SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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CHURCHES UNITED FOR FAIR HOUSING, INC.; LOS SURES LUCHA; UNITED NEIGHBORS ORGANIZATION; ST. JOHN'S LUTHERAN CHURCH SOCIAL ACTION COMMITTEE; 293 HOOPER STREET TENANT ASSOCIATION; 301 HOOPER STREET TENANT ASSOCIATION; ANGEL TEJADA; ISABEL LOPEZ; MARIBEL LOPEZ; LEONIDES REYES; AND ROBERT CAMACHO,

Petitioners-Plaintiffs,

- against -

BILL DE BLASIO, as Mayor of the City of New York, THE CITY OF NEW YORK and HARRISON REALTY LLC,

Respondents-Defendants.

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Index Number 151786/2018

Motion Seq. ## 001, 002

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1-7 (E-Filed Documents ("EFD") # 6-74), were used on this CPLR Article 78 Petition, request for a preliminary injunction, and cross-motions to dismiss:

Papers Numbered:

Upon the foregoing papers, the cross-motions to dismiss are granted, the petition is denied and dismissed, the temporary restraining order is vacated, and the request for a preliminary injunction is denied as moot.

Short Version

Petitioners-plaintiffs ("plaintiffs") seek to enforce certain provisions of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 USC §§ 3601-3631 ("FHA"), either as a private right of action, as a 42 USC § 1983 claim, or in the context of a CPLR Article 78 Proceeding, by requiring

defendant the City of New York ("the City") to conduct a racial impact study whenever it rezones property. However, the provisions at issue do not create a private right of action, and without that right 42 USC § 1983 claims and Article 78 relief will not lie. Even if they did lie, although the City is obligated "affirmatively to further fair housing" ("AFFH"), it is not obligated to conduct a racial impact study whenever it rezones property. Also, wealth and income disparities and discrimination are exceedingly widespread and unfortunate, and they negatively affect housing patterns, but as of today, they are not actionable. Thus, there is no legal impediment to the proposed housing being built.

I. Historical Note

In 1849 cousins Charles Pfizer, a chemist, and Charles Erhart, a confectioner, both originally from Germany, with $2,500 borrowed from Charles Pfizer's father, co-founded Charles Pfizer and Company ("Pfizer"), a chemicals business housed in a modest red-brick building at the intersection of Harrison Avenue and Bartlett Street in the Williamsburg section of the Borough of Brooklyn ("Kings County" in New York State parlance). The building contained Pfizer's office, laboratory, factory, and warehouse. Understandably, business boomed during the Civil War, with Pfizer drugs and dressings used to treat wounded Northern soldiers.

In 1891 Charles Erhart died, and Charles Pfizer took control. In 1906 Charles Pfizer died, and the New York Tribune wrote that "by bringing to his task a thorough German technical education, great industry, and determination, he successfully met all difficulties and each year expanded his business." In 2007 Pfizer ceased operating in Brooklyn. In 2012 defendant Harrison Realty, LLC ("Harrison") purchased Pfizer's remaining Brooklyn real estate for $12,750,000. Currently, Pfizer makes Advil, Bacitracin, Chapstick, Diazepam, Effexor, Fentanyl, Lidocane, Lipitor, Lyrica, Penicillin, Preparation H, Robitussin, Streptomycin, Viagra, Xanax, and Zoloft, among other many other substances (some household names, some virtually unheard of).

II. Acronyms Used Herein

AFFH – Affirmatively Further Fair Housing
AFH – Assessment of Fair Housing
AVPC – Amended Verified Petition-Complaint
CEQR – City Environmental Quality Review
CPC – City Planning Commission
DCP – Department of City Planning
DEIS – Draft Environmental Impact Statement
EFD – Electronically Filed Document
FEIS – Final Environmental Impact Statement
FHA – Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 USC §§ 3601-3631
HPD – The New York City Department of Housing Preservation and Development
HUD – United States Department of Housing and Urban Development
MIH – Mandatory Inclusionary Housing
ULURP – Uniform Land Use Review Procedure

III. The Pfizer Sites

The real estate that Harrison purchased ("The Pfizer Sites") comprises Block 2249, Lots 32, 37, 41, and 122, and Block 2265, Lot 14, in Brooklyn. They are bounded by Union Avenue to the west, Walton Avenue to the north, Harrison Avenue to the east, and Gerry Street to the south; Wallabout Street bisects them horizontally. They lie at the southwest corner of what is commonly known as "The Broadway Triangle," bounded by Broadway, Flushing Avenue, and Union Avenue. They are in Community District ("CD") 1, which encompasses Greenpoint, historically a White neighborhood to the north, and Williamsburg, with a large Hasidic population, to the south. South of The Pfizer Sites, directly across Flushing Avenue, is CD3, encompassing, essentially, Bedford-Stuyvesant, historically a Black neighborhood. A few blocks to the east lies CD4, encompassing, essentially, Bushwick, historically a Hispanic neighborhood.

The Pfizer Sites are official "brownfields" that for years have needed remediation. Currently, there are no buildings on The Pfizer Sites. Harrison is renting them out short-term for activities such as equipment and vehicle storage and as a staging area for nearby construction. The Pfizer Sites are well-served by public transportation. The surrounding area consists of a typical New York City mix of rowhouses, low-rise apartment buildings, schools, houses of worship, storefronts, and light-industry sites.

IV. The Parties

Plaintiff Churches United for Fair Housing, Inc. is a non-profit network of churches and congregants advocating for "fair housing" and racial equality. Plaintiff Los Sures Lucha is an unincorporated association of mostly low-income and Hispanic tenants and tenant associations in and around the neighborhood who are "fight[ing] for their right to stay." Plaintiff United Neighbors Organization is an unincorporated association of residents in the East Williamsburg area dedicated to neighborhood improvement, racial and economic diversity, and the housing rights of low-income, long-term residents. Plaintiff St. John's Lutheran Church Social Action Committee is the "social action arm" of the eponymous East Williamsburg church, "dedicated to promoting social and economic justice, particularly for the low-income residents of the area." Plaintiffs 293 and 301 Hooper Street Tenant Associations are unincorporated associations of tenants at those addresses on Williamsburg's South Side, most of whom are Black and/or Hispanic ("People of Color"), formed to fight "discrimination, harassment and [Tenant] displacement." The individual plaintiffs, Angel Tejada, Isabel and Maribel Lopez, Leonid Reyes, and Robert Camacho are low-income, Latino, community activists who live in the neighborhood.

Defendant Bill de Blasio is the Mayor of the City (collectively, "the City Defendants"). The City zones land within its borders and approved the rezoning here at issue. The City receives federal housing and community development funds under the Community Development Block Grant, Emergency Solutions Grant, HOME Program, and Housing Opportunities for Person with AIDS programs, all of which the United States Department of Housing and Urban Development ("HUD") administers. Harrison is a "single asset" New York Limited Liability Company that owns The Pfizer Sites and initiated the private rezoning action here at issue. Two Hasidic Jewish men indirectly own part of, and apparently control, Harrison.

