No. 11-1159

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., a New Jersey non-profit corporation, ANA AROCHO, VIVIAN BROOKS, GEORGE CHAMBERS, DOROTHY CHAMBERS, SANTOS CRUZ, ELIDA ECHEVARIA, NORMAN HARRIS, MATTIE HOWELL, NANCY LOPEZ, DOLORES NIXON, LEONARDO PAGAN, JAMES POTTER, HENRY SIMONS, JOYCE STARLING, ROBERT TIGAR, TAISHA TIRADO, RADAMES TORRES BURGOS, LILLIAN TORRES-MORENO, DAGMAR VICENTE, ALANDIA WARTHEN, SHEILA WARTHEN, CHARLIE MAE WILSON and LEONA WRIGHT,

APPELLANTS,

vs.

TOWNSHIP OF MOUNT HOLLY, a municipal corporation of the State of New Jersey, TOWNSHIP COUNCIL OF TOWNSHIP OF MOUNT HOLLY, as governing body of the Township of Mount Holly, KATHLEEN HOFFMAN, as Township Manager of the Township of Mount Holly, JULES THIESSEN, as Mayor of the Township of Mount Holly, KEATING URBAN PARTNERS, L.L.C., a company doing business in New Jersey, TRIAD ASSOCIATES, INC., a corporation doing business in New Jersey,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil Action No. 08-cv-02584 (NLH)

BRIEF FOR APPELLEES, TOWNSHIP OF MOUNT HOLLY, TOWNSHIP COUNCIL OF TOWNSHIP OF MOUNT HOLLY, KATHLEEN HOFFMAN, and JULES THIESSEN

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Table of Contents

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

COUNTER STATEMENT OF FACTS 1

STANDARD OF REVIEW 5

ARGUMENT 6

I. SUMMARY OF ARGUMENT 6

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE TOWNSHIP 7

A. APPELLANTS FAILED TO ALLEGE FACTS SUFFICIENT TO SUPPORT THEIR FHA CLAIMS 7

1. Appellants Statistics did not Show Disparate Adverse Impact 8

a. Appellants Failed to Credibly Allege a Disproportionate Burden on Minorities in the Gardens 10

b. Appellants Failed to Show a Disparate Impact on the General Minority Population 15

c. Appellants Statistics Fail to Show a Segregative Effect 18

2. Appellants' Allegations Fail to Show Intentional Discrimination 22

a. Removal of Blight was the Motivating Factor for the Township's Actions 24

b. There is not Discriminatory Impact 26

c. The Historical Background Demonstrates No Discriminatory Intent 26

d. The Administrative History and Sequence of Events Leading Up to the Adoption of the Redevelopment Plan Show No Discriminatory Intent 28

e. There were no Departures from Normal Procedural or Substantive Norms 31

3. The Township Established a Bona Fide Interest and Proof of No Less Restrictive Means 34

4. Appellants Failed to Make Credible Allegations of Less Restrictive Means 37

a. Appellants' Fact Allegations Show that Rehabilitation is Financially Unfeasible 38

b. The Facts of Record Show that Rehabilitation is Not Less Discriminatory 46

5. Adoption of Appellants Standard for Fair Housing Violation in the Redevelopment Context Will Severely Limit Municipal Redevelopment 50

a. Amicus United States Misstates Appellants Statistical Allegations 53

B. The Township was Properly Granted Summary Judgment on Appellants' Equal Protection Claims 55

C. No Violations of Civil Rights Act 57

III. APPELLANTS FAILED TO DEMONSTRATE HOW ADDITIONAL DISCOVERY WOULD BENEFIT THEM 58

Conclusion 61

Table of Authorities

Cases

Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191 (3d Cir. 1995) 38

Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997).....55,56

Anjelino v. New York Times Co., 200 F.3d 73 (3d Cir. 1999).....9

American Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575 (3d Cir. 2009).....5

Anjelino v. New York Times Co., 200 F.3d 73 (3d Cir. 1999).....9

Betsey v. Turtle Creek Assoc., 736 F.2d 983 (4th Cir. 1984) 12

Blair v. Scott Specialty Gases, 283 F.3d 595 3d Cir. 2002) 6

Bonvillian v. Lawler-Wood Housing, LLC, 242 Fed. Appx. 159 (5th Cir. 2007) 11

Brown v. Philip Morris Inc., 250 F.3d 789 (3rd Cir. 2001).....57

Buono v. City of Newark, 249 F.R.D. 469 (D.N.J.2008).....60

Chambers ex rel. Chambers v. School Dist. of Philadelphia Bd. of Educ., 587 F.3d 176 (3d Cir. 2009).....55,56

Citizens Financial Group, Inc. v. Citizens Nat. Bank of Evans City, 383 F.3d 110 (3d Cir. 2004).....21

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).....55,56

City of Memphis v. Greene, 451 U.S. 100 (1981).....13,50

Community Services, Inc. v. Wind Gap Mun. Auth., 421 F.3d 170 (3d Cir. 2005) 10

Cramer v. United States, 325 U.S. 1 (1945) 28

Doe v. City of Butler, Pa. 892 F.2d 315 (3d Cir. 1989) 11

Eastampton Center, L.L.C. v. Tp. of Eastampton, 155 F. Supp. 2d 102 (D.N.J. 2001).....8,22,52

E.C. v. Antar, 120 F. Supp. 2d 431, 440 (D.N.J. 2000).....59

Edwards v. Johnston County Health Dept., 885 F.2d 1215 (4th Cir. 1989)..10,13,53

Felicioni v. Administrative Office of Courts, 961 A.2d 1207 (N.J. Super., A.D. 2008).....56

Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447 (N.J. Sup. Ct. 2007) 34,50,51,53

