Broadway Triangle Community Coalition v Bloomberg
2010 NY Slip Op 31258(U)
May 20, 2010
Supreme Court, NY County
Docket Number: 112799/09
Judge: Emily Jane Goodman
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SCANNED ON 5/24/2010

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GOODMAN
Justice

PART 17

BROADWAY TRIANGLE

- v -

BLOOMBERG

INDEX NO. 112799/09

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided per attached

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAY 24 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/20/10

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK I.A.S. PART 17
---X
BROADWAY TRIANGLE COMMUNITY COALITION,
An Unincorporated Association, By and In the name of
its Chairman, Juan L. Ramos, et al

Plaintiffs, Index No.112799/09

-against-

MICHAEL BLOOMBERG, as Mayor of the City of New
York, City of New York, RAPHAEL E. CESTERO, as
Commissioner of the New York City Department of
Housing Preservation and Development,

Defendants.
---X
EMILY JANE GOODMAN, J.S.C.:

The allegations of Plaintiffs-Petitioners (hereafter Plaintiffs) can be reduced to one word: segregation. This action/proceeding is commenced by a coalition of individuals and community organizations alleging discrimination by Defendant Michael Bloomberg, as Mayor of the City of New York, the City of New York and Defendant Raphael Cestero, as Commissioner of New York City Department of Housing Preservation and Development (HPD) (together Defendants or City) as a result of government actions in an Urban Renewal area known as the Broadway Triangle in Williamsburg, Brooklyn.[1]

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[1]In 1989, the Board of Estimate of New York City, now defunct, created the Broadway Triangle Urban Renewal area comprised of 30 acres surrounding a now defunct Pfizer drug plant and spanning both sides of the Flushing Avenue border of South Williamsburg and northern Bedford-Stuyvesant, encompassing Community Districts 1 and 3.

The claims are that the City's intent and actions in selecting, in a no-bid process, one particular organization, United Jewish Organizations of Williamsburg, Inc. (UJO) an Hasidic entity, to develop affordable housing, and in re-zoning a nine block area covering approximately 18 acres in the Broadway Triangle from manufacturing to residential use, is discriminatory and will have a disparate impact on the Plaintiffs and on the neighborhood. UJO and its added development partner, Ridgewood Bushwick Senior Citizens Council, Inc. (RBSCC) are not named parties in this case, but their interests are identical to Defendants' interests.[2] The lawsuit challenges the re-zoning and development of an area which falls within the predominately white Community District 1 (Community 1), even though the entire Broadway Triangle covers land in Community 1 and in Community District 3 (Community 3), which is overwhelmingly non-white.

The Plaintiffs are primarily non-white families and organizations, but include some Hasidic families who are not part of UJO, and who allege religious discrimination. UJO, acting as a developer, was joined sometime in the process by the entity identified as RBSCC, whose members, if there are members, do not reside in the area in question. The

[2]Between January 2008 and January 2009, contingent site authorizations were granted to UJO and RBSCC for 100 Throop Avenue, 35 Bartlett Street and 31 Bartlett Street, which are expected to yield 181 units of affordable housing, 22 units of which are expected to be dedicated to RBSCC, even though there is no evidence of its connection to the area (other than charges of political manipulation). As part of the re-zoning, the City will also choose developers to build another 267 affordable units and an additional 356 affordable units are expected to be developed by private developers accessing Inclusionary Housing Program bonuses.

Court inquired at oral argument but could not ascertain the nature of RBSCC, whom it represents or what its interest is in this area, other than a statement by counsel for the City that it is "a nonprofit organization extending its reach in doing public purposes" (Tr of oral argument 3/11/10 at 25-26).