V. Housing in New York City

New Yorkers suffer from cognitive dissonance on housing: we are still experiencing a "housing emergency" that was first declared during World War II, and which gave rise to and still officially justifies our arcane system of rent regulation; and yet, to build any new housing, a developer must go through an arduous, Byzantine review process that seems like Rube Goldberg, Franz Kafka, and the Marquis de Sade cooked it up over martinis. The hoops through which a developer must jump include the Department of City Planning ("DCP"), the City Planning Commission ("CPC"), the Uniform Land Use Review Procedure ("ULURP"), the City Environmental Quality Review procedure ("CEQR"), the Draft Environmental Impact Statement ("DEIS"), the Final Environmental Impact Statement ("FEIS"), the local Community Board, the Borough President, the City Council, the Mayor, and numerous public hearings (at some of which our plaintiffs hotly contested the proposed project). Along the way, "environmental, social and economic factors" are considered, including "population, housing and economic activity," "land use patterns, low-income populations, the availability of goods and services," "economic investment," and "whether any changes created by the project [at issue] would have a significant impact compared to what would happen in the future without the project." See generally CEQR Technical Manual.[1] The FEIS analyzes potential environmental impacts in the following 22 areas:

I. Land Use, Zoning, and Public Policy
II. Socioeconomic Conditions
III. Community Facilities and Services
IV. Open Space
V. Shadows
VI. Historic and Cultural Resources
VII. Urban Design and Visual Resources
VIII. Hazardous Materials
IX. Water and Sewer Infrastructure
X. Energy
XI. Transportation
XII. Air Quality
XIII. Greenhouse Gas Emissions
XIV. Noise
XV. Public Health
XVI. Neighborhood Character
XVII. Construction
XVIII. Mitigation
XIX. Alternatives
XX. Unavoidable Adverse Impact
XXI. Growth-Inducing Aspects of the Proposed Action
XXII. Irreversible and Irretrievable Commitments of Resources

[1] "In assessing the legal sufficiency of a claim, the court may consider those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference.... and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference." Pisani v Westchester County Health Care Corp., 424 F Supp2d 710, 714 (SDNY 2006); see also John v New York City Dept. of Corr., 183 F Supp2d 619, 627 (SDNY 2002); Lore v New York Racing Assn. Inc., 12 Misc3d 1159(A), at 3 (Sup Ct, Nassau County 2006).

VI. The Rezoning

On February 24, 2015 Harrison initiated the rezoning of The Pfizer Sites from manufacturing to mixed residential and commercial use by submitting a "Land Use Review Application" to the DCP. On May 17, 2017 Harrison submitted a revised application to the City, pursuant to which eight mixed-use buildings, the tallest of which would be 14 stories and the shortest of which would be six stories, containing 1,146 residential apartments, housing an estimated 4,072 people (representing a 5.4% population increase within the surrounding half-mile) would be created, along with approximately 63,000 square feet of commercial space, and "26,000 square feet of required publicly accessible open space" ("The Pfizer Project"). The open space would include "25 trees, 1,460 square feet of planters, 400 linear feet of benches, 40 tables with two chairs each, 18 recycling and trash receptacles, and 12 bicycle racks.[2] Pursuant to the "Mandatory Inclusionary Housing" ("MIH") provisions of the City's zoning rules, (which defendants state is "a key initiative of Mayor de Blasio's housing plan"), 287 apartments (in the final accounting, based on Harrison's electing "MIH Option 1"[3]), representing 25% of the residential floor area, would be "low- to moderate-income units."

According to Harrison, Cross-Moving Affirmation [EFD # 48], ¶ 8, The Pfizer Project "could result in 115 units affordable to households at a maximum of 40% of [Area Median Income ("AMI")] ($34,360 income limit for a three-person family), 115 units affordable to households at a maximum of 60% of AMI ($51,540 income limit for a three-person family), and 57 units affordable to households at a maximum of 100% of AMI ($85,900 income for a three-person family)."[4] Furthermore, "the New York City Department of Housing Preservation and Development ("HPD"), as administering agent, directly reviews and approves the layout and location of all MIH apartments, the affordability levels of those apartments, the non-profit affordable housing administering agent, their track record, and their marketing plan to ensure compliance with MIH regulations, HPD rules and Fair Housing laws." Id. at ¶ 11. "The affordable housing units are distributed through a lottery, which is administered by an agent who is appointed by the HPD. The developer has no role in this process." Id. at ¶ 13.

On June 13, 2017 Brooklyn's Community Board 1 voted 26-15 in favor of recommending that the City approve the proposed rezoning. On September 19, 2017 the CPC approved the proposed rezoning, noting, in part, as follows:

> [T]he rezoning would … hel[p] to address the dire need for more housing, including affordable housing, particularly in transit-accessible areas of Brooklyn. The proposed project is consistent with the City's policy objectives for promoting housing production and affordability across the city and would facilitate the redevelopment of underutilized and contaminated land.

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[2] Harrison has publicly announced that it will "pay prevailing wages to service workers at the new development," hire "local workers for both the construction and operation of the new development," and roundly publicize the process to apply for housing. Just what these mean, and how, as a practical matter, they could be enforced, are problematic.

[3] As opposed to "Option 2," "The Deep Affordability Option," "The Workforce Option," or "The Affordable Housing Fund Option."

[4] What "could" depends upon is unclear.

* * *

> The Commission is sympathetic to concerns raised … regarding the potential for the development's unit sizes to skew larger. [S]pecific zoning regulations … require a mix of unit sizes to accommodate larger households. The Commission believes that the applicant representative's lack of responsiveness to questions about the unit sizes … obfuscates the Commission's consideration of the requested discretionary actions and was altogether unhelpful to the public review process.
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> [The applicant claimed that in its existing] developments, less than eight percent of dwelling units contain four or more bedrooms. The applican[t] further stated that … unit sizing would be entirely market-driven.

The CPC "emphasizes that its land use decisions are always based on rational land use concerns and not on assumptions based on the religion or ethnicity of an applicant or development team." Harrison's Cross-Moving Affirmation [EFD # 50] Exhibit B, at 23.

Sometime on or before October 24, 2017 the City and Harrison agreed to a "Bedroom Mix Restrictive Declaration" against The Pfizer Project[5] that the MIH apartments would include no less than 30% one-bedroom units and 30% two-bedroom units, and no more than 20% three-bedroom units and 20% four-bedroom units. On October 26, 2017 the New York City Council's Land Use Committee voted 17-4 to recommend the proposed rezoning. On October 31 the full City Council approved the proposed rezoning, which became final and official on November 6, 2017, after Mayor de Blasio declined to veto it.

VII. The Amended Verified Petition-Complaint

On or about February 28, 2018, plaintiffs commenced the instant hybrid action-special proceeding. On or about March 15, 2018 plaintiffs filed their Amended Verified Petition-Complaint ("AVPC").

The AVPC purports to state the following causes of action against defendants:

1. Plaintiffs' first cause of action, pursuant to CPLR 7803, claims that rezoning without evaluating segregation violates the FHA's AFFH mandate, and that the subject rezoning will discriminate against People of Color; and, therefore, that it was "arbitrary and capricious" and unlawful;

2. Plaintiffs' second cause of action, pursuant to FHA §§ 3601-3631, claims that "[d]efendants' discriminatory customs, practices and actions deprive [plaintiffs] of their right of equal access to housing [and to live] in an integrated community, both by intent and impact," and discriminates on the basis of race, color, religion, and national origin, thus violating FHA § 3604(a);

3. Plaintiffs' third cause of action, pursuant to the Federal Civil Rights Act of 1871 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, claims that the City Defendants' discriminatory customs, patterns, and actions deprive plaintiffs of their right to equal access to housing;

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[5] The Declaration "runs with the land."

