NC Br. 14, "the legislative or administrative history

establishes unequivocally that County officials did *not* support or consent to Garden City's adoption of R-T zoning for the Site.") The attempt falls short on both counts. As Plaintiffs have shown, the County *did* have authority to override Garden City's zoning decision; the County also did *not* object to that decision.

It is true that the County desired multi-family zoning for the Social Services Site because that would have brought in the most revenue for the County. (SAMF ¶ 22.) Indeed, maximizing County revenue was the driving purpose behind the County's real estate Consolidation Plan and the proposed sale of the Social Services Site. (*Id.* ¶¶ 20-24.) But as Plaintiffs have also shown (*see supra* at Section III.B), instead of standing its ground and insisting on doing what was best for the County (in terms of revenue, let alone creation of affordable, integrated housing opportunities), the County immediately dropped its quest to have the Site re-zoned for multi-family residential development when faced with racially-motivated community opposition. (*Id.* ¶¶ 103-09; Brown Decl. Ex. 54 at ACORN002391.)

Moreover, pursuant to New York law, the County was required to review the Village's zoning ordinance before it was enacted, and to "recommend approval, modification, or disapproval, of the proposed action, or report that the proposed action has no significant county-wide or inter-community impact." N.Y. Gen. Mun. Law § 239-m(4)(a) (McKinney 2011). This statutorily-required review and recommendation process would have been the perfect opportunity for the County to formally disapprove of the zoning ordinance, as the County claims it did. But the record shows that the County did *not* take this opportunity. (Reissman Decl. Ex. AQ.) Though the County claims that its real estate director, in the report pursuant to § 239-m(4)(a), "protested Garden City's proposed amendments to the Village Code . . . because it severely impacted the County's potential revenue from such sales" (Part 1 of 3 Parts of

Defendant County of Nassau's Statement of Material Facts Pursuant to Local Civil Rule 56.1 ("NC 56.1") ¶ 119), that "protest" was mainly focused on a request that Garden City not delete the "P" zoning from the Social Services Site. (*See* Reissman Decl. Ex. AQ.) The County asked that the density of the R-T zone be less severely limited (Reissman Decl. Ex. AQ at 4), but did not exercise its right to disapprove under § 239-m(4)(a), nor did it recommend that the more inclusive and previously requested R-M zoning be substituted for the exclusionary R-T zoning. Quite the contrary: the County stated that "the County is in *support* of the direction of many of the proposed amendments (*especially* the opportunity for a new residential use at the 101 County Seat Drive property)." (Reissman Decl. Ex. AQ at 1) (emphasis added). So much for the County's claimed "objection."

Further, when predecessor-plaintiff NYAHC contacted the County to work with it on a development proposal for the Social Services Site that would include multi-family affordable housing after NYAHC became aware of the County's intention to sell the Site, the County was presented with an additional opportunity to override the Village's zoning decision. In a September 10, 2004 letter accompanying a proposal for development of the Site, NYAHC stated:

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

(SAMF ¶ 135.) NYAHC met with former County Executive Suozzi and other County officials to discuss the proposal and the possibility of constructing affordable housing as part of a mixed income housing development on the Site. (*Id.* ¶ 141.) NYAHC also brought its concerns to the

Nassau County Planning Commission. (*Id.* ¶ 142.) NYAHC urged the County to withdraw or modify the RFP to require that some part of the Site contain affordable housing, but the County refused to reissue the RFP and did not even investigate whether an affordable or mixed income housing project would have been financially beneficial to the County. (*Id.* ¶¶ 143-44.) Despite NYAHC's demonstration to Nassau County that the R-T zoning and the County's RFP pursuant to that zoning foreclosed a unique opportunity to create much needed affordable housing, the County simply dismissed NYAHC's proposals as non-conforming and accepted the highest bidder's proposal to develop luxury housing on the Site. (*Id.* ¶ 145.) Nassau County's action had the foreseeable consequence of perpetuating the pervasive segregation that afflicts Nassau County and Garden City – a condition that has long been exacerbated by Nassau County's consistent practice of targeting minority areas for affordable housing construction. (*See supra* at Statement of Facts, Sections D and E, and *infra* at Section IV.B). But the County chose to turn a blind eye. Thus, Nassau County acceded to the discriminatory animus of the residents of Garden City and shares liability with the Village for intentional discrimination.

IV. THERE ARE MATERIAL ISSUES OF FACT AS TO WHETHER DEFENDANTS VIOLATED THE FAIR HOUSING ACT THROUGH ACTIONS THAT HAD A DISPARATE IMPACT ON RACIAL MINORITIES

Though Plaintiffs have shown a wealth of material issues of fact regarding Defendants' intentional discrimination, under a Second Circuit disparate impact analysis, a plaintiff need not show that the decision complained of was made with discriminatory intent in order to make out a *prima facie* FHA violation. *See Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-39 (2d Cir. 1979). Rather, Plaintiffs need only show that an outwardly neutral practice "actually or predictably has a discriminatory effect." *Huntington*, 844 F.2d at 934 (citing *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975)). "'Effect, and not motivation, is the touchstone, in part because clever men may easily conceal

their motivations.'" *Robinson*, 610 F.2d at 1037 (quoting *City of Black Jack*, 508 F.2d at 1184-84). A *prima facie* case of discriminatory effect may be made by showing that the policy or decision at issue either: (1) disproportionately impacts a minority group; *or* (2) perpetuates residential segregation, harming the community in general. *Huntington*, 844 F.2d at 937.

"In the context of disparate impact FHA claims, the Second Circuit applies heightened scrutiny." *Human Res. Research & Mgmt. Grp. v. County of Suffolk*, 687 F. Supp. 2d 237, 255 (E.D.N.Y. 2010) (emphasis omitted). Thus, once a plaintiff has demonstrated a *prima facie* case of discriminatory effect, the burden shifts to defendant to prove that "its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Huntington*, 844 F.2d at 936 (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908, (1978). In the end, the Court must balance the plaintiffs' showing of discriminatory impact against the defendant's justifications for its conduct. *Huntington*, 844 F.2d at 936. And though proof of discriminatory intent is not required to establish a *prima facie* disparate impact claim, it nonetheless remains an important factor because where, as here, "evidence of such intent is presented, that evidence would weigh heavily on the plaintiff's side of the ultimate balance." *Id.*

Plaintiffs have established a *prima facie* case of disparate impact; the record shows that the exclusionary zoning decision had a disparate impact on minorities in Nassau County *and* perpetuates the high level of segregation that exists in both the County and Garden City.