Although the New York City Council, as the final body, has approved the re-zoning, Plaintiffs challenge the size and nature of the development, and particularly which families are the apparent intended beneficiaries. According to Plaintiffs, the endgame is to self-select residents based, directly or indirectly, on ethnicity, religion or race, even if there is a lottery as projected. Despite the lack of affordable housing in this area, as in all of New York, this would be accomplished here by keeping density low by zoning for 6-7 stories only, and by creating very large apartments, i.e., multiple bedrooms for large families, despite the general demand for less commodious apartments.[3] Further, it is undisputed that residents from the predominantly white Community 1 area would be given a first preference for 50% of the units.

While the argument is that the Defendants, via the developers' plan, have been given a political accommodation to benefit the Hasidic community, the Court will not become entangled in the unfamiliar and dangerous waters of politics. However, the Court takes note, and it is not disputed, that Hasidim do not use elevators during the Sabbath for

[3]For example, of the 95 units to be build at 100 Throop Avenue, 48 units will be three and four bedroom apartments.

religious reasons, which necessitates their walking up and down stairs, making taller buildings unattractive to them. As to large apartments, Plaintiffs maintain that members of the Hasidic community tend to have the greatest number of children and would therefore be given preferential treatment or a preferential result, in addition to the built in community preference, because they alone would qualify for the larger apartments. That is, although in theory the larger apartments might be available to any eligible applicant in a lottery process, eligibility would require a very large family size, which Plaintiffs claim would be the Hasidic community only, because of the large number of children in their families, and not Plaintiffs', who require less spacious units.[4] In one very recent federal case arising out of Williamsburg, the testimony of Hasidic plaintiffs referred to family members with 10, 11, and 12 children (*see Ungar v NYCHA,* 2009 US Dist LEXIS 3578 *affd* 2010 US App. LEXIS 1666 [2d Cir 2010]). Digging deeper, Plaintiffs also cite racial discrimination in the composition of the Community Boards whose members are appointed by the Borough President and/or the local City Council member, and whose participation here was limited to Community 1, intentionally excluding Community 3, where Plaintiffs claim the largest number of families seeking affordable, two-bedroom housing accommodations reside.[5] Yet, apartment designs would be left to the developers,

[4]There appears to be no definition of a "large family," or whether a large family must be composed of parents and children, i.e., a traditional nuclear family, rather than, for example, an extended family incorporating cousins, aunts, uncles, and grandparents.

[5]Plaintiffs allege that the members of Community Board 1 are over 75% white despite the fact that the district is 45% non-white.

i.e., UJO and RBSCC, to create units that contain at least three and four bedrooms.

To ensure inclusiveness and reject separation, Plaintiffs advocate modified zoning to increase building height and to add smaller apartments to the plan along with the large apartments, so that members of the community who are not affiliated with UJO and RBSCC can qualify and not be shut out of the process by having smaller families who are content to live on higher floors. In other words, they advocate for higher floors and more apartments with a variety of sizes. The City argues against increased density/height, not on religious grounds, of course, but on the basis of "context," claiming that the buildings surrounding these empty lots are low-rise, and, allegedly, because of negative environmental impact on the community. But Plaintiffs counter this by pointing to high-rise middle income Mitchell-Lama and affordable New York City Housing Authority (NYCHA) buildings right across the street and in the immediate surrounding area, arguing that "context" is actually a "pretext." Having visited the site, the Court recognizes that a taller structure on what looks like unsightly, seemingly abandoned lots, would not insult the architectural integrity of the neighborhood.[6]

Plaintiffs have moved for a preliminary injunction barring the implementation of the re-zoning of the nine blocks at issue and enjoining the transfer of the deed to the property to the developers, in order to have the planning process and land use review

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[6]The Court visited the sites on April 16, 2010, accompanied by lawyers for the parties and their respective planning experts.

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procedures revisted to involve all segments of the community. They argue that an injunction is warranted because Defendants have violated the Equal Protection clauses of the United States and New York State Constitutions, Title VI of the Civil Rights Act of 1964, the Federal Fair Housing Act, the New York State and New York City Human Rights Laws, the Uniform Land Use Review Procedures (ULURP), the State Environmental Quality Review Act (SEQRA) and the New York City Environmental Quality Review (CEQR). Thus the central issues, as distilled, are whether the determination to construct buildings of the character described (low in height, large in rooms), rather than an alternative model, favors one religious group to the determent of all others, thereby discriminating and causing a disparate impact on society and whether that, along with the absence of a legitimate public purpose, can be demonstrated.