4. Plaintiff's fourth cause of action, pursuant to the Equal Protection Clause of Article 1 of the New York State Constitution, tracks their third cause of action; and

5. Plaintiffs' fifth cause of action, pursuant to the New York State Human Rights Law, tracks their third and fourth causes of action.

The AVPC asks this Court to declare that the City Defendants' approval of The Pfizer Project is null and void; to declare that the City's policy of not considering disparate racial impacts in its zoning decisions violates FHA § 3608(e)(5); to declare that the subject rezoning and any subsequent development discriminates against People of Color and thus violates the FHA, the Equal Protection Clauses of the United States and New York State Constitutions, and the State Human Rights Law; preliminarily and permanently to enjoin the City and Harrison from taking any actions (i.e., building) predicated on the rezoning and The Pfizer Project and from making zoning decisions that do not consider disparate racial impacts; and for costs and fees.

According to the AVPC, and not disputed by defendants, in 2005-2007 the White population in CD1 was 62% (compared to 35% city-wide), the Latino population was 28%, and the Black population was 4%. By 2012-2016 those percentages were 63%, 23%, and 4%. During that same period, CD3 went from 10% White, 17% Latino, and 70% Black to 23% White, 19% Latino, and 53% Black; and CD4 went from 6% White, 69% Latino, and 21% Black to 15% White, 60% Latino, and 18% Black. In 2012-2016 the aggregate population of CD1, CD3, and CD4 was 35% White, 33% Latino, and 25% Black, compared to city-wide aggregate populations of 32% White, 29% Latino, and 22% Black.

Plaintiffs allege that the City has "a stated policy of refusing to consider issues of fair housing or segregation in evaluating public and private rezoning proposals under CEQR and ULURP" and "has no alternative mechanism for considering the fair housing or segregation impacts of specific public and private rezoning applications, and thus has a de facto policy of not considering them, in violation of the law." AVPC ¶ 77

Plaintiffs also claim (AVPC ¶ 88) that "[i]f allowed to go forward, the [The Pfizer Project] will further segregate the Broadway Triangle and the surrounding area, and will have a disparate negative impact upon Families of Colors' ability to remain in or move into … Williamsburg-Greenpoint, Bedford Stuyvesant and Bushwick." This is because, to paraphrase and summarize plaintiffs' argument, "wealthy Whites" will rent most of the market-rate apartments; the relatively large proportion of three- and four-bedroom "affordable" apartments will favor Hasidic tenants; and monthly rents will rise in the surrounding areas, causing "secondary displacement," i.e., People of Color moving from rent-regulated and/or other below-market housing due to, among other things, landlords harassing them. In sum (AVPC ¶ 99): "By approving the Pfizer Sites Rezoning without even considering the impact it would have upon the segregation in North Brooklyn, the City has [violated] its state and federal obligations and has [approved] a proposal [that] will impose disparate negative impacts upon [B]lack and [L]atino families seeking to live in North Brooklyn."

"[Plaintiffs'] claims, stated simply, are that the rezoning action and subsequent development will impose a disparate impact upon racial minorities and will further segregate the Broadway Triangle neighborhood, and furthermore, that the City's failure to consider these impacts constitutes a *per se* violation of the [FHA's] mandate to [AFFH]." Plaintiffs' Reply Memo [EFD # 70], at 1.

VIII. The Freeman Affidavit

The AVPC includes an affidavit from Lance Freeman, a professor of, and director of the doctoral program in, Urban Planning at Columbia University. His research focuses on, among other things, "affordable housing, gentrification, discrimination in housing [and] residential segregation." He testified, to great effect, in the Broadway Triangle Community Coalition case, infra, something of a predecessor to this case, on "the likely impacts of a rezoning action and planned residential development upon different racial and religious groups in and around the Broadway Triangle." In addition to his qualitative expertise, he teaches courses in "social science research methods[,] including demographic and statistical analysis."

As here relevant, and simply put, Professor Freeman concluded, ¶ 45, that "the proposed ceiling of 20% for four-bedroom units exceeds the need for such units in [CD1], except for one subset of the population – the Hasidim," and that "Blacks and Hispanics will be dramatically underrepresented amongst those moving into the market rate units at [The Pfizer Project] relative to their population in the surrounding housing markets."

Professor Freeman also concluded that although White residents constitute only 38.9% of the City's population, they constitute 64.1% of the population that could afford to reside in the market rate units at The Pfizer Project; and that although People of Color constitute 46.7% of the City's population, they constitute only 20.5% of the population that could afford to reside in the market rate units. Thus, even the market rate units will operate to further segregate CD1 in favor of Whites, to the detriment of People of Color.

IX. Procedural History

On March 19, 2018 this Court issued a temporary restraining order that essentially allowed Harrison to apply for permits and to remediate the soil, and to shore up The Pfizer Sites if necessary for the remediation, but prohibited Harrison from laying a foundation or constructing any buildings. Simon Dushinsky, one of Harrison's principals, submitted an affidavit stating that Harrison's total expenditures on The Pfizer Project, including purchasing the property, are at $20,000,000; that mortgage payments and taxes are costing Harrison more than $4,000 per day; and that permitting and soil remediation are proceeding apace.

The City Defendants and Harrison now cross-move, separately, pursuant to CPLR 3211(a)(7) and 7804(f), to dismiss the AVPC on the ground that it fails to state a cause of action. Their basic arguments are that there is no private right of action under FHA § 3608; that plaintiffs cannot enforce FHA § 3608 pursuant to a CPLR Article 78 Proceeding; that the AFFH duty does not obligate the City to conduct a racial impact study of a proposed development prior to approving a zoning change; that the AVPC fails to allege facts sufficient to state a cause of action under the FHA for discriminatory effect under either a disparate impact or a perpetuation of segregation theory; and that there are no specific allegations of intentional discrimination.

X. Statutory Framework

The FHA was passed partially in response to (1) the social unrest of the mid-1960s; (2) the report of the National Advisory Commission on Civil Disorders, commonly known as "The Kerner Commission," which warned that the United States "is moving toward two societies, one black, one

white—separate and unequal"; and (3) the April 4, 1968 assassination of Martin Luther King, Jr.[6] It begins, FHA § 3601, by declaring that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." FHA § 3604 essentially outlaws discrimination in selling or renting housing based on "race, color, religion, sex, familial status, or national origin."

FHA § 3608(a) delegates to the Secretary of HUD "[t]he authority and responsibility for administering this Act." FHA § 3608(d) provides, in part, that "[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development … in a manner affirmatively to further [fair housing]." FHA § 3608(e)(5) directs the HUD Secretary to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of fair housing. As the recipient of federal housing funds ("Program Participant"), the City, too, is obligated "affirmatively to further fair housing," and pursuant to 42 USC § 5304(b)(2), to certify that it "will [AFFH]."

XI. Regulatory Framework

"Liability may be established under the [FHA] based on a practice's discriminatory effect … even if the practice was not motivated by a discriminatory intent." 24 CFR § 100.500. Subsection (a) states that a "practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." Pursuant to 24 CFR § 5.152:

> [AFFH] means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, [AFFH] means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to [AFFH] extends to all of a program participant's activities and programs relating to housing and urban development.