A. <u>The Exclusionary Zoning Had a Disparate Impact on Minority Groups</u>

In 2004, prior-plaintiff NYAHC created four proposals for residential development of the Social Service Site, each with a multi-family, affordable housing component that was consistent with the rejected R-M zoning classification. (SAMF ¶ 149.) A statistical analysis by Plaintiffs' expert, Nancy McArdle, shows that under these four proposals, the pool of renters who could

have afforded to live at the Site would have ranged from 56 minority households (or 18% of households) to 101 minority households (or 32% of households). (*Id.* ¶¶ 150-54.) Further, if parts of the proposed development were subsidized by the federal Section 8 program, approximately 88% of households that would have occupied the Section 8 units would have been minority, based on the racial make-up of the Nassau County Section 8 waiting list. (*Id.* ¶ 155.)

McArdle also analyzed the R-T zoning-compliant luxury housing development proposed by the winning bidder, a proposal the County had approved. (Brown Decl. Ex. 94, Declaration of Nancy McArdle, dated September 12, 2008 ("McArdle Report") ¶¶ 67-70.) This analysis shows that the proposed luxury development would likely have been occupied primarily – if not exclusively – by white households, with only 3 to 6 minority households. *(Id.* ¶ 69.) Such a development would have been unlikely to change the percentage of households in Garden City headed by a minority. (*Id.* ¶ 70.)

Further, McArdle's analysis shows that minority households in Nassau County are almost four times as likely to be very-low-income households than are non-minority households. (McArdle Report ¶ 7.) Because very-low-income minorities as a subgroup must generally rely on the availability of affordable housing, they were disproportionately impacted when Defendants' enactment of the R-T zoning eliminated the possibility of affordable housing in Garden City. Similarly, because minority households are more likely to be able to afford or qualify for affordable or Section 8 units than market rate units, at worst the R-T zoning classification essentially eliminates access to housing for a population that is roughly 88% minority (those on the Section 8 waiting list). (SAMF ¶ 155.) This result additionally supports a finding of disparate impact. *See Huntington*, 844 F.2d at 938 (restrictive zoning decision had substantial adverse impact when minorities composed 61% of those on Section 8 certificate

waiting list).

The record thus undisputedly shows that adoption of the R-T zoning, rather than the originally-proposed R-M zoning, created a disparate impact by severely restricting, if not eliminating, the number of multi-family affordable units that could have been built at the Site, and in turn the number and proportion of minority residents in Garden City. *See Huntington*, 844 F.2d 926, 937-38; *Tsombanidis*, 352 F.3d at 575 ("The basis for a successful disparate impact claim involves a comparison between two groups – those affected and those unaffected by the facially neutral policy"); *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 740-41 (8th Cir. 2005) ("[P]laintiffs must demonstrate that the objected-to action results in, or can be predicted to result in, a disparate impact upon a protected class compared to a relevant population as a whole."); *Rivera*, 2011 WL 1260209, at *7 (finding genuine issue of fact existed as to disparate impact where plaintiffs' expert found that redevelopment plan would affect 21.9% of Hispanic residents, but only 1.2% of non-Hispanic residents).

Faced with this evidence, and despite its claim that the rezoning "does not disproportionately affect a protected class, nor . . . have a segregative effect in the community" (GC Br. 32), Garden City concedes that the R-T zoning *did* have a discriminatory impact on minorities. (GC Br. 33-34) (the homes "would be financially unattainable for individuals of protected groups as compared to individuals of non-protected groups"). Garden City's feeble attempt to combat this clear disparate impact – *an impact it concedes does exist* – is to baldly state, with no legal support, that this impact does not constitute a violation under the FHA because "it is the County's price demand that excludes individuals of protected groups." (*Id.*) Nonsense. As Plaintiffs have demonstrated, it is the restrictive R-T zoning that precluded the development of affordable multi-family units.

Garden City also claims that 36 affordable housing units could still have been constructed under the R-T zoning, despite the fact that a special use permit would be required to build them. (*Id.* 34.) This disingenuous claim lacks any support in the record, and indeed it defies logic to expect that the Board, which rejected zoning that would have permitted multi-family housing as-of-right, would grant a multi-family special use permit under a discretionary system for reviewing proposed projects' "aesthetics." (*Id.*)

For its part, Nassau County does not even attempt to dispute that the exclusionary zoning (for which Nassau County shares liability) and Nassau County's decision to sell the Social Services Site without providing for affordable housing caused a disparate impact on minority groups in Nassau County and perpetuated segregation. (NC Br. 20.) Instead, the County attempts to divert the Court's attention from the County's role in creating a disparate impact on minorities and perpetuating segregation by referring to irrelevant facts regarding its dispersal of federal HUD funds, and by claiming once again, cursorily, that the County had nothing to do with the acts about which Plaintiffs complain. (*Id.* 20-21, 23.) These irrelevant facts cannot defeat Plaintiffs' undisputed evidence, and Plaintiffs have shown that the County cannot disclaim responsibility here (*supra* at Section III.B).

B. <u>The Exclusionary Zoning Perpetuated Residential Segregation</u>

Plaintiffs have established that Nassau County is one of the most segregated counties in the country, that Garden City exemplifies such segregation, that the County sorely needed affordable housing, and that Garden City contained no affordable housing. (SAMF ¶¶ 1-9, 168, 203, 236; Brown Decl. Ex. 89 at NASSAU COUNTY 026953.) Moreover, the County acknowledges that it is aware that communities with low numbers of minorities use zoning to maintain the status quo of segregation, that "pervasive structural and institutional racism spanning centuries remains omnipresent in Long Island," and that "exclusionary zoning and

lethargic government fair-housing enforcement" allows the situation to persist. (SAMF ¶¶ 247, 250.) The County's own evaluative report states that "unlawful discrimination is one of the most blatant impediments to fair housing." (*Id.* ¶ 251.)