Groach Assoc. #33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n., 508 F.3d 366 (6th Cir. 2007).....11

Hallmark Developers, Inc. v. Fulton County, Georgia, 466 F.3d 1276 (8th Cir. 2006) 9,11

Harris v. McRae, 448 U.S. 297 (1980) 26

Hazelwood School Dist. v. U.S., 433 U.S. 299 (1977) 9,17

Heffron v. Adamar of New Jersey, Inc., 270 F. Supp. 2d 562 (D.N.J. 2003). 6

Hispanics United of DuPage County, v. Village of Addison, Illnois, 988 F. Supp. 1130 (N.D. Ill. 1997) 44

Horvath v. Keystone Health Plan East, Inc., 333 F.3d 450 (3d Cir. 2003) 58

Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926 (2nd Cir.), aff'd 488 U.S. 15 (1988).....10

In re Graham, 973 F.2d 1089 (3d Cir. 1992) 28

In re Northwestern Mut. Life Ins. Co. Sales Practices Litigation, 70 F. Supp. 2d 466 (D.N.J. 1999).....58

In re TMI Litig., 193 F.3d 613, 716 (3d Cir. 1999).....39

Intern. Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977).....9

Izzo v. Borough of River Edge, 843 F.2d 765 (3d Cir. 1988).....52

J & J Snack Foods Corp. v. Earthgrains Co., 220 F. Supp. 2d 358, 368 (D.N.J. 2002).....39

Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983).....26

Jones v. HUD, 390 F. Supp. 587 (E.D.La. 1974).....14

Jones v. U.S. Dept. of Housing and Urban Development (HUD), 390 F. Supp. 579 (D.C.La. 1974).....29

Kelo v. New London, 545 U.S. 469 (2005).....34

Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156 (3d Cir. 2009).....38

Koorn v. Lacey Tp., 78 Fed. Appx. 199, 2003 WL 22366923 (3d Cir. 2003).....9,11

Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Tp. of Scotch Plains, 284 F.3d 442 (3d Cir. 2002).....9,10

Lewis v. Harris, 908 A.2d 196 (N.J. Sup. Ct. 2006).....57

Lynch v. J.P. Stevens & Co., Inc., 758 F. Supp. 976 (D.N.J. 1991).....39

Maldonado v. Ramirez, 757 F.2d 48 (3d Cir. 1985).....38

McCauley v. City of Jacksonville, N.C., 739 F. Supp. 278 (E.D.N.C. 1989).....29

McCleskey v. Kemp, 481 U.S. 279 (1987).....26

McKnight v. Hayden, 65 F. Supp. 2d 113 (E.D.N.Y. 1999).....24

Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).....17,18,34,44

Mitchell v. Cellone, 389 F.3d 86 (3d Cir. 2004) 13

Moore v. Detroit School Reform Bd., 293 F.3d 352 (6th Cir. 2002) 32

Mountain Side Mobile Estate Partnership v. Sect. of Housing and Urban Dev., 56 F.3d 1243 (10th Cir. 1995).....11

Pa. Prot. & Advocacy, Inc. v. Pa. Dept. of Pub. Welfare, 402 F.3d 374 (3d Cir. 2005).....5,6

Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977).....passim

Rogers v. Lodge, 458 U.S. 613 (1982) 27

Sadler v. 218 Housing Corp., 417 F. Supp. 348 (N.D.Ga. 1976).....47

Shannon v. U. S. Dept. of Housing and Urban Dev., 436 F.2d 809 (3d Cir. 1970) 47

Shaw by Strain v. Strackhouse, 920 F.2d 1135 (3d Cir. 1990) 39

South Camden Citizens in Action v. New Jersey Dep't of Env. Prot., 254 F. Supp. 2d 486 (D.N.J. 2003) 20,47

Strykers Bay Neighborhood Council, Inc. v. City of New York, 695 F. Supp. 1531 (S.D.N.Y. 1988) 21

Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810 (4th Cir. 1995) 29

United States v. Branella, 972 F. Supp. 294 (D.N.J. 1997).....22,23

United States v. City of Birmingham, Mich., 727 F.2d 560 (6th Cir. 1984).....61

United States v. O'Brien, 391 U.S. 367 (1967) 29

United States v. Sensient Colors, Inc., 649 F. Supp. 2d 309 (D.N.J. 2009).....60

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).....passim

Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).....15

Yokem v. Griffith, 167 F. Supp. 120 (D.N.J. 1958).....38

Statutes

N.J.S.A. 20:4-1 et seq. 33
N.J.S.A. 20:4-5.....44
N.J.S.A. 40:4-6.....33,43
N.J.S.A. 40A:12A-1 et seq.....1,56
N.J.S.A. 40A:12A-5.....51
N.J.S.A. 47:1A-1 et seq.....59
N.J.S.A. 52:31B-1 et seq.....33
42 U.S.C. §3601.....6
42 U.S.C. §3604.....7,8
42 U.S.C. §1982.....57

New Jersey Admnistrative Code

N.J.A.C. 5:11-3.7(a).....33

Other

114 Cong. Rec. 2985 (1968).....21,47

U. S. Const. Amend. XIV 55

COUNTERSTATEMENT OF THE FACTS

Counsel for Appellants are exponents of the principle that repetition creates belief. There are simply insufficient permissible pages to even attempt a point by point response to Appellants' alleged issues, let alone its argument. Despite the pertinacious attempts by Appellants to create a morass of mythical factual issues and divert judicial attention, it is a remarkable aspect of this litigation that very few vital facts are actually in dispute.