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[6] "On April 4th, Martin Luther King, Jr., was shot dead in Memphis, and riots erupted in a hundred cities. The next day, [President Lyndon B.] Johnson wrote to House Speaker John W. McCormack, a Massachusetts Democrat, imploring Congress to pass the [FHA], saying, 'When the Nation so urgently needs the healing balm of unity, a brutal wound on our conscience forces upon us all this question: What more can I do to achieve brotherhood and equality among all Americans?' The act passed, over a Southern filibuster, on April 10th, the day after King's funeral." Evan Osnos, *The Talk of the Town*, The New Yorker, July 30, 2018 at 13, col 1. One would think, or at least hope, that passage was also belated recognition of America's long legacy of racial violence and injustices, and looked towards a more integrated and harmonious society.

Pursuant to 24 CFR § 570.601(a)(2), which became effective August 17, 2015:

> In accordance with the [FHA], the [HUD] Secretary requires that [Program Participants] administer all programs and activities related to housing and urban development in a manner to affirmatively further the policies of the [FHA]. Furthermore, in accordance with section 104(b)(2) of the Act, for each community receiving a grant under subpart D of this part, the certification that the grantee will [AFFH] shall specifically require the grantee to take meaningful actions to further the goals identified in the grantee's [Assessment of Fair Housing ("AFH")] conducted in accordance with the requirements of 24 CFR §§ 5.150 through 5.180 and take no action that is materially inconsistent with its obligation to [AFFH].

However, "on May 23, 2018, HUD announced the withdrawal of the Local Government Assessment Tool developed by HUD for use by local governments when conducting and submitting their own [AFH]." Harrison's Reply Memo [EFD # 73], at 6.[7] Although the regulations and requirements are in flux, the general thrust remains unchanged: localities must AFFH.

XII. Obligations of Program Participants

Cases that interpret the FHA, its myriad regulations, and other cases, are legion, if not always consistent. However, at least one thing is clear: the AFFH duty begins, not ends, with HUD; it is, in turn, imposed on all Program Participants. E.g. Otero v New York City Hous. Auth. 484 F2d 1122, 1133-34 (2d Cir 1973). Otero goes on to state that the AFFH duty demands that "[a]ction 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 [FHA] was designed to combat." Id. at 11-34.[8]

Plaintiffs rely on Otero, Reply Memo [EFD # 69], at 13, for the proposition that "the duty to [AFFH] requires at a minimum giving some consideration to the racial impacts of significant acts and decisions affecting housing." The City considered that when The Pfizer Project ran the DCP, CPC, ULURP, CEQR, Community Board, Borough President, City Council, Mayor, and all those public hearings gantlet.

XIII. Standing

Defendants often claim that plaintiffs do not have "standing" to assert their various claims. This appears to be a misnomer. The issue of "standing" refers to whether or not a party has the right to assert a claim; it does not address whether or not a claim exists. For example, if you are liable to my sister, I do not have "standing" to pursue her claim, basically because I should not benefit if I prevail, and you should not benefit if I fail. Harrison says, in its cross-moving memorandum, that "plaintiffs

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[7] Ironically, in view of the instant action, New York State is currently suing HUD for relaxing (or delaying), certain aspects of the AFFH obligation.

[8] Thus, a major goal of the FHA is to prevent the increase of segregation in "ghettos." Ironically, here, plaintiffs are arguing, in a sense, that The Pfizer Project will cause People of Color to leave a "ghetto," not that they will be forced into a "ghetto," or be prevented from residing outside of a "ghetto."

do not have standing to allege such a claim as according to prevailing case law in this state there is no express or implied private right of action under [FHA §] 3608." But if there is no private right of action, standing is simply irrelevant. Nobody has "standing" if there is no claim.

This Court believes that the individual plaintiffs, as People of Color who live near The Pfizer Sites, would be injured, if injury there be, by The Pfizer Project and are within the zone of interests that the FHA seeks to protect. A New York Court of Appeals case, Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668, 687 (1996), provides an instructive summary of how to determine whether or not a party has standing to challenge an administrative action:

> Generally, standing to challenge an administrative action turns on a showing that the action will have a harmful effect on the challenger and that the interest to be asserted is within the zone of interest to be protected by the statute (*see, Matter of Dairylea Coop. v Walkley,* 38 NY2d 6, 10). A nearby property owner may have standing to challenge a proposed zoning change because aggrievement may be inferred from proximity (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals,* 69 NY2d 406, 413-14). The proximity alone permits an inference that the challenger possesses an interest different from other members of the community.

In particular, standing to bring an FHA challenge may be predicated on acts that "impinge upon [a] plaintiff's right to live in an integrated community." Fair Hous. in Huntington Comm. Inc. v Town of Huntington,, 316 F3d 357, 362 (2d Cir 2003); see also Ragin v Harry Macklowe Real Estate Co., 6 F3d 898, 904-05 (2d Cir 1993). Thus, this Court finds that plaintiffs have standing to bring this case.

XIV. Ripeness

This Court, unlike defendants, believes that plaintiffs' purported claims are "ripe." True, not a single person now lives in The Pfizer Project, which has not yet been built. But for purposes of a motion to dismiss on the pleadings, a court cannot be blind to possibilities, much less probabilities. There is a good chance that if The Pfizer Project is built, Whites will reside in greater proportion than they exist in the neighborhood or the City. Plaintiffs should not be forced to wait until that happens, when their claims may be deemed moot, waived, untimely, etc.; they should not be forced to choose between the Scylla of unripe and the Charybdis of moot.

XV. General Policy, or One-Off Decision

This Court also rejects defendants' argument, e.g., Reply Memo [EFD # 74], at 23, n.8, that The Pfizer Project cannot be challenged because it was a single decision rather than a general policy. Most importantly, the City's single "decision" not to conduct a racial impact study was the result of an acknowledged general policy not to do so. More philosophically, "the distinction between a single isolated decision and a [general] practice is 'analytically unmanageable – almost any repeated course of conduct can be traced back to a single decision.'" MHANY Mgt. v County of Nassau, 819 F3d 581, 619 (2d Cir 2016).

XVI. Basis for Suit: FHA § 3608; 42 US § 1983; CPLR Article 78

A. FHA § 3608

FHA § 3608 does not provide an express private right of action. Accordingly, many cases have addressed the question of whether or not it creates an implied private right of action. Plaintiffs are (or at least were) understandably fond of Anderson v City of Alpharetta, GA, 737 F2d 1530 (11th Cir 1984). The key line in Anderson is that "[s]ince HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits...." Id. at 1535. However, Anderson does not help plaintiffs' cause or case. The court there simply affirmed the dismissal of FHA § 3608 claims against HUD. Thus, the statement about "private suits" was pure dicta. Early on, the court stated as follows:

> [T]he plaintiffs contend that HUD violated its obligation under section 3608(d)(5)[9] to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of the [FHA] because it failed to do what the grantee was unable to do for itself. They further assert that there is an implied private cause of action under the statute which permits them to bring suit to specifically enforce the "assistance" provision of section 3608(d)(3).[10] These are both novel contentions, and we do not find the plaintiffs' arguments persuasive.