By adopting (or acquiescing in the adoption of) a zoning classification that excludes virtually any affordable housing, Defendants continue to perpetuate this deep-seated segregation. Garden City appears to argue that the continued segregation is somehow mitigated in this case because the R-T zoning "promot[ed] townhouses, a type of housing not previously constructed in the Village." (GC Br. 3, 35.) This is nonsense. Garden City's apparent argument is that if it builds housing of a variety previously not specifically defined in its zoning code, it does not matter whether its zoning blocked the possibility of that housing being occupied by minorities; this is absurd on its face. Garden City relies on *Ventura Village, Inc. v. City of Minneapolis*, 419 F.3d 725, 727 (8th Cir. 2005) in a weak attempt to support this argument, but the case is inapposite. The court in *Ventura Village* held that the City of Minneapolis did not discriminate when it approved construction of a supportive housing facility for homeless families because it approved every application for all eleven of such projects, including six in majority white neighborhoods. *Id.* at 728. The crucial distinction is that in *Ventura Village*, the city increased overall the housing available *to a protected class of persons in a desegregative manner*. Garden City has not done anything remotely similar here. Rather, its zoning enactment blocked the possibility of providing housing for minorities in Garden City, thus promoting segregation.

As for Nassau County, when it decided to sell the Social Services Site in Garden City to raise funds for the County, it was well aware that the County was segregated, that the County needed affordable housing, that racism was a barrier to building affordable housing in non-minority neighborhoods, and that vacant land rarely becomes available in areas with

predominantly white residents. But Nassau County did not even investigate the possibility of a desegregative option for the Social Services Site – an affordable housing project, or a coupling of affordable and "upscale" housing in a single project – despite the fact that Plaintiffs contacted County executives to discuss that very possibility. (SAMF ¶¶ 141-45.)

The County argues that it is "*prohibited* from disbursing federal funds related to affordable housing to predominantly white and higher-income communities such as Garden City who do *not* join the Consortium." (NC Br. 21) (emphasis in original.) The County's claim is essentially that the federal government and state and county governments that receive federal funding are powerless to affirmatively further fair housing – as the FHA requires – in the communities that most sorely *lack* fair, open and integrated housing opportunities because these communities refuse to take federal funds. No such "catch-22" exists in law or logic. The County fails to acknowledge that giving funds directly to a local municipality such as Garden City is not the only way to fund or promote affordable housing development within such municipalities. The County admits that it allocates HUD funds for non-profit organizations, and further admits that certain HUD grants "serve as 'gap filling' for construction of new housing." (NC 56.1 Part 2 ¶¶ 66-67.) Garden City's status as a non-Consortium member does not prevent the County from distributing HUD grants to private developers who commit to building affordable housing on privately-owned land within Garden City. Certainly the County is not prohibited from using HUD funds to develop affordable housing on County-owned property in non-Consortium communities such as Garden City.

More broadly, Nassau County's approach to remedying its dearth of affordable housing relies heavily on the use of federal CDBG and HOME funds. (*See*, *e.g.*, *id.* ¶¶ 254-58.) But this approach purposefully and exclusively targets majority-minority communities as sites for

affordable housing development. (*Id.* ¶¶ 231-34; 254-57.) By developing the housing most needed by, and most likely to attract, low- and moderate-income minority families *only* within communities that are already disproportionately minority, Nassau County's practices have continued to perpetuate and reinforce the already extreme segregation in the County to the present day. *See United States ex rel. Anti-Discrimination Ctr. of Metro. N.Y. v. Westchester Cnty., N.Y.*, 668 F. Supp. 2d 548, 564-65 (S.D.N.Y. 2009) ("As a matter of logic, providing more affordable housing for a low income racial minority will improve [a county's] housing stock but may do little to change any pattern of discrimination or segregation. Addressing that pattern would at a minimum necessitate an analysis of where the additional housing is placed").

Defendants' actions in creating the discriminatory zoning thus foreseeably perpetuated segregation in and around Garden City and within Nassau County. And again, the County does not even try to dispute the segregative effects of the exclusionary zoning. (NC Br. 20.)

C. Neither Defendant Can Demonstrate a Legitimate, Bona Fide Governmental Interest in the Exclusionary Zoning, Nor Can They Demonstrate that There Was No Less Discriminatory Alternative

1. Garden City Cannot Demonstrate a Legitimate, Bona Fide Interest in the R-T Zoning

Although a town's interest in zoning requirements is "substantial," those interests "cannot . . . automatically outweigh significant disparate effects." *Huntington*, 844 F.2d at 937. Rather, in considering disparate impact for purposes of an FHA claim, the Court must balance a plaintiff's showing of discriminatory impact against the defense's justifications for its conduct. *Id.* at 936. Furthermore, when a court conducts this fact-intensive exercise, evidence of discriminatory intent weighs heavily in a plaintiff's favor, as does a plea for relief requesting elimination of a defendant's obstacles to housing (as Plaintiffs request here) as opposed to a request for an affirmative order to compel a governmental defendant to build housing. *See id.*

Garden City attempts, again feebly, to justify its zoning decision based on purported concerns about traffic and school overcrowding. (GC Br. 35-36.) These concerns, as Plaintiffs have shown (*supra* at Statement of Facts, Section C and Section III.A.1), are completely undercut by the record. Any residential use of the Social Services Site would have decreased the amount of traffic in comparison to commercial use. (SAMF ¶¶ 75-76.) And though the BFJ study that Garden City points to does report that townhouses generate less traffic than other uses, the difference is not significant, and the traffic generated by any residential housing would have been substantially less than the traffic Garden City residents at the time experienced from office use on the Social Services Site. (Affidavit of Peter Bee, dated March 30, 2009 ("Bee Aff."), Ex. I, "A Zoning Study for the Public P District, dated April 22, 2004 ("4/22/04 Zoning Study") at 11.) The evidence also shows that residents' opposition to multi-family housing based on potential overcrowding in schools was pretextual. Public officials and BFJ repeatedly presented the community with data and analyses concluding that single-family homes would place a larger burden on local schools than multi-family homes. (SAMF ¶¶ 71-72.) Garden City concedes this, and acknowledges that townhomes would have produced the same number of school children as multi-family homes. (GC Br. 36.) The BFJ presentation on which Garden City relies in fact shows that multi-family housing at the Site would have generated a total of only 53 additional schoolchildren, while the school system could have accommodated an additional 565 students at that time. (Bee Aff. Ex. I, 4/24/04 Zoning Study at 10.)