It is undisputed that the Gardens area of Mount Holly is the *only* blighted residential neighborhood in the Township as found by the Township pursuant to the Local Redevelopment and Housing Law (N.J.S.A. 40A:12A-1 *et seq*.) and as validated by the New Jersey Superior Court trial court, the Appellate Division and the New Jersey Supreme Court (JA1790, ¶3 & JA1810, ¶119-121). It is undisputed that the New Jersey Superior Court found the 2002 blight designation was based on the established record that showed "the general condition of the structures [were] substandard, dilapidated, obsolescent and in some cases unsafe and unsanitary." (JA1369). It is undisputed that through the State Court review, both the State Trial and Appellate Courts specifically found no evidence of discriminatory intent on the part of the Township in the designation of blight or in the adoption of the redevelopment plan. (JA1121, JA1128, JA1960 & JA1963).

It is undisputed that neither the 2003 Redevelopment Plan, nor the 2005

Redevelopment Plan called for "acquisition of all Gardens homes" or "displacement and relocation of all Gardens residents out of the community." (Appellant's Brief, p.7). Rather, the 2003 Redevelopment Plan "authorize[d]" the Township to acquire properties through the use of eminent domain, but anticipated that the Township would work with affected property owners to appropriately redevelop their own properties, and that the residents might have to relocate during construction. (JA0863). Similarly, the 2005 Redevelopment Plan "authorize[d]" acquisition, but specifically included a rehabilitation component. (JA0979 & JA0972). Temporary relocation again was anticipated. (JA0978).

It is undisputed that Mount Holly Township has acquired over 200 of the Townhouses in the area through *voluntary* sales over the last ten (10) years and has not begun a single eminent domain proceeding.[1] (JA2017, ¶130). These former residents sold their home or relocated for many reasons: some related to the planned redevelopment and some unrelated to the implementation of the Redevelopment Plan, including threatened foreclosure of their homes, new jobs, Section 8 issues, non-payment of rent, to attend a new school, overcrowding of the residence, N.J. District attorney seizure of their home, and death. (JA1850-1874, ¶11.a, ¶12.b, ¶23a-b, ¶26.a-c &e-f, ¶27.b, ¶27.d, &¶29.b).

Of those former residents who relocated through the Township relocation

[1] Although this year the Township has started the appraisal and negotiation process that precedes eminent domain actions.

office, Plaintiffs made no credible allegation that persons had difficulty finding replacement housing at their desired location. It is undisputed that many of the former residents' economic situations improved as a result of the relocation process.[2] (JA1850-1870, ¶11b, ¶12.g, ¶13.d, ¶14.d-e, ¶17.b, ¶18, ¶20.c, ¶23.b, ¶24.e, ¶26.a-b & ¶26.e) It is undisputed that the one former resident alleged by Plaintiffs to have had difficulty finding replacement housing was Alandia Warthen, who moved in 2005 as a result of her landlord's actions, not the Township's; moreover, Ms. Warthen moved before the Township's relocation office was opened in November, 2006. (JA0627-0628, ¶7 & 10; & JA2675-2678; & JA1815, ¶149).

It is further undisputed that not all Gardens residents wanted to remain in the Gardens. Residential surveys from 2000 and 2006 showed that 33% and 39%, respectively, of the residents polled expressed an interest in living in a new neighborhood. (JA0743 & JA1627). The injunction contains evidence of the locations of 57 of the relocated families. (JA160-1164). Of those relocated, 17 (30%) stayed in Mount Holly and 31 (54%) relocated to other municipalities within Burlington County. Id.

[2] The vast majority of those individuals who were referenced in Ms. Holt's Certification were selected because they were feature stories in the Public Advocate's Report. Ms. Holt's Certification was primarily intended to rebut the inaccurate facts contained in the Public Advocate's Report, on which Plaintiffs' relied in support of their Motion for Preliminary Injunction.

It is undisputed that there are hundreds of pages of transcripts of dozens of public meetings indicating that the Township wanted to get rid of the crime, absentee landlords and deteriorated properties within in the Gardens area, not the people. (JA1223, JA1224, JA0744, & JA0987-0988). It is undisputed that many of the members of the Planning Board and Governing Body repeatedly expressed concern about taking care of the Gardens residents as part of the redevelopment efforts. (JA2266-2267 & JA2272-2273). Finally, it is undisputed that the Planning Board and Governing Body also indicated that they did not want any of the residents to move out of town and that the redevelopment of the Gardens was done to better their lives. (JA0934-0936 & JA2267 & JA1012, p.124, line 23 to p.125, line 21 & JA1013, p.127, lines 7-14 & JA1031, p.51, line 24 to p.52, line 11).

It is undisputed that that same record reflects that officials truly believed Mount Holly had enough affordable housing stock to accommodate everyone who wanted to stay. (JA1012, p.122, lines14-25 & JA1032, p.55, lines 6-13). It is undisputed that to assist residents in finding affordable replacement housing, Mount Holly Township has paid residents relocation benefits when State law did not require such payments, at levels that substantially exceed State law requirements. (JA2475, ¶22, Appellant's Brief, p.46 & JA1043-1044).

In determining the best method of implementing redevelopment within the area, the Township was first and foremost concerned with identifying a realistic

and financially feasible plan that would actually result in redevelopment of the area. (JA2547). However, the Township also had the "goal to provide as many low-to-moderate income units as economically feasible." (JA1014, p.130, lines 23-25). The Township Council was also concerned with adopting a redevelopment plan that would bankrupt the Township. (JA1346).

It is undisputed that as of May 2008 Mount Holly Township had spent $16 million in acquisitions and relocations in furtherance of their redevelopment of the Gardens and had bonded $16.5 million. (JA1346).

It is undisputed that in June 2011, of the original 300 plus townhomes, there remain 70 privately owned properties and 52 Township-owned properties currently undergoing demolition.