Id. at 1533. A close reading of Anderson indicates that its *ratio decidendi* is that HUD cannot be sued for doing nothing, only for providing funds to bad actors, a far cry from our case. There, the plaintiffs alleged that the defendants were preventing the development of low-income housing in high-income areas. That is the reverse of our case, where plaintiffs are contesting what they consider to be the development of high-income housing in a low-income area. In any event, even if Anderson were to stand for the proposition asserted, the great weight of authority is to the effect that there is no private right of action under FHA § 3608(e)(5).

In what was the leading case of Cort v Ash, 422 US 66, 78 (1975) (Brennan, J.), the United States Supreme Court articulated four factors to consider in determining whether or not a federal statute creates an implied private right of action to enforce it:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

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[9] What was FHA § 3608(d)(5) is now FHA § 3608(e)(5).

[10] What was FHA § 3608(d)(3) is now FHA § 3608(e)(3).

Id. (citations omitted). Courts applying the Cort criteria have generally, and increasingly, held that FHA § 3608 does not create a private right of action. In Latinos Unidos de Chelsea En Accion ("LUCHA") v Secretary of Hous. & Urban Dev., 799 F2d 774, 792-93 (1st Cir 1986), accord Asylum Hill Problem Solving Revitalization Assn. v King, 277 Conn 238 (Conn 2005), the court held that there is no FHA § 3608 private right of action against the Secretary of HUD:

> [T]here is no private right of action under section 3608[(e)]. Of particular significance to us is the multi-faceted enforcement scheme expressly set out in the statute. First, Congress explicitly created a judicial remedy for discrimination in the sale, rental, financing or brokerage of housing as prohibited by sections 3603, 3604, 3605 and 3606 of Title VIII. 42 U.S.C. § 3612(a). Second, Title VIII provides for the filing of complaints with the Secretary, which may lead to a civil suit by the complainant against the [Program Participant] if voluntary compliance is not obtained within thirty days. Id. at §§ 3610(a)-(d). Finally, Title VIII also provides that the Attorney General may bring suit to challenge a "pattern or practice" of discrimination. Id. at § 3613. In view of these provisions, it is unlikely that "'Congress absentmindedly forgot to mention an intended private action'" against HUD under section 3608(d).

Id. (citations omitted).

The obvious question after LUCHA was whether or not FHA § 3608 created an implied private right of action against non-federal entities. Judge Arthur Spatt answered with a resounding "no" in MHANY Mgt. v County of Nassau, 843 F Supp2d 287, 333 (EDNY 2012) (extended discussion) ("it is clear to the Court that Congress did not intend for private citizens to enforce Section 3608 directly against a non-federal entity, but rather those enforcement responsibilities lie with the federal government"), aff'd in part and vacated in part on other grounds, 819 F3d 581, 624 (2d Cir 2016) ("The district court considered … allegations under 42 U.S.C. § 3608 (Section 808 of the FHA), and concluded that Section 808 does not provide a private right of action. Plaintiffs do not challenge the district court's conclusion with respect to Section 808 on appeal"); accord Pleune v Pierce, 697 F Supp 113, 120 (EDNY 1988) (Pooler, J.) ("no independent private right of action exists") (citing cases). This Court agrees with Judge Spatt that "if Section 3608 is not enforceable through a private right of action against HUD, it cannot be enforceable through that same vehicle against a non-federal agency implementing the duties imposed upon HUD by the FHA." MHANY, 843 F Supp2d at 333.

South Middlesex Opportunity Council, Inc. v Town of Framingham, 2008 WL 4595369, *17 (D Mass 2008), also agreed with Judge Spatt:

> Based on [*Gonzaga Univ. v Doe*, 536 US 273 (2002), infra,], I find that even if certain other provisions of the FHA confer individual rights, § 3608 does not. The Supreme Court in *Gonzaga* stated that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights," the statute affords no basis for a private suit. *Gonzaga*, 536 U.S. at 286. After reviewing the structure of the FHA, I conclude that Congress did not intend to confer an individual right pursuant to § 3608. *See Thomas v. Butzen,* 2005 WL 2387676, at *10 (N.D.Ill. Sept. 26, 2005). Congress provided an enforcement mechanism in the FHA for private individuals to bring civil actions "after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613. "Discriminatory

> housing practice" is defined as "an act that is unlawful under § 3604, 3605, 3606, or 3617 of this title." 42 U.S.C. § 3602. Conspicuously missing from the list is § 3608. "The existence of an express cause of action in the FHA that does not encompass § 3608(e)(5) strongly suggests that Congress did not intend § 3608(e)(5) to create enforceable rights." *Thomas,* 2005 WL 2387676, at *10.

Thomas v Butzen, 2005 WL 2387676, *10-11 (Guzman, J.), further elaborates on Congress' intent that FHA § 3608 not confer an enforceable private right of action:

> The text and structure of the FHA clearly evince Congress' intent that section 3608(e)(5) not confer an enforceable, individual right. The statute contains an express right of action that permits any "aggrieved person [to] commence a civil action ... to obtain appropriate relief with respect to such discriminatory housing practice...." 42 U.S.C. § 3613. The statute defines "discriminatory housing practice" as an act that is unlawful under sections [3604, 3605, 3606, or 3617]...." 42 U.S.C. § 3602(f). A housing authority's failure to further fair housing is not a discriminatory housing practice actionable under section 3613, nor is it the subject of a separate cause of action in the statute. The existence of an express cause of action in the FHA that does not encompass section 3608(e)(5) suggests that Congress did not intend section 3608(e)(5) to create enforceable rights.
>
> * * *
>
> Moreover, the right allegedly conferred by section 3608(e)(5) is "'[too] vague and amorphous'" to be enforceable. That section does not define HUD's duty to further fair housing or place any parameters on it. If violations of that duty could be redressed via section 1983, virtually any act or omission of HUD with respect to housing would be subject to judicial review. Neither the federal nor the state judicial system has the authority, resources or expertise to become HUD's overseer, the position plaintiffs' interpretation of section 3608(e)(5) would impose on them.
>
> In short, there is nothing in section 3608(e)(5) in particular, or the FHA in general, that suggests Congress intended for HUD's duty to further fair housing to confer enforceable rights on individuals like plaintiffs.

Id. (citations omitted). This Court agrees with Judge Guzman that while the HUD Secretary may be able to AFFH, courts do not have the "authority, resources or expertise" to oversee whether or not every single policy, practice, or act, no matter how big or how small, of every Program Participant is doing so.

B. 42 USC § 1983

Section 1983 of 42 USC codifies the Civil Rights Act of 1871. See generally Monell v Dept. of Social Servs., 436 US 658 (1978). Liability under it presupposes "an independent constitutional violation." Segal v City of New York, 459 F3d 207, 219 (2d Cir 2006). Here, none is sufficiently alleged.

Blessing v Freestone, 520 US 329 (1997) (O'Connor, J.) (9-0) was, for a few years, the leading case on whether or not 42 USC § 1983 creates a private right of action.

> Section 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the constitution and laws." We have held that this provision safeguards certain rights conferred by federal statutes. In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal *right,* not merely a violation of federal law. We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the states. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory terms.
>
> Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983. Because our inquiry focuses on congressional intent, dismissal is proper if Congress "specifically foreclosed a remedy under § 1983." Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.

Id. at 340-41. In Gonzaga, the court brought Blessing to heel.

> [S]ome courts [have interpreted] *Blessing* as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect; something less than what is required for a statute to create rights enforceable directly from the statute itself under an implied private right of action. … We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.