In the face of this empirical evidence nullifying their concerns, Garden City residents nonetheless persisted in demanding that single-family housing be built at the Social Services Site because of traffic and school overcrowding. (SAMF ¶¶ 70-77.) This behavior suggests an ulterior motive. Garden City's own expert states that local opposition should not dictate a

Board's zoning decision, especially if the opposition is unsupported. (Brown Decl. Ex. 125, Deposition of Patrick Cleary, taken January 9, 2009, at 35:21-37:23.) At a minimum, this contrary behavior – and Garden City's reaction to it – demonstrates an additional issue of material fact as to whether Garden City had a legitimate, bona fide interest in the exclusionary zoning. *See Huntington*, 844 F.2d at 940 (traffic concern "entirely insubstantial" when testimony did not support it); *Innovative Health Sys.*, 117 F.3d at 49 (city "may not base its [zoning] decisions on the perceived harm from such stereotypes and generalized fears").

Garden City does not even attempt to show that there was no less discriminatory alternative to the R-T zoning. This complete lack of proof in and of itself precludes summary judgment under the required strict scrutiny standard.

2. Nassau County Demonstrates Neither a Legitimate, Bona Fide Interest in the R-T Zoning, nor a Less Discriminatory Alternative

The County claims that though Defendants' actions *did* have a disparate impact on minority populations in Nassau County, the County's actions were justified by "legitimate, bona fide and non-discriminatory government interests." (NC Br. 20.) The first of those claimed interests, that "the County's practices in receiving, administering and distributing federal funds . . . fully conform to HUD regulations and affirmatively further the goals of the FHA" (NC Br. 20), is both untrue and irrelevant to whether the County had a legitimate interest in its actions related to the re-zoning of the Social Services Site. First, as discussed at Section V, *infra*, the County's administration of federal housing funds falls far short of meeting its obligation affirmatively to further the goals of the FHA; indeed, its explicit policy of locating affordable housing in low income, majority-minority communities violates this duty. Second, the County's administration of HUD funds has no connection at all to the issue of whether the County had a legitimate, bona fide interest in acquiescing to the exclusionary R-T zoning.

The County next claims that "in seeking and selecting the highest bidder for the Site, the County exercised a legitimate, bona fide government interest." (NC Br. 21.) Certainly raising revenue is a legitimate government interest. But the facts demonstrate that the County's claimed "interest" here is merely pretextual; after all, the County wanted the Site zoned for multi-family residential use because *multi-family* zoning, and not singe-family R-T zoning, would have brought in the most money for the County, both in sale revenue and future taxes. (SAMF ¶¶ 48, 80-81.) When the County was confronted with opposition to multi-family housing – driven by Garden City residents' fear that multi-family zoning might lead to the development of affordable housing, with the accompanying dreaded influx of minority residents – the County not only acquiesced to the R-T zoning, it actively supported its discriminatory purpose. (*Id.* ¶ 104; Brown Decl. Ex. 54 at ACORN002392, "We would be willing to put deed restrictions on any property that we sold. The Village would have control of their zoning requirements. We would put on restrictions whatsoever, no ifs ands or buts, that it cannot be anything but upscale housing.") Even though the County believed that R-M zoning was more economically advantageous than single-family zoning (SAMF ¶¶ 48, 80-81), the County did nothing to challenge the R-T zoning.

The discriminatory action that Plaintiffs complain of – enactment of the exclusionary R-T zoning – and the disparate impact that resulted, occurred *before* the County put out its RFP to potential developers. Once the exclusionary zoning was enacted – due to opposition to multi-family housing the County has acknowledged was, at least in part, racially motivated – the County's interest in pursuing the highest bid for the property could not legitimize its earlier acquiescence and participation in the discriminatory zoning decision, especially considering that the County was under an affirmative duty to further fair housing opportunities. (*See infra* at Section V.) What happened during the RFP process is beside the point for the purposes of this

Court's disparate impact analysis.

Nevertheless, the County asserts that not only did it have a legitimate purpose, there was no "less discriminatory alternative that would have produced revenue to the County compared to the $56.5 million bid by Fairhaven Properties." (NC Br. 22.) But again, because the discrimination occurred well *before* the County had even put out the RFP, this argument fails to meet the County's burden (and it is the County's burden, not Plaintiffs' burden, as the County implies, NC Br. 22) to demonstrate that there was no less discriminatory alternative to acquiescing in the enactment of the R-T zoning and subsequently selecting a development project for the Site that did not include an affordable housing component. *See Huntington*, 844 F.2d at 936.

In any case, predecessor-plaintiff NYAHC had presented the County with just such an alternative: a housing development proposal that would have promoted residential desegregation (which was also a necessary prerequisite for the County to meet its duty affirmatively to further fair housing). And it is at least a triable issue of fact as to whether the bid the County ultimately accepted was more financially advantageous to the County than the $5,000,000 per year revenue stream over a period of 30 years (a total of $150,000,000) initially offered to the County by NYAHC. (*See* SAMF ¶ 139.) In fact, NYAHC's initial proposal represented a present value return to the County of $67 million, significantly more than the winning bid of $56.5 million. (*Id.* ¶¶ 139-40.) In myopically shying away from NYAHC's proposal, the County failed to recognize that it need not have chosen between affordable housing and revenue – that in fact, it could have had both. Nassau County simply failed to investigate whether an affordable housing project was possible on the Site while still obtaining a reasonable purchase price. For example, there is no evidence that the County considered the availability of federal funds to incentivize a developer to

earmark a portion of the Site for affordable housing. (*See*, *e.g.*, NC 56.1 Pt. 2 ¶¶ 66, 67.)

Finally, Nassau County's reliance on *Strykers Bay Neighborhood Council, Inc. v. City of New York*, 695 F. Supp. 1531 (S.D.NY. 1988) is misplaced. In that case, the city had fought for and won the right to build low-income housing on the disputed property. During the course of the litigation in which the city won that right, inflation rendered the funds appropriated for the project insufficient. To resolve this shortfall, the city chose to develop a portion of the site for luxury housing in order to subsidize the building of low-to moderate-income rental units on the remainder of the property. In rejecting the contention that the city violated the FHA, the court ruled that because the city's urban renewal efforts had resulted in significantly *more* integrated housing in the area, its decision to build luxury housing on part of the project had no discriminatory impact. Here, in stark contrast, the County did nothing at all to promote affordable housing on the Site.

In sum, the County's attempt to show a legitimate bona fide interest and that there was no less discriminatory alternative fails, and is insufficient to support summary judgment.