Allegations In the Amended Verified Petition & Complaint

- UJO pushed for the rezoning of the Broadway Triangle "exclusively for its own uses" (¶52)
- The City, along with HPD, co-sponsored an all day planning retreat known as a "charette" (¶56)
- Organizations associated with the Latino and African-American communities and part of the Hasidic community, and every major community group in the Broadway Triangle Community Coalition not affiliated with the UJO, were excluded from input in developing the rezoning plan (¶s 57, 59)
- In 2008, the City arranged for UJO to sponsor another charette, which was abruptly cancelled (¶s 61, 63)

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- The Coalition held its own charette in 2009 and formulated a plan which provided for almost double the units provided for in the original plan (¶s 67, 68)

- The City "committed no-bid site control" to UJO to develop the city owned portion of the Broadway Triangle (¶70)

- No communal review was sought by UJO prior to taking site control (¶73)

- The City prematurely committed to funding UJO and Ridgewood Bushwick for development before the proposed re-zoning of land was approved by the City Council, before the ULURP process began (¶s 75, 76)

- The City committed other property to UJO and Ridgewood Bushwick for residential development prematurely, and through a "no-bid, noncompetitive process" in violation of ULURP (¶s 83, 86)

- According to the Final Environmental Impact Statement, the proposed action includes the redrawing of the boundaries of the Urban Renewal Area to be limited to a portion that falls within the predominantly white controlled Community Board No.1 of Greenpoint/Williamsburg (¶s 91-93)

- The proposed re-zoning and land transfers have concluded and have been approved by the majority white Community Board No.1, the Brooklyn Borough President, the City Planning Commission, the City Council's Land Use Committee, and the City Council (¶s 94, 101-104)

- Community Board No.3, the membership of which and the district it serves are overwhelmingly non-white, was not consulted by the City concerning the proposed re-zoning, in violation of ULURP (¶s 96, 129, 131, 165, 166)

- The zoning was illegal "spot" zoning structured to avoid non-white approval; in almost 2000 units of public housing in South Williamsburg, almost 50% are occupied by Hasidic families, while the waiting list for such housing is over 90% Latino and African American (¶s 115, 117, 148)

- As found in a federal court case, Hasidim are significantly over-represented in the three Williamsburg developments in that white families, who constitute 10% of the Housing Authority's applicant pool, constitute approximately half of the families (¶149)

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- The City engaged in an exclusionary planning process demonstrated by its "willingness to consult only with the white-dominated alliance of UJO and Ridgewood Bushwick" and by its "exclusion of Community District No.3 and the non-white residents of Bedford Stuyvesant and Williamsburg from the planning process" which would have a "dramatic discriminatory impact on non-white communities" due to the decision to construct low-rise, low-density buildings, minimizing the number of small apartments (¶159)

- The City's policy is that the residents of the predominantly white Community Board No.1 will receive first preference for 50% of the affordable units at the expense of the non-white communities and Hasidic residents not allied with the UJO (¶160)

- The City's proposed rezoning plan violates the Equal Protection clause of the Federal and the New York State Constitutions and Title VI of the Civil Rights Act of 1964 because the re-zoning evinces a racially and religious discriminatory intent as well as results in a discriminatory impact (¶s 168, 184)

- The City's planning process and resulting re-zoning plan constitute violations of the Fair Housing Act for the same reasons (¶177)

- The City's re-zoning plan violates New York State and New York City Human Rights Laws due to the "deliberate and significant discriminatory impact on nonwhites in Williamsburg and Bedford Stuyvesant, and those in the Hasidic community not allied with UJO because they will be substantially excluded from the housing to be built" (¶s 185-192)

- The City's re-zoning plan violates ULURP because the City has failed to "consider the proposed rezoning in light of a comprehensive community plan" and excluded Community 3 from the process (¶s 193-203)

- The City's rejection of higher density, high rise housing in its re-zoning plan, due to "contextual" considerations and its failure to take a "hard look" violates SEQRA and CEQR (¶s 204-212).