STANDARD OF REVIEW

Since the standard of review for the grant of summary judgment is "de novo" the Appellate Division must apply the "same standard as that used by the District Court". American Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009). In other words, the Appellate Division must "review the record and draw inferences in a light most favorable to the nonmoving party." Pa. Prot. & Advocacy, Inc. v. Pa. Dept. of Pub. Welfare, 402 F.3d 374, 379 (3d Cir. 2005).

While it is true that the "non-movant's allegations are to be taken as true, and when they 'conflict with those of the movant' they are entitled to the "benefit

of the doubt", the non-moving party is required to "designate 'specific facts showing that there is a genuine issue for trial'". Blair v. Scott Specialty Gases, 283 F.3d 595, 603 (3d Cir. 2002). Specifically, "the nonmoving party must provide admissible evidence containing 'specific facts showing that there is a genuine issue for trial." Pa. Prot. & Advocacy, 402 F.3d at 379. To defeat Summary Judgment, "a plaintiff cannot simply rely on 'vague', 'self-serving' statements which are unsupported by facts in the record … plaintiff 'must point to concrete evidence in the record which supports each essential element' of a claim on which he will bear the burden of proof at trial." Heffron v. Adamar of New Jersey, Inc., 270 F. Supp. 2d 562, 574 -575 (D.N.J. 2003).

Applying this standard, the District Court properly concluded "plaintiffs have not provided the requisite proof to take the issues to a jury." (JA0009).

ARGUMENT

I. SUMMARY OF ARGUMENT

Appellants contend the legal standard is simple. In a neighborhood of 100 people, where 75 are minorities and 25 are white, a governmental action affecting all 100 people equally is prima facie evidence of a "disparate impact" under the Fair Housing Act, 42 U.S.C. §3601, et seq. ("FHA"). Appellants contend affecting a greater raw number of minorities constitutes "disparate impact."

The Township contends credible allegations that governmental action

adversely affected a substantially greater percentage of minorities as compared to the percentage of whites affected would be prima facie evidence of "disparate impact" under the FHA.

This is the legal issue at the core of this case.

Appellants also contend that if they identify any conceptual alternative to the Township's proposed redevelopment project, they have shown a less restrictive means. The Township contends that any alleged less discriminatory means must be realistic, both in terms of capability of being carried out and economic feasibility; it needs to be in the "realm of possibility." The Township contends that, throughout the public record of the redevelopment process, it has adequately and reasonably considered the less discriminatory means proposed by Appellants and found them to be unrealistic.

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE TOWNSHIP.

A. Appellants Failed to Allege Facts Sufficient to Support their FHA Claims.

The Township Defendants were properly granted Summary Judgment on the Plaintiff's FHA claims because Appellants did not make credible allegations, statistically or otherwise, that housing was being made unavailable "because of" race. By its express terms, §3604(a) of the FHA makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the

sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. §3604(a). Thus, unless property is (1) denied or made "unavailable", (2) "because of" race, there is no violation of the FHA.

Discrimination "because of race" can be established through proof of intentional discrimination, or that "the challenged action by defendant had a racially discriminatory effect." Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 & 148 (3d Cir. 1977). See also Eastampton Center, L.L.C. v. Tp. of Eastampton, 155 F. Supp. 2d 102, 111 (D.N.J. 2001). Evidence that governmental actions had the effect of removing minorities from an area, leaving an all-white community is sufficient to establish a prima facie case of discriminatory effect. Rizzo, 564 F.2d at 149. Discriminatory impact can also be shown where governmental action has the "undeniable effect of 'bear(ing) more heavily on one race than another.'" Id. at 143.

Here, Plaintiffs' FHA case focused on allegations of discriminatory impact. However, neither discriminatory impact, nor intentional discrimination was supported by sufficient allegations to prevail on the cause of action.

1. Appellants' Statistics did not Show Disparate Adverse Impact.

Appellants assert that the Township's redevelopment activities have an adverse disparate impact on minorities. "Discriminatory effect may be proved by

showing either 'adverse impact to a particular minority group' or 'harm to the community generally by the perpetuation of segregation.'" Koorn v. Lacey Tp., 78 Fed. Appx. 199, 206, 2003 WL 22366923, 5 (3d Cir. 2003). A prima facie case under the disparate impact theory requires proof of the following: "'(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices.'" Lapid-Laurel, L.L.C. v. Zoning Bd. of Adj. of Tp. of Scotch Plains, 284 F.3d 442, 466 -467 (3d Cir. 2002).

While it is true that "[t]ypically, a disparate impact is demonstrated by statistics," Hallmark Developers, Inc. v. Fulton County, Georgia, 466 F.3d 1276, 1286 (8th Cir. 2006), the usefulness of statistics in proving disparate impact "depends on all of the surrounding facts and circumstances." Intern. Brotherhood of Teamsters v. U.S., 431 U.S. 324, 340 (1977). Statistics are generally considered useful in discrimination cases when the statistical imbalance is a telltale sign of purposeful discrimination. Id. at 324, n.20.

Statistics alone are proper in establishing a prima facie case of discrimination only where "gross statistical disparities can be shown." Hazelwood School Dist. v. U.S., 433 U.S. 299, 307-308 (1977).[3] For example, in Rizzo, the

[3] Both Intern. Brotherhood and Hazelwood School Dist. (later cited) are Title VII cases. It has been said that Title VIII FHA cases are "analogous" to Title VII cases. Anjelino v. New York Times Co., 200 F.3d 73, 90, n.23 (3d Cir. 1999).