V. PLAINTIFFS HAVE A PRIVATE RIGHT OF ACTION TO ENFORCE SECTION 3608(e)(5) OF THE FAIR HOUSING ACT AND THERE ARE GENUINE ISSUES OF MATERIAL FACT CONCERNING WHETHER NASSAU COUNTY VIOLATED THIS PROVISION

As Plaintiffs have shown, Nassau County is one of the most segregated counties in the United States. (SAMF ¶¶ 10-14, 243-44.) Plaintiffs also have shown that this segregation has been caused, perpetuated and reinforced by the County's longstanding policy and practice of using millions of dollars in federal CDBG and HOME funds to promote and develop affordable housing only in majority-minority and low income areas. (*Id.* ¶¶ 15-16, 254-59.) The County's use of federal funds to further these segregative policies violates § 3608(e)(5) of the FHA, which requires recipients of such federal housing funding programs to affirmatively further fair housing

to promote residential integration. *See* 42 U.S.C. § 3608(e)(5). Moreover, because the County is a recipient of federal CDBG and HOME funds, its acquiescence in the FHA violations surrounding the rezoning and planned sale of the Social Services Site constitutes an additional breach of the County's duty under § 3608(e)(5) affirmatively to further fair housing.

The County first attacked the § 3608(e)(5) claim in its 2006 motion to dismiss, arguing that Plaintiffs failed to state a cause of action. This Court denied the motion in its entirety. With respect to the § 3608(e)(5) claim, Judge Bianco stated:

> As to section 3608, the cases only require that the claims rely on grants that relate to section 3608 "housing or urban development." *See Evans v. Lynn,* 537 F.2d 571, 579 (2d Cir. 1975). Obviously, plaintiffs will not ultimately succeed unless they can show that particular grants were misused by defendants, but *Evans* does not stand for the proposition that a complaint does not state a claim unless a particular grant is identified. *Evans,* 537 F.2d at 578 (holding that the agencies administering grants have "an affirmative duty to encourage fair housing" and that an individual who is injured has standing to challenge "administrative violations of statutory duties").

ACORN v. Cnty. of Nassau, et al., No. 05-CV-2301 (JFB) (WDW), 2006 WL 2053732, at *12 (E.D.N.Y. July 21, 2006).

Despite this holding – which is the law of this case – the County now attacks the § 3608(e)(5) claim again in its summary judgment motion, arguing that (1) § 3608(e)(5) does not impose an affirmative duty to further fair housing on non-federal entities; (2) there is no private right of action to enforce § 3608(e)(5) against the County; and (3) even if there is private right of action, the County has met its duty to affirmatively further fair housing. (NC Br. 23-32.) These arguments are meritless.

A. Section 3608(e)(5) Imposes an Affirmative Duty to Further Fair Housing on Non-Federal Entities Such as Nassau County

In its 2006 motion to dismiss, the County conceded that the "affirmatively to further" duty "has been held to impose a duty on a municipality receiving federal funds to take affirmative steps to integrate its own public housing." (Dkt. 30, Memorandum of Law in

Support of Defendant County of Nassau's Motion to Dismiss the Amended Complaint, dated January 20, 2006, at 15) (citing *Otero*, 484 F.2d at 1122.) It is difficult to fathom why the County would now argue otherwise. Indeed, in *Otero*, decided almost forty years ago, the Second Circuit held that local recipients of federal housing assistance (in that case, a public housing authority) are "obligated to take affirmative steps to promote racial integration," *id.* at 1125, and that "the affirmative duty placed on the Secretary of HUD by § 3608(d)(5)" applies "*through him on other agencies administering federally-assisted housing programs*." *Id.* at 1133-34 (emphasis added).

Since *Otero*, several laws and regulations have been enacted requiring grantees of CDBG funds to certify that they affirmatively will further fair housing. *See* 42 U.S.C. § 5304(b)(2); 24 C.F.R. § 570.601-02 (providing steps federal fund recipients must take when certifying that they are affirmatively furthering fair housing). Courts have relied on these regulations to find that non-federal recipients of federal housing assistance have a duty to affirmatively further fair housing. In 1994, the Second Circuit confirmed that local officials, as conditions for receiving federal CDBG funds, must (1) "affirmatively further fair housing . . . and handle CDBG funds in conformance with the Constitution and applicable civil rights laws." *Comer v. Cisneros*, 37 F.3d 775, 792 (2d Cir. 1994). Likewise, the court in *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 432 (E.D.N.Y. 1995) stated that "a unit of local government is eligible to receive CDBG funds only if it certifies to HUD that it . . . meets certain statutory requirements" concerning the duty to affirmatively further fair housing. *See also Anderson v. Jackson*, No. 06-3298, 2007 WL 458232, at *3-4 (E.D. La. Feb. 6, 2007) (applying the § 3608(e)(5) duty to the Housing Authority of New Orleans); *Wallace v. Chicago Hous. Auth.*, 298 F. Supp. 2d 710, 719 (N.D. Ill. 2003) (relying on *Otero* in holding that § 3608

is equally enforceable against local housing authorities as against HUD); *Langlois v. Abington Hous. Auth.,* 234 F. Supp. 2d 33, 73 (D. Mass. 2002) (declining to "construe the boundary of the duty to affirmatively further fair housing as ending with [HUD]"); *Reese v. Miami-Dade Cnty.*, 210 F. Supp. 2d 1324, 1329 (S.D. Fla. 2002) ([T]he duty to "affirmatively further fair housing imposes a binding obligation upon the States.").

In *Westchester County*, 668 F. Supp. 2d at 566, the court confirmed that as a recipient of CDBG funds, the defendant-county had a duty to affirmatively further fair housing, and held that grantees must certify to the Secretary that, among other things, "the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 [42 U.S.C. § 2000a *et seq.*] and the Fair Housing Act [42 U.S.C. § 3601 *et seq.*], and the grantee will affirmatively further fair housing." *Id.*

In attempting to overcome well-established precedent that § 3608(e)(5) requires both HUD *and* recipients of federal housing assistance to affirmatively further fair housing, Nassau County relies on only one case – *Acevedo v. Nassau County*, 500 F.2d 1078 (2d Cir. 1974) – and does not even discuss *Otero*, the case it initially acknowledged "impose[d] a duty on a municipality receiving federal funds to take affirmative steps to integrate its own public housing," in its 2006 motion to dismiss. But *Acevedo* does not stand for the proposition that § 3608(e)(5) is inapplicable to non-federal recipients of federal HUD funds. The primary claim in *Acevedo* was that the defendants had violated the Fourteenth Amendment by providing low-income housing for senior citizens without also providing low-income family housing. *See Acevedo*, 500 F.2d at 1081. The *Acevedo* court rejected this claim and then briefly considered a "rather vague [FHA] claim" that did not even indicate the sections of the FHA on which plaintiffs relied. *Id.* at 1082. In this context, the court – in dicta – briefly made note of § 3608:

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

Id. Nothing in this vague dicta states that a federal housing funds grantee has no duty to affirmatively further fair housing. *Acevedo* certainly cannot be interpreted as overruling *Otero*'s plain holding the year before that local recipients of federal housing assistance have a duty to affirmatively further fair housing. Indeed, the decision does not even mention *Otero*. Clearly *Acevedo*'s dicta does not negate the subsequent statutes, regulations and case law that consistently and clearly require recipients of federal funds, like Nassau County, to affirmatively further fair housing.