536 US at 282; see also South Middlesex, 2008 WL 4595369, *17 (court dismissed "so much of the § 1983 claim as is based on a violation of § 3608 of the FHA."); Butzen, 2005 WL 2387676, *11 ("there is nothing in section 3608(e)(5) in particular … that suggests Congress intended for HUD's duty to further fair housing to confer enforceable rights on individuals like plaintiffs. Plaintiffs' FHA § 1983 claims based on that section are, therefore, dismissed with prejudice"). Thus, as Congress did not intend to create a private right of action pursuant to FHA § 3608, and the courts have not created one, plaintiffs here may not maintain a 42 USC § 1983 claim thereunder.

C. CPLR Article 78

This Court takes an expansive view of CPLR Article 78 Proceedings ("where there is a right, there is a remedy"), and agrees with plaintiffs, Reply Memo [EFD # 69], at 2, that they are an "appropriate vehicle for claims challenging "whether a determination [of a government agency or officer] was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." However, the law in New York is that if there is no private right of action under a federal statute, an Article 78 Proceeding seeking to enforce it will not lie. E.g. George v Bloomberg, 2 AD3d 294, 294 (1st Dept 2003) (rejecting the argument that a CPLR

Article 78 Proceeding could be brought based on a statute that does not create a private right of action); Matter of E. Ramapo Cent. Sch. Dist. v King, 130 AD3d 19, 20 (3d Dept 2015) (Peters, P.J.) (dismissing CPLR Article 78 Proceeding because there was no underlying private right of action), aff'd on other grounds, 29 NYS3d 938 (2017) (failure to exhaust administrative remedies; lack of concrete injury); Home Care Assn. v Bane, 218 AD2d 106, 110-11 (3d Dept 1995) (dismissing Article 78 proceeding for lack of a private right of action).

Plaintiffs' reliance on Broadway Triangle Community Coalition v Bloomberg, 35 Misc3d 167 (Sup Ct, NY County 2011) (Emily Jane Goodman, J.) (see infra), for the proposition that "courts have allowed plaintiffs to proceed under CPLR Article 78 upon challenges to the City of New York's compliance with its [AFFH] duty" seems misplaced, as Justice Goodman's opinion does not even mention CPLR Article 78.

Plaintiffs seek to analogize CPLR Article 78 review to review under the federal Administrative Procedure Act. Whatever the merits of that comparison (and this Court does not doubt them), CPLR Article 78 relief simply does not lie without a private right of action.

XVII. Disparate Treatment; Disparate Impact; Wealth Discrimination; "Displacement" Theory

"An FHA violation may be established on a theory of disparate impact or one of disparate treatment." LeBlanc-Sternberg v Fletcher, 67 F3d 412, 425 (2d Cir 1995) (Kearse, J.).

A. Disparate Treatment Claims

Plaintiffs' AVPC fails adequately to allege "disparate treatment," more commonly (and more bluntly) known as "intentional discrimination." A case that is somewhat far afield, but that gives some sense of what a claim of intentional discrimination requires, is Sayeh v 66 Madison Ave. Apt. Corp., 73 AD3d 459, 461 (1st Dept 2010):

> To make a prima facie case of housing discrimination under [the FHA, a] plaintiff must demonstrate (1) that he is a member of the class protected by the statute; (2) that he sought and was qualified to purchase the apartment; (3) that he was rejected; and (4) that the coop's denial of his application occurred under circumstances giving rise to an inference of discrimination.

Under a disparate treatment theory, "a plaintiff can establish a prima facie case by showing that animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive." MHANY, 819 F3d at 606 (internal quotation marks omitted). According to Village of Arlington Heights v Metropolitan Hous. Dev. Corp., 429 US 252, 253 (1977), in evaluating a claim of intentional discrimination, "disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers, must be shown."

This Court is not privy to the inner minds of the developers. Perhaps they are slightly more responsive to the housing needs of people like themselves (White and Hasidic). Perhaps they just want to meet what they perceive to be the community's needs. Perhaps they are incorrigible racists.

But allegations of racial animus, much less any facts to support them, either in the developers, or in the City officials, or in the entire rezoning process, are starkly absent.[11]

B. Disparate Impact Claims

Disparate impact is more subtle and more complex. A Second Department case, Suffolk Hous. Servs. v Town of Brookhaven, 109 AD2d 323, 325 (2d Dept 1985), aff'd, 70 NY2d 122 (1987), states:

> There are two kinds of racially discriminatory effects which a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the [FHA] independently of the extent to which it produces a disparate effect on different racial groups.

The leading case of Texas Dept. of Hous. and Community Affairs v Inclusive Communities Project, ___ US ___, 135 S Ct 2507 (2015) (Kennedy, J.) (5-4), authorizes disparate impact claims; it also limits them (in an extended discussion worth quoting at great length):

> Recognition of disparate-impact liability under the FHA … plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.
>
> But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the "removal of artificial, arbitrary, and unnecessary barriers," not the displacement of valid governmental policies. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.
>
> … [T]he heartland of disparate-impact suits targe[t] artificial barriers to housing … .
>
> It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable. Entrepreneurs must be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for

[11] Obviously, calling Mr. Dushinsky or Mayor de Blasio "a racist," without a factual foundation, would not save the AVPC.

housing authorities. The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities. As HUD itself recognized in its recent rulemaking, disparate-impact liability "does not mandate that affordable housing be located in neighborhoods with any particular characteristic." 78 Fed.Reg. 11476.

In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and "would almost inexorably lead" governmental or private entities to use "numerical quotas," and serious constitutional questions then could arise.

The litigation at issue here provides an example. From the standpoint of determining advantage or disadvantage to racial minorities, it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa. If those sorts of judgments are subject to challenge without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that itself raises serious constitutional concerns.

Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact, and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all. It may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units. [I]f the [plaintiff] cannot show a causal connection between the Department's policy and a disparate impact … that should result in dismissal of this case. 747 F.3d, at 283–284 (specially concurring opinion).

The FHA imposes a command with respect to disparate-impact liability. Here, that command goes to a state entity. In other cases, the command will go to a private person or entity. Governmental or private policies are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them. Courts should avoid interpreting

> disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.
>
> The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims. If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system. … Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely "remov[ing] ... artificial, arbitrary, and unnecessary barriers." And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.

Id. at 2511-24 (citations omitted; emphases added). The key phrase, which Justice Kennedy repeats three times, is "artificial, arbitrary, and unnecessary barriers." With one arguable exception, the AVPC does not allege or suggest any "barriers." Anyone can apply for the MIH residences, anyone can apply for the market-rate residences, anyone can apply for the smaller apartments, anyone can apply for the larger apartments, and anyone (who meets the income and family-composition requirements) can live in any of them.