Court found statistical evidence of discriminatory impact from the elimination of an affordable housing project, where 95% of the affordable housing waiting list was non-white. Rizzo, 546 F.2d 143. The Rizzo Court explained that the effect of the canceled housing project was to contribute to maintaining segregated housing in Philadelphia. Id. at 142. Unlike Rizzo, the District Court correctly found that neither gross statistical disparities nor perpetuation of segregation was shown by Plaintiffs' statistical proofs.

a. Appellants Failed to Credibly Allege a Disproportionate Burden on Minorities.

Appellants attempt to use statistics to allege a greater adverse impact on minorities by pointing out that the Gardens is predominately minority. (Plaintiff's Brief, p.12). However, it is insufficient to simply allege that an action will affect a greater number of minorities than non-minorities if the degree of harm is the same for both. Edwards v. Johnston County Health Dept., 885 F.2d 1215, 1223 (4th Cir. 1989). The focus must be on the "the disproportionate **burden** on minorities". Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 938 (2nd Cir.), *aff'd* 488 U.S. 15 (1988) (emphasis added). As explained in Huntington Branch, 844 F.2d at 938, the proper focus is on the "disproportionate burden on minorities"

Federal Courts have routinely stated that in reviewing disparate impact claims under the FHA, it is appropriate to "borrow" from Title VII caselaw. Community Services, Inc. v. Wind Gap Mun. Auth., 421 F.3d 170, 176, n.5 (C.A.3 (Pa.),2005). Lapid-Laurel, 284 F.3d at 466 and Rizzo, 564 F.2d at 146.

considering proportional statistics rather than absolute numbers.

A statistical analysis must utilize appropriate comparables. Mountain Side Mobile Estate Partnership v. Sect. of HUD, 56 F.3d 1243, 1253 (10th Cir. 1995). To establish disparate impact, "appropriate inquiry is into the impact on the total group to which the policy or decision applies." Hallmark Developers, 466 F.3d at 1286 (internal citations omitted). Thus, a court must look at the total group to which a policy applies and compare the impact on minorities to that on non-minorities within the group. Groach Assoc. #33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n, 508 F.3d. 366, 378 (6th Cir. 2007).

For example, in Koorn, supra, 78 Fed. Appx. at 206, no disparate impact was found where an ordinance affected all citizens, minorities and white, alike. See also Doe v. City of Butler, Pa., 892 F.2d 315, 323 (3d Cir. 1989), (stating plaintiffs failed to show discriminatory effect from an ordinance which primarily impacted group homes for abused women because the ordinance would have a comparable effect on a non-protected group if it were applied to a different type of group home such as one for recovering alcoholics). Similarly, in Bonvillian v. Lawler-Wood Housing, LLC, 242 Fed. Appx. 159, 160 (5th Cir. 2007), no disparate impact on minorities was found from the closure of an apartment because "the building is closed to *all* potential tenants" and therefore, "there is no 'significantly greater discriminatory impact on members of a protected class.'" Likewise, in Groach

Assoc., 508 F.3d at 378-379, the Court found no disparate impact even though 90% of the occupants of an apartment building to be demolished were minority because the policy applied to all residents of the building.

By contrast, in Betsey v. Turtle Creek Assoc., 736 F.2d 983, 987 (4th Cir. 1984), disparate impact was found because after considering the group to which the policy applied, it found "[o]f the total number of men, women and children living in Building Three, 74.9 percent of the non-whites were given eviction notices while only 26.4 percent of the whites received such notices." Ibid. Thus, there was a disparate impact. Ibid.

Here, when considering the total group to which the Township's redevelopment policies apply, it is clear that there is no greater impact or burden on minorities. The ongoing voluntary acquisition of properties and demolition of Township-owned properties is being applied to all residents of the Gardens, regardless of race. It is undisputed that the Redevelopment Plan calls for the acquisition and demolition of all the existing homes in the Gardens, without regard to race. (JA2009, ¶100 & 125 - Plaintiffs' Statement of Undisputed Fact). This means 100% of the minority residents in the area, and 100% of the white residents will have their homes acquired. Even though there are more minorities in the area, both are being impacted or burdened equally. Appellants' statistics did not establish a disproportionate impact on minorities.

Rather, their statistics establish that minorities are disproportionately represented in the redevelopment area. Appellants claim that minorities will be 8 times and 11 times more affected than non-minorities. (JA2045, ¶11). The reason for this is simple: the Gardens has a high concentration of minority residents and minorities are overrepresented in the Gardens area, compared to the rest of Mount Holly. (JA0069, ¶30 & JA0070, ¶32).

Merely establishing a disproportionate representation alone is insufficient to establish discrimination. As explained in City of Memphis v. Greene,

> Because urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group. To regard an inevitable consequence of that kind as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom. Proper respect for the dignity of the residents of any neighborhood requires that they accept the same burdens as well as the same benefits of citizenship regardless of their racial or ethnic origin.

451 U.S. 100, 128 (1981).[4] Rather, if a consequence of a particular action is unavoidable, there can be no inference of discriminatory intent. See Edwards, 885 F.2d at 1223 (stating that simply showing that the majority of migrant farm workers were minorities, without more, did not establish disparate adverse impact

[4] The FHA was enacted pursuant to the Congressional Power under the Thirteenth Amendment. Mitchell v. Cellone, 389 F.3d 86, 87 -88 (3d Cir. 2004).

because "any policy or action taken with respect to these workers will necessarily affect more non-white than white migrant workers"). See also Jones v. HUD, 390 F. Supp. 587 (E.D.La. 1974) (stating the Court should not "infer" racial discrimination is a motivating factor behind a decision to close an apartment simply because the majority of the occupants are minority).