Defendants oppose a preliminary injunction and cross-move for summary judgment dismissing Plaintiffs' action/proceeding.[7] The City maintains that as a matter of law (i) all ULURP procedures were followed and that no input was required from Community Board 3, as it was not an "affected" community district once the relevant land was deemed to be located solely within Community 1; (ii) SEQRA and CEQA were complied with in that the Final Environmental Impact Statement (FEIS) took a "hard look," including evaluating the alternative proposals of a high-density project (e.g., a "tower in the park"); (iii) facilitating construction of only a six or seven story building does not demonstrate the City's discriminatory intent; moreover, even if Sabbath observers who do not use elevators prefer to live on lower floors, the apartments are awarded by lottery and anyone who qualifies can live there (after application of the 50 percent preference for Community 1 residents), nor did the City discriminate by allowing the developers to focus on creating only large apartments, citing the lack of evidence that it is only Hasidic families that want large apartments, and New York State's financial incentive for projects containing multiple bedrooms; (iv) awarding contingent site authorizations to UJO and RBSCC is not unusual as authorizations are routinely issued to a wide variety of developers; (v) the history of strife in Williamsburg involving NYCHA,

[7]Among the voluminous and excessive documents reviewed by the Court are Plaintiffs' 94 page, and Defendants' 66 page, memoranda of law, submitted in violation of New York County, Supreme Court, Civil Branch Uniform Rule 14. Compliance with court rules are particularly important now when the courts are dealing with an ever-increasing volume of litigation.

a public housing corporation, cannot be imputed to the City, it is argued, although the Court takes note that both are represented by the City's counsel in this very court virtually every day; and (vi) it is speculation to conclude that UJO would assign the not-yet built apartments in a discriminatory manner, when apartments are rented by lottery and when other projects, like Schaeffer Landing, developed and owned by UJO and a partner, are diverse (Schaeffer Landings residents are "43% Hispanic, 42% white, 9% black and 6% Asian").

The Law

Decision on the preliminary injunction is held in abeyance pending a hearing, pursuant to CPLR 6312 (c), for the reasons discussed below.

A preliminary injunction is a drastic remedy which should not be granted unless the movant establishes a clear right to equitable relief (*see* CPLR 6301; *Koultukis v Phillips*, 285 AD2d 433, 435 [1st Dept 2001]). The purpose of a preliminary injunction is to maintain the status quo pending a full hearing on the merits (*Jamie B. v Hernandez*, 274 AD2d 335, 336 [1st Dept 2000]). To establish entitlement to a preliminary injunction, the movant must show: (1) a likelihood of success on the merits; (2) irreparable harm absent injunctive relief; and (3) that a balancing of the equities favors the movant's position (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *City of New York v Untitled LLC*, 51 AD3d 509, 511 [1st Dept 2008]; *Borenstein v Rochel Props.*, 176 AD2d 171, 172 [1st Dept 1991]). "'Proof establishing these elements must

be by affidavit and other competent proof, with evidentiary detail'" (*Scotto v Mei*, 219 AD2d 181, 182 [1st Dept 1996], quoting *Faberge Intl. v Di Pino*, 109 AD2d 235, 240 [1st Dept 1985]). A court may order an evidentiary hearing for greater development of the facts (*see J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397, 400 [1986]; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C6312:1]). Even when facts are in dispute, a court can find a likelihood of success on the merits, even where those issues of fact persist after the hearing is held (*see J.A. Preston Corp, supra.*; *Ma v Lien*, 198 AD2d 186 [1st Dept 1993]). A likelihood of success on the merits may be sufficiently established not only when facts are in dispute, but when the evidence is inconclusive (*see Four Times Square Associates, L.L.C. v Cigna Investments, Inc.*, 306 AD2d 4, 5 [1st Dept 2003]).