B. Section 3608(e)(5) Creates an Individual Right, Which Plaintiffs May Enforce Through Section 1983

The County next argues that there is no private right of action that permits Plaintiffs to enforce § 3608(e)(5). The County rests this argument primarily on two cases from the First Circuit – *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 154 (1st Cir. 1987) and *Latinos Unidos de Chelsea v. Secretary of Housing and Urban Development*, 799 F.2d 774, 792-93 (1st Cir. 1986) – which hold that there is no private right of action to bring a § 3608(e)(5) claim against *federal agencies* except pursuant to the Administrative Procedures Act ("APA"). The County also argues that § 3608(e)(5) does not create an implied right of action, relying on *Cort v. Ash*, 422 U.S. 66 (1975).

NAACP and *Latinos Unidos de Chelsea* are easily distinguishable: Plaintiffs' § 3608(e)(5) claim is not against HUD, or any other federal agency, but against Nassau County, a non-federal recipient of federal housing funding. The APA does not provide an enforcement mechanism for Plaintiffs in this setting.

Therefore, Plaintiffs bring this claim against Nassau County under 42 U.S.C. § 1983. Pursuant to § 1983, private individuals may sue state actors to enforce their constitutional rights and rights created by federal statutes. *See*, *e.g.*, *Maine v. Thiboutot,* 448 U.S. 1, 4 (1980). Section 1983 provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

In determining whether a statute is enforceable through a private right of action under § 1983, the court must consider "whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002). The right conferred must be unambiguous. *Id.* at 283.

Here, § 3608(e)(5) creates an unambiguous right that Plaintiffs may enforce pursuant to § 1983. Indeed, several courts have found that § 3608(e)(5) is enforceable through § 1983. Shortly after *Gonzaga*, the court in *Langlois* held that "both the statutory text and case law construing it make clear that Section 3608(e)(5) is fundamentally concerned with, and aimed at, affirmatively protecting the right to fair housing," and that Congress clearly intended § 3608(e)(5) "to benefit the plaintiffs here: people in desperate need of access to fair housing, minorities and the poor." In 2003, the court in *Wallace*, 298 F. Supp. 2d at 718, reached the same conclusion. The *Wallace* court considered the differences between the Federal Educational Rights and Privacy Act ("FERPA") – the statute examined in *Gonzaga* – and the FHA, and found that

FERPA, unlike the FHA, was a law enacted pursuant to Congress' spending power. *Id.* The *Wallace* court further noted that FERPA spoke only "in terms of institutional policy and practice," while § 3608(e)(5) is a civil rights statute that contains "an explicit focus on those who have traditionally been victims of discrimination in housing." *Id.* *Wallace* concluded that "unlike FERPA, it is clear that the Fair Housing Act clearly does aim to 'confer individual rights upon a class of beneficiaries,'" *id.* at 718-19, and "the fact that [in other sections of the FHA] private enforcement is available under the Act supports our conclusion that Congress intended to confer rights upon a class of individuals." *Id.* at 719. Four years later, in 2007, the court in *Anderson* agreed. *See* 2007 WL 458232, at *4.

Indeed, the legislative history, original jurisdictional analogue, and original title of § 1983 all indicate that equal rights statutes hold a unique significance for the § 1983 remedy. In the Civil Rights Act of 1871, Congress enacted § 1983 to guarantee protection for the rights secured by the Fourteenth Amendment. *See* § 1983 and the Civil Rights Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2006)). The legislative history reveals the specific goals of § 1983: to curtail the "social and political disability" inflicted on African Americans, prevent further "injury of a *certain class* of citizens" that have been traditionally discriminated against, and to improve state and local governments' "inadequ[acy] or unwilling[ness] to apply the proper corrective" to restore equal balance among its citizens. Cong. Globe, 42d Cong., 1st Sess. at 439 (1871) (remarks by Rep. Cobb), 457 (remarks by Rep. Coburn) (emphasis added), and 374 (remarks by Rep. Lowe).

Supreme Court § 1983 jurisprudence consistently recognizes § 1983's special legislative purpose to enforce equal rights laws. *See*, *e.g.*, *Blessing v. Freestone*, 520 U.S. 329, 350 (1997) (Scalia, J., concurring) (courts should determine the scope of § 1983 enforceable rights

"according to the understanding of § 1983 when it was enacted" – that is, to enforce constitutional rights and statutory civil rights); *Thiboutot*, 448 U.S. at 21-22 (Powell, J., dissenting) (arguing that only equal rights statutes should be enforced through § 1983); *Chapman v. Houston Welfare Org.*, 441 U.S. 600, 611 (1979) ("prime focus of Congress" in enacting § 1983 was to provide "a right of action to enforce the protections of the Fourteenth Amendment and federal laws enacted pursuant thereto"). The FHA – including § 3608(e)(5) – is such a civil rights statute that was enacted to combat race-based discrimination, and its overriding nature and purpose is to protect the housing rights of those classes traditionally and adversely affected by discrimination. *See Otero*, 484 F.2d at 1133-34 ("Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.") Section 1983 is thus designed to address the inability or unwillingness of state actors to deter discriminatory acts forbidden by civil rights statutes like the FHA.

Application of the factors considered in *Gonzaga* to § 3608(e)(5) supports a finding that § 3608(e)(5) creates rights enforceable through § 1983. First, *Gonzaga* requires congressional intent to create rights in the provision at issue, which is indicated by an "unmistakable focus on the benefited class," as determined through an examination of the "text and structure" of the statute as a whole. 536 U.S. at 283-84, 287-89. Section 3608(e)(5) unmistakably focuses on the FHA's benefited classes when viewed in the context of the FHA's text and structure. Section 3605(e)(5) requires that "activities relating to housing and urban development [be conducted] in a manner affirmatively to further the policies of this *subchapter*" (emphasis added). Section 3601 states that the FHA's policy is "to provide . . . for fair housing throughout the United States," and 42 U.S.C. §§ 3604 and 3605 are directly focused on providing fair housing for those

who may be discriminated against on the basis of race, color, religion, national origin, sex, familial status, or disability.