Given the Garden's racial composition, there was no way for the Township to undertake redevelopment of the area without affecting more minorities than whites simply because there are more of them in the area. In granting Summary Judgment, the lower Court explained the flaw in Plaintiffs' logic:

> [U]nder Plaintiffs' logic, any action by the Township to do anything with regard to the Gardens would result in a disparate impact, simply because of the racial composition of the Gardens. The FHA (or any other civil rights law) does not contemplate that a town will never be permitted to ameliorate a blighted area inhabited mainly by minorities simply because it will affect minorities.

(JA0016). Affecting more minorities than non-minorities is simply an unavoidable consequence of the Township's redevelopment efforts and does not amount to an inference of discriminatory intent.

Since 100% of minorities and 100% of non-minorities will be burdened equally, Plaintiffs' statistics fail to prove there is a greater adverse impact on minorities.

b. Appellants Failed to Show a Disparate Impact on the General Minority Population.

To support their claim of disparate impact, Appellants also claim that more of the minority population lives in poverty and therefore destruction of inexpensive blighted housing would have a greater impact on minorities in general.

Appellants equate blighted, cheap housing with "affordable" housing, a term in New Jersey that equates with housing that is certified compliant with habitability and income restrictions under the Council on Affordable Housing (COAH).

Appellants' expert opined that low-income residents "are disproportionately African-American and Hispanic." (JA2047, ¶14). However, a mere statistical correlation between poverty and a particular race or ethnicity does not transform discrimination against poor people into racial discrimination. Ybarra v. Town of Los Altos Hills, 503 F.2d 250, 253 (9th Cir. 1974).

Appellants' expert also opined that only households above 80% of the area median income can afford to move into the proposed Project. (JA2047, ¶18). Because the homes with the Gardens are currently "affordable" to low and moderate income families, Appellants' conclude that acquisition and demolition of the homes in the Gardens and replacement of the homes with more expensive market rate homes will have a disproportionally adverse effect on minorities. (JA1991, ¶30 & JA2003, ¶82 & JA2033, ¶206-208 - Plaintiffs' Statement of

Undisputed Fact).

However, as the District Court explained, "[t]he FHA prohibits the Township from making unavailable a dwelling to any person because of race – it does not speak to income." (JA0014).

Appellants' statistics show that the percentage difference between whites and minorities who can afford the new housing is a slim margin. Appellants' 2008 Emulated CHAS Table shows approximately 64.5% of the minority households have incomes above 80% of the Median Family Income[5] compared to 72.7% of white households. (JA2070). This is also consistent with the Census Data provided by the Township, which showed that 65.92% of the African American and Hispanic population in Burlington County have incomes above 80% of the median income of $44,580.[6] (JA2679-2680). Thus, the act of replacing the cheaper, blighted units with market rate units will only affect 35.5% of minority versus 27.3% of white households or 8.2% more minority households.[7]

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[5] This figure is derived from subtracting the number of Non-Hispanic Black and Hispanic households below 80% from the total households (all income levels) and dividing by the total households, i.e. (29,543 – 10,475) / 29,543 = 0.645432 or about 64.5%.

[6] This figure is derived from adding all the minority households (both Hispanic and African American) with incomes of $45,000 or higher and dividing by the total number of Hispanic and African American households.

[7] Appellants' 2008 Emulated CHAS Table shows that 23.4% of the white affordable housing in the Gardens will be lost, compared to 74.4% minority occupied affordable housing. (JA2070). However, these figures are only

Affecting 8.2% more minorities than non-minorities is not a "gross statistical disparity". See Hazelwood School Dist., supra, 433 U.S. at 307-308 (stating statistics alone are proper in establishing a prima facie case of discrimination only where "gross statistical disparities can be shown").

In addition, when you compare the total households with incomes below 80% of the median income with those of white and minorities, it appears that a greater number of whites are affected than minorities. Approximately 71.8% of the households below 80% median income are white, compared to 22% who are minority.[8] (JA2070). Likewise, 66.8% of the households below 50% median income are white, compared to 26.5% minority. Id. In other words, the vast majority of the households in need of affordable housing are white.

In Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1291 (7th Cir. 1977), statistics similar to those presented by Appellants in this case was considered "relatively weak" support for a disparate impact claim. The Court stated,

> It is true that the Village's refusal to rezone had an adverse impact on a significantly greater percentage of the nonwhite people in the Chicago area than of the white people in that area. But it is also true that the class disadvantaged by the Village's action was not

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reflective of the fact that the Gardens area is predominately occupied by minorities (nearly 75%). (JA0069, ¶29 & 30).

[8] These figures are derived by dividing the number of white and minority households below 80% median income by the total number of households below 80% median income (i.e., 34,206 ÷ 47,611 = 0.718).

> predominantly nonwhite, because sixty percent of the people in the Chicago area eligible for federal housing subsidization in 1970 were white.

By contrast, in Rizzo, where adverse impact was found, the Court noted that the canceled housing project would affect about 14,000 to 15,000 people on a public housing waiting list, of which 95% were minority and 5% were non-minority. Rizzo, supra, 564 F.2d at 142.

Here, the statistics show that the majority of the households who would need and/or qualify for affordable housing (with incomes below 50% and 80% median income) are white. Thus, like Arlington Heights, Appellants' statistics regarding adverse impact on minorities are weak and therefore, the District Court properly found that Appellants failed to present facts to defeat Summary Judgment.

c. Appellants' Statistics Fail to Show a Segregative Effect.