Equal Protection under the United States and New York State Constitutions, Title VI of the Civil Rights Act of 1964, the Federal Fair Housing Act, and the New York State and New York City Human Rights Laws

The parties agree that the Equal Protection claims, as well as Title VI of the Civil Rights Act of 1964 claim, require an extraordinary high level of proof, i.e., proof of intent to discriminate, as well as discriminatory impact (*see Village of Arlington Heights v Metropolitan Housing Dev. Corp.*, 429 US 252, 268-71 [1977]; *Gratz v Bollinger*, 539 US 244, 276 n 23 [2003]). To demonstrate the official decision making body's intent, it is sufficient to show that it "acted for the sole purposes of effectuating the desires of private citizens, that racial considerations were a motivating factor behind those desires,

and that members of the decision-making body were aware of the motivations of private citizen[s]" (*United States v Yonkers Bd. of Ed.*, 837 F2d 1181, 1225 [2d Cir 1987] [internal citations omitted]). Moreover "[b]ecause explicit statements of racially discriminatory motivation are decreasing, circumstantial evidence must often be used to establish the requisite intent. Among the factors that are instructive in determining whether racially discriminatory intent is present are: discriminatory or segregative effect, historical background, the sequence of events leading up to the challenged actions, and whether there were any departures from normal or substantive criteria" (*Hallmark Developers, Inc. v Fulton County, Ga.*, 466 F3d 1276, 1283 -84 [11th Cir 2006] [internal citations omitted]). The Court cannot discount the circumstantial evidence which may allow reasonable people to infer a purposefulness in the manner in which the entire enterprise has proceeded. But no inference or conclusion need be reached at this time.

Under the Fair Housing Act and both the State and New York City Human Rights Laws, evidence of intent is not required. To prove a prima facie case under the Fair Housing Act, plaintiffs need demonstrate only that the challenged actions had a discriminatory effect (*see Williamsburg Fair Housing Committee v NYCHA*, 493 F Supp 1225 [SDNY 1980]; *see also Huntington Branch, NAACP v Town of Huntington*, 844 F2d 926 [2d Cir 1988] ["A disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group"]). If a plaintiff makes a prima facie showing, the burden shifts to the

defendant to prove that its actions furthered a "legitimate, bona fide government interest and that no alternative would serve that interest with less discriminatory effect." (*Ungar v NYCHA*, 2010 US App LEXIS 1666 [2d Cir 2010]). A plaintiff is ordinarily required to include statistical evidence to show the disparity between groups, but other evidence can be used (*id*). In addition to a disparate impact theory, a violation of the Fair Housing Act can be demonstrated under a disparate treatment theory which looks at whether animus against the protected group was a significant factor in the position of the municipal decision maker (*see LeBlanc-Sternberg v Fletcher*, 67 F3d 412 [2d Cir 1995]). The goal of the Fair Housing Act is to promote "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" (*Otero v NYCHA*, 484 F2d 1122, 1134 [2d Cir 1973]).

Defendants incorrectly argue that Plaintiffs cannot demonstrate a violation of the Fair Housing Act because the act "speaks to the conveyance of a rental or ownership interest in a dwelling unit" and that Plaintiffs speculate that UJO will control the projects in a discriminatory manner. The Fair Housing Act provides that it is unlawful to "otherwise make unavailable" or deny a dwelling to any person because of race, among other things, and to discriminate against any such person in the terms, conditions or privileges of sale or rental of a dwelling (42 USC § 3604 [a] [b] [c]). The phrase "otherwise make unavailable" has been interpreted to reach a wide variety of