C. Wealth Discrimination

That one arguable barrier, encapsulated in the Freeman Affidavit, is wealth. Wealth inequality, and concomitant income inequality, are inexorably, and unfortunately, rising in the United States, https://en.wikipedia.org/wiki/wealth_inequality_in_the_united_states, and they are closely aligned with the racial divide between Whites and People of Color, https://en.wikipedia.org/wiki/wealth_inequality_in_the_united_states#racial_disparities. However, the query before this Court is not whether or not people and courts are morally obligated to address wealth inequality but, rather, whether or not assertions of wealth discrimination are actionable under the FHA. The courts have consistently held that they are not, as such claims are outside the ambit of constitutional and statutory protection. See Housing Justice Campaign v Koch, 164 AD2d 656, 657 (1st Dept 1991) ("Plaintiffs are really arguing that the city should be providing more affordable housing for its low-income families; however, allegations of wealth discrimination are outside the ambit of constitutional protections or any statute protecting constitutional rights, such as the [FHA], which does not compel the construction of housing of any kind."). The "poor" are not a protected class; FHA § 3604 bars discrimination based on "race, color, religion, sex, [handicap,] familial status, or national origin," not on "wealth." See generally San Antonio Ind. Sch. Dist. v Rodriguez, 411 US 1, 24 (1973) (Powell, J.) ("At least where wealth is involved, the equal protection clause does not require absolute equality or precisely equal advantages.").

D. Plaintiffs' "Displacement" Theory

This Court adamantly rejects plaintiffs' "displacement" claim (to the extent it is still being asserted). The theory, more or less, is that if The Pfizer Project causes property values in the surrounding area to rise (which in and of itself would seem to be desirable), landlords will have an incentive to harass tenants to leave rent regulated and/or other below-market housing. The antidote to this speculation is stronger tenant protection laws and enforcement, not to resist rising real estate values. Furthermore, the FEIS states that The Pfizer Project

> would not result in significant adverse impacts due to indirect residential displacement of low- or middle income residents [as the] area has experienced a trend toward more costly housing and an influx of a more affluent population[12] that is anticipated to continue in the future without the proposed action. The proposed action and [Reasonable Worst-Case Development Scenario ("RWCDS")] would not introduce a new trend or accelerate an existing trend of changing socioeconomic conditions in a manner that would have the potential to substantially change the socioeconomic character of the neighborhood. In addition, the proposed action and RWCDS would add up to 344 [now 287] affordable housing units to the study area, which would help ensure housing opportunities for lower-income residents and would encourage a more diverse demographic composition within the study area.

City's Cross-Moving Affirmation [EFD #27], Exhibit C, at 3-19. The FEIS is not binding on this Court, but it does demonstrate that the political process has at least addressed the main issues in the instant lawsuit, which is all that the law requires.[13]

XVIII. The Broadway Triangle Community Coalition Case & Program Participants' Flexibility
Racial disparity in Broadway Triangle housing has been the subject of litigation for decades. See AVPC [EFD # 6], ¶ 47 et seq. Most recently, in Broadway Triangle Community Coalition v Bloomberg, 35 Misc3d 167 (Sup Ct, NY County 2011), after presiding over an eight-day hearing, Justice Emily Jane Goodman, in a learned opinion, preliminarily enjoined a proposed Broadway Triangle housing development, finding "that [the City had] failed to consider and analyze, as required by law, whether other alternatives exist, and that [the City had] not demonstrated that [its] policies and actions [were] furthered by legitimate interests which cannot be satisfied by lesser or nondiscriminatory alternatives," and that the project would "perpetuat[e] segregation and disproportionately impac[t] a minority group or groups." Justice Goodman's "disproportionate impact" finding was premised largely on "[t]he testimony of [Lance Freeman]… that plans to construct buildings of only six to seven stories [desirable for Sabbath observers who do not use elevators during that time, such as Hasidim], and the creation of very large apartments for very large families [desirable for groups that tend to have large families, such as Hasidim] (despite the far greater local demand for smaller apartments), favors one religious group to the detriment of others."

According to plaintiffs, Reply Memo [EFD # 69], at 13, Broadway Triangle "stands for the proposition that [a racial impact study] is necessary for public rezonings [i.e., of city-owned land], [and] whether or not to extend this holding to rezoning actions initiated by private applicants is apparently an issue of first impression."

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[12] Commonly known as "gentrification."

[13] Indeed, the FEIS itself clocks in at over three inches thick. Just the Exhibits alone to the City Defendants' Cross-Moving Affirmation consist of nine inches worth of studies, reports, diagrams, charts, graphs, transcripts, maps, photographs, and spreadsheets. Could even more study possibly provide more useful information?

Whether or not this Court would have decided Broadway Triangle the same way as Justice Goodman did – and whether or not, as a court of co-ordinate jurisdiction, it would have followed Broadway Triangle if faced with the same set of facts – faced with a different set of facts (privately owned land, and taller buildings), it here reaches a different result. In Broadway Triangle, Justice Goodman held that the failure to analyze the impact of a proposed program is an AFFH failure, and that prior studies on a city-wide basis are no substitute. Broadway Triangle, 35 Misc3d at 176. In this Court's view, those studies are not a substitute, because there is no *per se* requirement to conduct a racial impact study to rezone.[14] "Consider" does not, to this Court, require a racial impact study for every proposed project; indeed, the requirement is "consider," not "study," much less "conduct a study."

Finally, the Court notes that Justice Goodman issued her decision before Justice Kennedy issued the Supreme Court's decision in Texas, which severely limited disparate impact litigation.[15]

In U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v Westchester County, New York, 495 F Supp2d 375, 387 (SDNY 2007), the court stated that "[a]t a minimum, when a [Program Participant] … certifies that it will [AFFH], the [Program Participant] must consider the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction." This refers to the certification process, which is not at issue in the case. In any event, this is a far cry from requiring Program Participants to conduct a racial impact study as part of every zoning decision or act. This Court has found no authority for the proposition that Program Participants must study the racial impact of a proposed residential development prior to approving a requested zoning change. "Because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt." Asian Ams. for Equality v Koch, 72 NY2d 121, 131 (1988) ("if the zoning ordinance is adopted for a legitimate governmental purpose and there is a reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end, it will be upheld") (internal quotation marks omitted); McGowan v Cohalan, 41 NY2d 434, 436 (1977) ("zoning classifications, like other legislative programs, are clothed with a presumption of constitutional legitimacy.").

Furthermore, "[P]rogram [P]articipants have flexibility in setting goals and priorities related to fair housing concerns so long as those goals are designed, and are consistent with, the analysis of data and local knowledge and the obligation to [AFFH] and other fair housing and civil rights requirements." 80 Fed Reg 42272. HUD has explained that Program Participants have "considerable choice and flexibility in formulating goals and priorities to achieve fair housing outcomes and establishing the metrics that will be used to monitor and document progress." Id. Similarly, pursuant to 24 CFR § 5.15:

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[14] Whether or not city-wide studies are, as a practical and factual matter, a substitute for individual zoning racial impact studies is a question that this Court obviously cannot consider or decide in a motion on the pleadings.

[15] One might wonder whether or not Justice Kennedy's opinion would have daunted or deterred the indomitable Justice Goodman.

> A program participant's strategies and actions must [AFFH] and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation.

Here, the outwardly neutral practice presumably is rezoning actions without racial impact studies. But the City is not obligated to conduct them. This Court fails to see how building mixed-use, mixed-income housing on what had been a vacant brownfield will "have a disparate impact upon racial minorities." It will not "further segregate the Broadway Triangle neighborhood" because it will, if plaintiffs are correct, pull Whites closer to majority-minority areas. In any event, no court in the 50 years since Congress enacted the FHA has held that zoning decisions require racial impact studies.

XIX. Equal Protection

As plaintiffs have failed to sufficiently state a cognizable cause of action for intentional discrimination, plaintiffs' claims under the Equal Protection Clause must also be dismissed.