Finally, Plaintiffs' allege that redevelopment will drive the minority population out of Mount Holly. Historically, statistics have been used to show a policy will perpetuate segregation. In Rizzo, 564 F.2d at 142, the Court relied on statistics to show disparate impact, where the cancellation of a housing project would perpetuate segregation. The Court noted that the waiting list for the project was 95% minorities and that the area in which the housing project was to be located had recently become 99.9% white. Id. at 140 & 142. Because the project "was a unique opportunity for these Blacks living in racially impacted areas of

Philadelphia to live in an integrated, non-racially impacted neighborhood," "[c]ancellation of the project erased that opportunity and contributed to the maintenance of segregated housing." Id. a 142.

Here, Appellants' claim their statistics showed that the Township's redevelopment perpetuates segregation by causing Mt. Holly's minority population to be "drastically reduced." (Appellants' Brief, p.13). Appellants' statistics indicated that the displaced population is 75% minority and "a much smaller percentage of minority households – only 21% – would be able to afford the newly redeveloped community." Id. at p.12-13. Appellants' concluded that this translated into a reduction of the minority population within the Township.

The District Court, however, found Appellants' arguments unavailing, stating,

> [P]laintiffs have not demonstrated that the Township is preventing minorities from purchasing or moving into the new homes, or otherwise limiting the new residents to non-minorities. Plaintiffs have not provided any proof or statistics to suggest that the new homes created by the redevelopment will be financially out-of-reach for all or most minorities.

(JA0015). In a footnote, the Court noted that Appellants' statistics were based on old 2000 Census numbers, and that the 2008 Census numbers "evidence" "the minority population's ability to occupy all 464 market rate homes." (JA0016, n.9). The Court explained,

> These statistics hold very little validity to show a disparate impact on

> the Township's minority population for several reasons: (1) they take into account the entire population of Burlington County, rather than only Mt. Holly Township, and the towns in Burlington County are of various economic and racial compositions (2) they do not account for minorities who will move into Mt. Holly Township from outside Burlington County; (3) they do not account for the deed restricted units that will be more affordable; (4) they do not account for a non-minority purchaser who rents to a minority; (5) they do not account for the minorities who will move elsewhere within Mt. Holly Township; and (6) more recent population survey data (from 2008, compared to the 2000 Census data used by plaintiffs' expert) shows 16,744 African-Americans and Hispanic households in Burlington County have incomes exceeding $45,000, evidence of the minority populations ability to occupy all 464 market rate homes.

Id.

Appellants' statistics do not show evidence of perpetuation of segregation. Rather, the undisputed facts show that redevelopment will further integration. Initially, the Gardens was heavily segregated, with a significant low-income minority population of 75%, compared to a 33.3% minority population for the rest of the Mt. Holly. (JA1987, ¶13 & 10 - Plaintiffs' Statement of Undisputed Facts). The redevelopment project will have the effect of creating a more integrated housing project, dispersing poverty concentration by limiting the affordable housing units and comingling them with market rate housing. (JA1987, ¶11 & 13, & JA1991, ¶30 - Plaintiffs' Statement of Undisputed Facts). Since the proposed redevelopment project will result in a more integrated, mixed-income community than previously existed, Appellants have failed to show evidence of a segregating effect.

The Township's redevelopment efforts are consistent with the underlying purposes of the FHA. As explained in S. Camden Citizens in Action v. N.J. Dep't of Env. Prot., 254 F. Supp. 2d 486, 500 (D.N.J. 2003), "the underlying policy behind Title VIII is to encourage the dispersion of urban ghettos and to create more integrated neighborhoods. *See* 114 Cong. Rec. 2985 (1968) (statement of Sen. Proxmire) (noting that Title VIII will establish 'a policy of dispersal through open housing ... look[ing] to the eventual dissolution of the ghetto and the construction of low to moderate income housing in the suburbs.')." Adverse impact is not shown where a proposed housing project results in a more integrated, mixed-income housing complex than what previously existed. Strykers Bay Neighborhood Council, Inc. v. The City of New York, 695 F. Supp. 1531, 1542-1543 (S.D.N.Y. 1988).

Moreover, unlike in Rizzo, Mount Holly is not a community which is predominately white. Rather, as of 2000, it was only 66.2% white. (JA1987, ¶13 - Plaintiffs' Statement of Undisputed Facts). At Summary Judgment, over two-thirds (2/3) of the residents in the Gardens had relocated. (JA1985, ¶3 & JA2024, ¶163 - Plaintiffs' Statement of Undisputed Facts). Appellants fail to identify any fact to show that Mount Holly's minority population decreased as a result of the redevelopment activities. Rather, American Community Survey Demographic

Estimates from the 2005 to 2009[9] show that Mount Holly's minority population has actually grown over the last few years. http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=&geo_id=06000US3400548900&_geoContext=01000US%7C04000US34%7C05000US34005%7C06000US3400548900&_street=&_county=mount+holly%2C+nj&_cityTown=mount+holly%2C+nj&_state=&_zip=&_lang=en&_sse=on&ActiveGeoDiv=&_useEV=&pctxt=fph&pgsl=060&_submenuId=factsheet_1&ds_name=null&_ci_nbr=null&qr_name=null&reg=null%3Anull&_keyword=&_industry, last visited 2-28-11. In 2000, Mt. Holly was comprised of 66.2% white, while population estimates from 2005 to 2009 indicate the white population has declined to 63.3%. (Id. & JA1987, ¶10 - Plaintiffs' Statement of Undisputed Facts). Thus, Plaintiffs' did not make credible allegations to show redevelopment has or will reduce Mt. Holly's minority population.