discriminatory housing practices, including discriminating zoning practices (*see LeBlanc-Sternberg v Fletcher*, 67 F3d at 424 n1, *supra*). A claim is stated under the Fair Housing Act when the municipality creates a land development plan or zoning classification, which discriminates, even though the plan is effectuated by private developers (*see Town of Huntington v Huntington Branch NAACP*, 488 US 15 [1988]; *Rivera v Village of Farmingdale,* 571 F Supp 2d 359 [EDNY 2008]). Thus, the issue of whether the City's actions in re-zoning the area constitutes discrimination is not based on what UJO will do in the future, and states a cause of action under the Fair Housing Act. Also, Plaintiffs may ultimately demonstrate that the application of the community preference violates the Fair Housing Act.

Claims under the New York State Human Rights Law are analyzed under the same standards used for the Federal Fair Housing Act (*see Okolie v Pakioff*, 589 F Supp 2d 204, 221 [EDNY 2008]). In addition, the New York City Human Rights Law requires a showing of disparate impact in order to establish an unlawful discriminatory practice under Administrative Code §8-107(17). The New York State Human Rights Law makes it an unlawful discriminatory practice for the owner, and others, to discriminate against any person because of race, among other things, "in the terms, conditions or privileges of any publicly-assisted housing accommodations" which are constructed or to be constructed (Exec. Law § 296 *et seq*). Similarly, the New York City Human Rights Law prohibits discriminatory practices in the "sale, rental or lease of a housing

accommodation, constructed or to be constructed" (Administrative Code of the City of N.Y. § 8-107 [5]).[8]

A hearing is required on the issue of whether the City has violated the Fair Housing Act, and the Human Rights Laws, as to the application of the community preference, inter alia, and for greater exploration of the facts surrounding the allegation of discriminatory impact, including statistics supporting Plaintiffs' claim that only Hasidic families want or need larger apartments and other probative statistics supporting the claim of disparate impact (*see J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d at 400, *supra*).

The Attorney's Affirmation In Further Support Of Motion For Preliminary Injunction, In Opposition To Cross Motion For Summary Judgment And In Reply To Answer cites to page 4-4 of the FEIS which states that the "study area" (which is located within 1/4 of a mile of the area in dispute) is 76.3 % non-white. Further, the affirmation cites and attaches the New York City Housing Authority Annual Plan For Fiscal Year 2010: Public Housing Waiting List, which reflects that the applicants for NYCHA housing are more than 90% non-white, and that the demand for one and two bedroom apartments is significant (58.1% and 32.8% respectively), while the demand for three and

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[8]Defendants argue that Plaintiffs cannot demonstrate that its actions constitute a "practice" in violation of the New York City and New York State Human Rights Laws because re-zoning does not constitute such a practice. Neither side has cited relevant cases on this point. However, even if zoning does not constitute a practice under the Human Rights Laws, Plaintiffs may demonstrate that the application of the community preference discriminates against them in the terms, conditions or privileges of leasing, and therefore, Plaintiffs state a cause of action under the Human Rights Laws.

four bedroom apartments is negligible (8.7% and 0.4%).[9] Although the statistics do not reflect that only white or Hasidic families desire the larger apartments, they do indicate the overwhelming need for smaller apartments, at least at NYCHA projects.[10] With such negligible demand for large apartments as compared with smaller ones, it is questionable why in such a daunting housing crisis, there is such so powerful a commitment, with funds, to construct only large, and, therefore, fewer, apartments.

Moreover, although Plaintiffs have not cited any statistics regarding City sponsored projects in Williamsburg, such as the one at issue, the City has cited to Schaeffer Landing, a UJO project, as an example of diversity. However, Schaeffer Landing is not a shining example since residents at Schaeffer Landing are 42% white, while the Citywide application pool, at least for NYCHA housing, is overwhelmingly non-white.[11]

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[9] The Amended Verified Petition & Complaint alleges in ¶148 that "[a]t the present time, in the almost 2000 units of existing public housing in South Williamsburg, almost 50% remain occupied by Hasidic families...despite the fact that waiting list in Brooklyn for such housing has remained over 90% Latino and African American." However, no evidence is offered to support this allegation.