Second, the *Gonzaga* Court considered whether Congress conferred entitlements "sufficiently specific and definite to qualify as enforceable rights." 536 U.S. at 280 (quoting *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431-32 (2002), which further noted that statutory rights should not be "beyond the competence of the judiciary to enforce.") Courts have had no difficulty in defining § 3608(e)(5)'s requirement to affirmatively further fair housing. *See Otero*, 484 F.2d at 1134 ("Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat."); *Westchester Cnty.*, 668 F. Supp. 2d at 564 ("[T]he central goal of the obligation to [affirmatively further fair housing] [is] to end housing discrimination and segregation").

Third, the *Gonzaga* Court indicated that to be enforceable under § 1983, a statute should create a binding obligation in "mandatory" terms. 536 U.S. at 280 (quoting *Wright*, 479 U.S. at 430). Section 3608(e)(5) provides that the Secretary of HUD "*shall* administer programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter" (emphasis added). This is a mandatory obligation. Moreover, HUD regulations obligate grantees of federal housing and community development funds to affirmatively further fair housing and require such grantees to certify that they will do so. *See* 24 C.F.R. § 570.601(a)(2) (*requiring* that "grantees administer all programs and activities related to housing and community development in a manner to affirmatively further the policies of the Fair Housing Act."); 24 C.F.R. § 91.325(a)(1) ("[e]ach State is *required* to submit a certification that it will affirmatively further fair housing . . .") (emphasis added).

Finally, *Gonzaga* states that when a statute incorporates a comprehensive enforcement scheme, this may indicate that Congress did not intend to create an individual enforcement right under § 1983. 536 U.S. at 290. The FHA, unlike FERPA (examined in *Gonzaga*), does not contain any explicit enforcement provision for § 3608(e)(5). Without § 1983, individuals do not have a mechanism for enforcing against local governments § 3608(e)(5)'s guarantee of affirmatively furthered fair housing.

While two district courts have held that § 3608(e)(5) does not create a private right of action under § 1983, those courts both applied a very strict textual reading of § 3608(e)(5), without the contextual analysis *Gonzaga* suggests. *See Thomas v. Butzen*, No. 04 C 5555, 2005 WL 2387676 (N.D. Ill. Sept. 26, 2005); *S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, No. 07-12018-DPW, 2008 WL 4595369 (D. Mass. Sept. 30, 2008). As Plaintiffs have demonstrated above, § 3608(e)(5) more than survives *Gonzaga*'s contextual analysis. Moreover, these district courts' rigid analytical approach ignores § 3608(e)(5)'s history and purpose within an important equal rights statute – which reveals that § 3608(e)(5) is exactly the sort of remedial civil rights legislation § 1983 was designed to enforce. *See Wallace*, 298 F. Supp. 2d at 718 ("Congress drafted the FHA . . . with an explicit focus on those who have traditionally been victims of discrimination in housing).

C. There are Material Issues of Fact as to Whether Nassau County Violated Section 3608(e)(5)

The County argues that, assuming it does have a duty to affirmatively further fair housing, it "has fulfilled its obligation." (NC Br. 31.) In support of this argument, the County relies on the affidavit of the County official responsible for administering CDBG and HOME funds, which sets forth that the County has produced analyses of impediments and created charts that show actions taken to overcome these impediments and that track the County's expenditure of

federal CDBG and HOME grants. (*See generally* Affidavit of Kevin J. Crean in Support of Defendant Nassau County's Motion for Summary Judgment, dated March 10, 2011.)

While HUD regulations require creation of the analyses of impediments and charts described in these affidavits (*see* 24 C.F.R. § 91.325(a)(1)), the duty to affirmatively further fair housing requires far more than such ministerial tasks. The Second Circuit in *Otero* held that:

> the affirmative duty placed on the Secretary of HUD by § 3608(d)(5) and through him on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. *Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat*.

484 F.2d at 1133-34 (emphasis added). More recently, the Southern District of New York in *Westchester County* held that "a grantee that certifies to the federal government that it will affirmatively further fair housing as a condition to its receipt of federal funds must analyze 'the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction.'" 668 F. Supp. 2d at 550 (citing earlier decision at 495 F. Supp. 2d 375, 376 (2007)). Furthermore, "in identifying impediments to fair housing choice, [the grantee] must analyze impediments erected by race discrimination or segregation, and if such impediments exist, it must take appropriate action to overcome the effects of those impediments." *Id.* at 552 (citing 495 F. Supp. 2d at 387).

Nothing in the factual recitation in the County's brief demonstrates in any way that it has met these basic responsibilities. Indeed, if anything, the undisputed facts in this case establish that Nassau County has acted contrary to its duty to affirmatively further fair housing. First, the County's discriminatory actions with respect to the Social Services Site are a clear violation of

this duty. Claiming – under color of state law (NC Br. 16-17) – that it was powerless to take any action to combat the discriminatory zoning, Nassau County both acquiesced in blatant discrimination and passed up an opportunity to fulfill its obligation to affirmatively further fair housing through sale and development of the Social Services Site. Second, as discussed at Section III.B, the County has long had a policy of locating affordable housing in minority neighborhoods, thereby exacerbating residential segregation. (SAMF ¶¶ 225-35.) It expressly admits in its Consolidated Plans of 1995, 2000, 2005, and 2010 that it targeted affordable housing within lower income communities in the County with the highest percentage of minorities. (*Id.* ¶¶ 232-34.) Such a policy is directly contrary to the duty to take "actions . . . to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation," as mandated by *Otero*. *See* 484 F.2d at 1134.

Moreover, the record is replete with evidence that County officials long have been aware of racial discrimination and racism in the County and its negative impact on residential segregation. (SAMF ¶¶ 91, 110-11, 186-87, 243-46, 252-53.) Despite this, County officials explicitly ignored race in their plans for use of federal housing funds. The Director of the Office of Housing and Community Development testified at her deposition that the County was not supposed to look at racial demographics in planning its use of federal housing funds, and that the County does not consider the racial demographics of the areas where CDBG funds are to be used to help create new affordable housing. (*Id.* ¶¶ 254-55.) This practice is directly contrary to the duty affirmatively to further fair housing: that a grantee of CDBG and HOME funds "must analyze impediments erected by race discrimination or segregation, and if such impediments exist, it must take appropriate action to overcome the effects of those impediments." *Westchester Cnty.*, 668 F. Supp. 2d at 552 (citing 495 F. Supp. 2d at 387).