> Plaintiffs' claims under the equal protection clause … are … meritless. It is well settled that proof of racially discriminatory intent or purpose is necessary to establish a violation of the equal protection clause. *Village of Arlington Heights* [(supra)]. The City's decision not to build low-income housing on site 30A was motivated by financial concerns, not discriminatory intent. Therefore, these claims must be dismissed as well.

Strykers Bay Neighborhood Council v City of New York, 695 F Supp 1531, 1543 (SDNY 1988) (Conner, J.); see also Hayden v County of Nassau, 180 F3d 42, 48 (2d Cir 1999) (intentional discrimination is the *sine qua non* of an equal protection claim); Brown v City of Oneonta, 221 F3d 329, 337 (2d Cir 2000) ("to state a race-based claim under the equal protection clause, a plaintiff must allege that a government actor intentionally discriminated against him on the basis of his race.").

Finally, as federal and state equal protection are coterminous, plaintiffs' claims under the Equal Protection Clause of Article I of the New York State Constitution is also subject to dismissal. Matter of Walsh v Katz, 17 NY3d 336, 343 (2011); see also Long Is. Lighting Co. v Assessor of Town of Brookhaven, 154 AD2d 188 (2d Dept 1990) (equal protection clause embodied in New York Constitution no broader than coverage in the federal counterpart).

XX. Human Rights Law

"Claims under the FHA and Human Rights Law § 296 are evaluated under the same framework." Olsen v Stark Homes, Inc., 759 F3d 140, 153 (2d Cir 2014) (Kearse, J.), *quoting* Mitchell v Shane, 350 F3d 39, 47 (2d Cir 2003). As plaintiffs fail to state a cause of action under the FHA, their Human Rights Law claims cannot stand.

XXI. Preliminary Injunction

Plaintiffs' request for a preliminary injunction is denied as moot, as the case is being dismissed. However, the Court notes that were plaintiffs required to demonstrate "irreparable injury," "[i]rreparable injury may be presumed from the fact of discrimination and violation of fair housing statutes." Gresham v Windrush Partners, Ltd., 730 F2d 1417, 1423 (11th Cir 1984); Silver Sage Partners, Ltd. v City of Desert Hot Springs, 251 F3d 814, 827 (9th Cir 2001) ("[w]here a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury.").

XXII. Some Food for Thought

As defendants suggest, the classic, the majority, and perhaps the only cases that have found that a zoning decision violated the FHA for having "perpetuated segregation" are those in which the zoning decision was "exclusionary," that is, where it prevented integration of a predominantly White area, such as by preventing the construction of low-income (read "People of Color") housing. Here, housing will be built, and not in an affluent, lily-white suburb.

The bedroom mix restrictive declaration provides that no more than 20% of the units will be four-bedroom and no more than 20% will be three-bedroom. The exact percentages will not be determined until Harrison submits an MIH application and until HPD determines that the application complies with the zoning resolution. Thus, plaintiffs' "bedroom mix" claim is, strictly speaking, premature. It is also problematic. Do Hasidim really have larger families? Is this a subtle form of discrimination? Is making a residential building somewhat more attractive to one ethnic group than others illegal? Is the mix of apartments just a business decision? A three-bedroom apartment could be the parents in one, a daughter in the second, and a son in the third, hardly an unknown family makeup in Families of Color. And, again, the law affords cities and developers flexibility. In the final analysis, this Court finds that the attenuated "bedroom mix" claim, which is not based on any actual "barrier," as required by Texas, is too thin a reed on which to stop The Pfizer Project.

One question that occurs to this Court, but is mentioned only peripherally, if at all, by the parties, is, "What good would a racial impact study do?" If it showed that Whites and People of Color would inhabit The Pfizer Project somewhat equally, or in the same proportions as they exist in the City, or in the same proportions as they exist in the local community, then presumably The Pfizer Project would have clear sailing. If, on the other hand, it showed that Whites would predominate, or exist in a greater proportion than in comparable areas, would that mean that The Pfizer Project would have to be scuttled, or redrawn? The answer, according to controlling case law, is "no," unless some intentional discrimination or "barriers," rather than "wealth discrimination," could be shown.

The Pfizer Project will probably extend a predominantly White area (Williamsburg) closer to Black (Bedford-Stuyvesant) and Hispanic (Bushwick) areas. This appears not to be the result of some nefarious midnight plot but, rather, the inexorable, on-the-ground realities of population growth (Hasidic) and income disparity (White compared to People of Color). The growth and disparity are due to social forces and, thus, are not actionable. In fact, in the view of this former cab-driver, a White enclave along gritty Flushing Avenue in Brooklyn will be integrative, not segregative. A recent New Yorker article noted that "Parkchester [located in the Bronx] was originally a planned community conceived by Metropolitan Life Insurance Company and was for decades segregated, predominantly Irish and Italian. Today, it's largely African-American, Hispanic, and South Asian."

David Remnick, *Left Wing of the Possible*, The New Yorker, July 23, 2018 at 18, col 2 (profile of Alexandria Ocasio-Cortez). This "reverse segregation" (mostly-or-all White to mostly-or-all People of Color) was probably partially the result of anti-discrimination statutes in general and the FHA in particular. It was probably also partially the result of on-the-ground social forces (one of which is commonly known as "White flight" or "reaching the tipping point").[16]

According to the City Defendants, Reply Memo [EFD # 74], at 3, and not disputed by plaintiffs, the City "is committed to the implementation of 'Where We Live NYC,' . . . a comprehensive [FHA] process, which will use the same framework and cover the same content as the AFH under the 2015 AFFH Regulations. See http://www1.nyc.gov/site/hpd/about/press-releases/2018/03/03-09b-18.page." A visit to the website shows a press release proclaiming as follows: "Data-driven, collaborative effort will result in strategies to address discrimination, residential segregation, and unequal access to opportunities; City launches process to affirm commitment to fair housing law despite recent setbacks from the federal government." Whether "Where We Live NYC" (incorporated here by reference) is a serious effort to address "unfair housing," or whether it is mere "window-dressing," remains to be seen and is outside of the scope of this opinion. But on the surface, at least, it appears to, as it claims, go beyond what the federal government, in the FHA and its implementing regulations, currently requires. Indeed, lest anyone think the City is laggard in complying with its general, ministerial obligations under the FHA, the City has programs, plans, initiatives, and publications galore on the subject. See Harrison's Cross-Moving Memo [EFD # 47], at 13-15.

The instant proceeding is well-intentioned, passionately argued, and occasionally produces a glimmer of plausibility. But it cannot overcome that there is no private right of action under the FHA provisions upon which it principally relies, and it lies outside the limits on disparate impact claims that Texas imposes.

The City needs more housing…..a lot more. The Pfizer Project has already passed political-process muster; today it passes judicial-process muster. This Court finds no legal impediment to it and will not stand in its way one more day.

Conclusion

Defendants' respective cross-motions to dismiss are granted; the petition-complaint is denied and dismissed; the temporary restraining order is vacated; and the request for a preliminary injunction is denied as moot.

Dated: July 30, 2018

Arthur F. Engoron, J.S.C.

[16] Those social forces, particularly the need for more housing in North Brooklyn, are so strong that Harrison has already invested some $20,000,000, and it and the City have forged ahead with this project, despite the smack-down thrashing that Justice Goodman delivered to the City the last time around.