[10]Paragraph D of the UJO-Ridgewood Bushwick Sole-Source Funding Application And Site Control: 100 Throop Avenue (Community Narrative) provides that "[r]ight now, large families have the hardest time finding housing in CD 1. Only 11% of all housing units in CD#1 have three or more bedrooms. Yet 16% of all households are large families (defined as 5 people or more). While large households represent only 16% of all households in Brooklyn CD 1, they include 57,000 people and comprise 1/3 of the total population of Brooklyn CD 1." It would be important for the Court to know the racial make up of these 57,000 people.

[11]Neither side has addressed the issue of whether the Court should consider the racial composition of a citywide pool of public housing applicants, or, for example, the

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Further development of evidence of anticipated discriminatory impact is also necessary because of the evidence of racial discrimination in NYCHA public housing in Williamsburg in decades of litigation, suggesting the need for a brighter light. In *Ungar v NYCHA* (2010 US App. LEXIS 1666 [2d Cir 2010]), the Hasidic plaintiffs acknowledged the "historic over-representation of Hasidic in the Williamsburg projects" and the United States District Court found that the "Authority's records also demonstrate that large apartments in the three developments are currently occupied almost entirely by Jewish families, and that all families on the waiting list for apartments of seven rooms or more in the three Williamsburg projects are Hasidic" (*Ungar v NYCHA,* 2009 US Dist LEXIS 3578 [SDNY 2009], *affd* 2010 US App. LEXIS 1666, *supra*). Further, as noted in that case, the Hasidic families stated "that they *cannot* live outside of Williamsburg" due to religious reasons (*id.* [emphasis added]), furthering the insular, but expanding community of Hasidic families in Williamsburg, potentially to the exclusion of the larger community. The Hasidic plaintiffs in *Ungar* unsuccessfully sought to facilitate this religious-based need by seeking a unique accommodation enabling Hasidic applicants to have special rights in the application and waiting list protocol so that they could remain in Williamsburg, while other applicants would have to accept apartments when and where they became available.

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racial composition of the residents of the Broadway Triangle Urban Renewal area (which includes Community 1 and 3) in evaluating discriminatory impact.

At the hearing, the record must be developed, inter alia, with respect to the impact of the community preference given to residents of Community 1. Although the City argues that a community preference is routinely offered and, in fact, was given in the 1990s to Community 3 for approximately 260 units of affordable housing previously built in that district, such a preference here may violate law if it creates a disparate impact. Moreover, any Community 3 preference, which was never challenged, is irrelevant because no one argues that such a preference resulted in a disparate impact.

Accordingly, the current submissions are sufficient to warrant a hearing based on claims of discrimination, segregation, and favoritism in Williamsburg (*see J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d at 400, *supra*). If through clarification and testimony, Plaintiffs establish a likelihood of success under either the Fair Housing Act or the Human Rights Laws, as to the preference, then the equities would lie in Plaintiffs favor and the harm resulting from the lack of an injunction would be irreparable–i.e., a deprivation of housing financed with public (City and State) funds, as a result of discrimination. Moreover, although the City points to State incentives for building larger apartments, that would not necessarily create an issue of fact which would preclude the award of an injunction, if the evidence demonstrates that a disparate impact results from such a plan (*id*).[12]

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[12]Although it is not sufficient for Plaintiffs to rely solely on a building being low-rise as evidence of discrimination, it appears that a "tower in the park" could be built, despite some of the drawbacks stated in the FEIS. It is vexing that in a time of an unprecedented, critical shortage of housing, the City is so defiant by commitment to this

Defendants' cross motion to dismiss and ULURP, SEQRA AND CEQR

The standards for summary judgment are well settled.

> "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]).