In sum, Nassau County – consistently and repeatedly – has ignored its duty to affirmatively further fair housing to the detriment of the minority populations that the FHA and Section 1983 were designed to benefit. Plaintiffs should have the opportunity to present such failures at trial.

VI. WHETHER DEFENDANTS VIOLATED 42 U.S.C. §§ 1981, 1982, 1983, 2000(D) AND THE EQUAL PROTECTION CLAUSE RAISES MATERIAL ISSUES OF FACT

As set forth in Sections III, IV and V, Plaintiffs have evidence sufficient to create, at a minimum, triable questions of fact as to whether Defendants acted with discriminatory intent and whether their purported justifications are pretextual. This evidence is sufficient to create triable issues of fact as to whether Defendants violated 42 U.S.C. in §§ 1981, 1982, 1983 (in addition to the § 1983 violation set out in Section V), 2000(d) and the Equal Protection Clause.

A. Defendants Violated 42 U.S.C. § 1981

42 U.S.C. § 1981 provides that "all persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." To establish a claim under § 1981, a plaintiff must demonstrate that: (1) he is a member of a racial minority, (2) defendant had an intent to discriminate on the basis of race, and (3) the discrimination concerned one or more of the activities enumerated in the statute. *See Wiltshire v. Dhanraj*, 421 F. Supp. 2d 544, 555 (E.D.N.Y. 2005). Plaintiffs have met these requirements. Plaintiff Francine McCray and many members of plaintiff NYCC are racial minorities who seek and sought affordable housing in Nassau County, including Garden City. (Amended Complaint ¶ 7, Complaint in Intervention ¶¶ 1, 7.) The rezoning of the Social Services Site was based on improper discriminatory intent. (*See supra* at Sections III and IV.) Plaintiffs have thus been denied full and equal benefit of laws for the security of property.

B. Defendants Violated 42 U.S.C. § 1982

42 U.S.C. § 1982 states that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." To establish a violation of § 1982, a plaintiff must establish that she was "[intentionally] deprived of a property right because of her race." *Harary v. Allstate Ins. Co.*, 983 F. Supp. 95 (E.D.N.Y. 1997) (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968)). Plaintiffs have established their deprivation of a property interest in the Social Services Site resulting from Defendants' racial discrimination. (*See supra* at Sections III and IV.)

C. Defendants Violated 42 U.S.C. § 1983

To set forth a claim under 42 U.S.C. § 1983, plaintiffs must allege that: (1) defendants acted under color of state law, and (2) as a result of defendants' actions, the plaintiffs suffered a denial of their federal statutory rights, or their constitutional rights or privileges. *See Fair Hous. in Huntington Comm. v. Town of Huntington*, No. 02-CV-2787(DRH)(WDW), 2005 WL 3184273, at *5 (E.D.N.Y. Nov. 29, 2005). Plaintiffs meet these requirements. Garden City acted under color of state law when it passed the R-T zoning ordinance, preventing the development of affordable housing in the Village. *See* Section III.A. The County now attempts to defend its actions under color of state law by claiming that New York law deprived it of "zoning power" in Garden City. (NC Br. at 15-17.) As a result of these actions – taken under color of state law – Plaintiffs suffered a denial of their federal and constitutional rights, including violations of 42 U.S.C. §§ 1981, 1982, 2000(d), 3608 (as explained previously at Sections V and VI.A and B) and the Equal Protection Clause.

D. Defendants Violated the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment commands that "no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'" *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (internal citation omitted). A court must examine governmental action that is the subject of an equal protection claim with strict scrutiny where the action "disadvantages a suspect class." *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983). Under strict scrutiny, the challenged governmental action "will be upheld only if the government can establish a compelling justification for the action." *Id.* Race is a suspect class. *See McLaughlin v. State of Fla.*, 379 U.S. 184, 192 (1964). Under a strict scrutiny analysis, plaintiffs must show discriminatory intent or purpose. *See McKnight v. Hayden*, 65 F. Supp. 2d 113, 120 (E.D.N.Y. 1999) (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Defendants' actions disadvantaged members of a suspect class, in response to racial animus. (*See supra* at Sections III, IV and V.) Defendants have failed to demonstrate even a legitimate justification for their actions, let alone a compelling one. (*See supra* at Section IV.C) Nor have Defendants demonstrated that there was no less discriminatory alternative. (*Id.*) Garden City's reliance on *Orange Lake Associates, Inc. v. Kirkpatrick*, 21 F.3d 1214 (2d Cir. 1994), is misplaced. In *Orange Lake*, as Garden City correctly points out, the plaintiffs were unable to articulate the discriminatory intent or effect necessary to warranting a strict scrutiny analysis. *Id.* at 1227. That is not the case here.

E. Defendants Violated 42 U.S.C. § 2000d

Title VI of the Civil Rights Act of 1964 commands that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Congress enacted § 2000d to prevent

beneficiaries of federal monies from using the funds to finance racially segregated programs. *See Soberal-Perez*, 717 F.2d at 39. The prohibition against using federal funds in a discriminatory manner applies to programs in which the federal government distributes funds to subsidize public housing programs. *See Hills v. Gautreaux*, 425 U.S. 284, 301 (1976). Essentially the same showing is required to establish a violation of 42 U.S.C. § 2000d as is required to make out a racial discrimination violation of the Equal Protection Clause. *See Goodwin v. Wyman*, 330 F. Supp. 1038, 1040 n.3 (S.D.N.Y. 1971). Nassau County concedes that Plaintiffs "may sue to enforce § 601 (of Title VI of the Civil Rights Act of 1964, § 2000d *et seq*.)," arguing only that Plaintiffs cannot show intentional discrimination. (NC Br. 38, 39-40.) But Plaintiffs have amply demonstrated that Nassau County, a recipient of significant federal housing funding for decades (including HOME and CDBG grants), has in this instance complemented its longstanding racially segregative policies with a particular and pointed demonstration of discrimination. (*See supra* at Sections III, IV and V.)

CONCLUSION

For the foregoing reasons, the Court should deny Garden City's and Nassau County's motions for summary judgment.

New York, New York
August 31, 2011

Respectfully submitted,

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