Plaintiffs have not demonstrated a likelihood of success in establishing a violation of ULURP, SEQRA or CEQR, such that the process should be re-started, and Defendants have established entitlement to dismissal of the SEQRA and CEQR claims (and the religious discrimination claims brought by Hasidic members who are not part of UJO), but not as to any other causes of action.

Although Community 1 and 3 were both part of the larger 1989 Broadway Triangle Urban Renewal Plan, Plaintiffs have not demonstrated that Community Board 3 was an "affected community board" as that term is defined under ULURP. While the Court is mindful that Plaintiffs' position is that Community 3 was intentionally left out by

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particular format and it is equally vexing that in devastating economic times, approximately $40 million would be forthcoming from the State and the City for housing a much smaller number of families than could otherwise be accommodated.

gerrymandering the lines, an "affected community board" is defined as "the community board for a community district in which land included in a plan or application pursuant to this chapter is located." (City Charter §196). Although Plaintiffs contend that "land included in a plan" refers to the larger Urban Renewal area containing both districts, citing the FEIS which looked at impacts to Community 3, no cases have been cited for Plaintiffs' proposition (nor has the City cited any cases in support of its narrower construction). In any event, as the City notes, ULURP allows for a community board to take part in what is an advisory review process (*see Community Bd. v Schaffer*, 84 NY2d 148, 159 [1994]), even where the application does not involve land located within that community "if in the board's judgment the application might significantly affect the welfare of the community district." (City Charter §197-c [m]). The City has argued that Community Board 3 did not take advantage of this provision and Plaintiffs do not address this. Moreover, Plaintiffs have not disputed that they had some connection to the process beginning on or around April 8, 2008, when its representatives attended a public meeting held by HPD and they do not dispute that some members met with HPD in May and June 2008. Plaintiffs also do not dispute that the City looked at the possibility of building a taller building in the FEIS, which is one of the recommendations Plaintiffs wanted effectuated. Moreover, Plaintiffs do not dispute that the City invited them to hold another charrette and present proposals, but Plaintiffs assert that the City never intended to truly consider those proposals because the outcome was pre-determined.

With respect to SEQRA and CEQR, the Court cannot say that the City did not take a "hard look" as required even though it is strongly suggested that the results were pre-ordained. The twenty-nine chapter FEIS reviewed environmental impacts and mitigation measures in detail, and reviewed alternatives, including 44 pages devoted to a "Higher Density Alternative" finding "substantial costs associated with the removal and reconstruction of the streets and infrastructure." A court cannot substitute its own judgment for that of the agency, weigh the desirability of the proposed action, or choose among alternatives (*see Akpan v Koch*, 75 NY2d 561, 570 [1990]). Nor can the Court find that the City acted arbitrarily in connection with the previously mentioned steps or that the determination was not supported by the substantial evidence (*see Aldrich v Pattison*, 107 AD2d 258, 267 [2d Dept 1985]). Accordingly, Plaintiffs do not establish a violation of SEQRA or CEQR.

It is hereby

ORDERED that the issue of whether an injunction should be granted is held in abeyance pending a hearing to be held on June 14, 2010 at 10AM in Room 422 at 60 Centre Street; and it is further

ORDERED that Defendants' cross-motion for summary judgment is denied, except as to dismissal of Plaintiffs' SEQRA and CEQR claims which, along with the religious discrimination claim asserted by those Hasidic plaintiffs who are not aligned with UJO, are dismissed; and it is further

ADJUDGED that the portion of the Amended Verified Petition & Complaint alleging SEQRA and CEQR claims is denied and Amended Verified Petition is dismissed as to those claims; and it is further

ORDERED that the all the causes of action asserted by those Hasidic members not aligned with UJO, based on religious discrimination, are severed from the action and are dismissed; and it is further

ORDERED that the remainder of this action/proceeding shall continue.

Dated: May 20, 2010

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED
MAY 24 2010
NEW YORK
COUNTY CLERK'S OFFICE