2. Appellants' Allegations Fail to Show Intentional Discrimination.

Under the FHA, intentional discrimination can be shown two ways, either by showing disparate treatment, or by showing that a discriminatory purpose was the motivating factor behind the governmental action. Eastampton Center, supra, 155 F. Supp. 2d at 122. Ordinarily questions of intent must be decided by the fact-

[9] The Court is permitted to take judicial notice of Census data. See Citizens Financial Group, Inc. v. Citizens Nat. Bank of Evans City, 383 F.3d 110, 127 n. 2 (3d Cir. 2004).

finder. U.S. v. Branella, 972 F. Supp. 294, 299 (D.N.J. 1997). "However, on a motion for summary judgment, if the non-moving party does not provide sufficient evidence to support each element of the prima facie case, the case does not withstand summary judgment and the fact finder need never address the factual question of intent." Ibid.

As discussed above, there was no credible allegation of disparate impact because the Township's redevelopment designation and redevelopment plan were facially neutral and treated all residents alike regardless of race. As to discriminatory purpose, the District Court determined that Plaintiffs failed to provide sufficient facts to defeat summary judgment, noting,

> [P]laintiffs tell a story, long on accusations and suppositions but short on proof, of the Township's ten-year, insidious desire to displace the minority population of Mt. Holly. If there were merit to these claims, plaintiffs would be able to annotate their allegations with factual evidence that would infer such discriminatory motive. They have not done so.

(JA0024-0025). The Court also stated "[i]n contrast, the Township provides transcripts of town council and planning board meetings, where concerned citizens and council members discussed the plans for the Gardens." (JA0026). These documents, the Court noted, showed the "Township's consideration of the residents' concerns" and that "their input was welcomed and encouraged." Id. Rather than evidencing discrimination, the Court found that the documented evidence showed the Township was motivated by the need to cure the "extensive

deterioration, crime, and overall unsafe living conditions" and by the "significant concern for the Gardens' resident's welfare". (JA0027).

Discriminatory intent or purpose can be established through the weighing of several factors: (1) "discriminatory impact"; (2) the challenged action's "historical background" or the action's legislative history; (3) "'sequence of events leading up to the challenged decisions'"; (4) any departure from "'normal procedural sequences'"; and (5) any departure from or "normal substantive criteria". Rizzo, supra, 564 F.2d at 143, citing Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977). This fact-sensitive analysis must start from the presumption that governmental actors generally act constitutionally. McKnight v. Hayden, 65 F. Supp. 2d 113, 120 (E.D.N.Y.1999). This means "'courts should be 'reluctant to attribute unconstitutional motives to the state, particularly where a plausible [constitutional] purpose may be discovered from the face of the statute.'" Ibid.

Appellants failed to make the required showing and the District Court properly granted summary judgment to the Township.

a. Removal of Blight was the Motivating Factor for the Township's Actions.

The facts of record showed that the true motivating factor behind the Township's Actions was the removal of blight. Appellants are really claiming that the Township's selection of the Gardens area for redevelopment was done with

intent to discriminate against minorities. This issue was litigated in State courts and those courts specifically found no evidence of discriminatory intent in the redevelopment designation or adoption of a redevelopment plan. (JA1121, JA1128, JA1133, JA1160 & JA1163)

In this case, based on the extensive public record, the District Court specifically found that "but-for the significant concern for the Gardens' residents' welfare, and the desire to make the Township as a whole a safe and pleasant town for all of its citizens, minority and non-minority, the Township would have never undertaken the long-overdue project…" (JA0027). Moreover, the District Court noted, "plaintiffs could not dispute the ironic observation that if the Township had allowed the Gardens to continue to deteriorate as it had over the years, that it might then be fairly characterized as having a discriminatory intent towards its minority, low-income residents." (JA0027, n.18).

The evidence showed Appellants' housing was being made unavailable, not because of race, but because it had become blighted. All acquisition of housing by the Township was done and will continue to be done for the sole purpose of effectuating the Redevelopment Plan for the area. (JA2251-2252 & JA1690).

Likewise, the evidence shows that the new housing to be built as part of the Redevelopment Project may be unavailable to Appellants because of income, not race. Appellants' certifications make clear that the new housing will be unavailable

to Appellants because they cannot afford it, not because of race. (Compare JA2129 with JA2131 & JA0613 with JA1795, ¶32). See also JA2025, ¶165. In fact, several of the Plaintiffs are white. (JA1793, ¶15 & JA1795, ¶¶29, 30, 32 & 35 &JA1796, ¶40).

As recognized by the District Court in granting Summary Judgment, "if none of the plaintiffs can afford the new homes, it is not just the African-American and Hispanic plaintiffs who are impacted by the increased housing prices -- it is all Gardens residents, including the Caucasion residents." (JA0015). The District Court concluded, "[t]he FHA prohibits the Township from making unavailable a dwelling to any person because of race -- it does not speak to income." (JA0014). Poverty is not a suspect classification, Harris v. McRae, 448 U.S. 297, 323 (1980).

Thus, the District Court properly found that there was no credible allegation of intentional discrimination.

b. There is not Discriminatory Impact.

With regard to the first factor of the Arlington Heights/Rizzo test, the evidence supports the Trial Court's granting of Summary Judgment finding that there was no discriminatory impact.

c. The Historical Background Demonstrates No Discriminatory Intent.

Evidence of historical background is relevant "**if** it establishes an ongoing *pattern* of discrimination against the plaintiff class." Jean v. Nelson, 711 F.2d

1455, 1490 (11th Cir. 1983) (emphasis added). Moreover, to be relevant, historical background evidence must be "reasonably contemporaneous with the challenged decision." McCleskey v. Kemp, 481 U.S. 279, 298 n.20 (1987). Actions taken too far in the past are simply not indicative of current discriminatory intent. Id.

Here, the challenged governmental action is actually twofold: First, in the process of the voluntary acquisition of properties and demolition of those properties and, second, in the adoption and implementation of a redevelopment plan for the Gardens. Appellants identify numerous programs that previously attempted, prior to the redevelopment designation, to redevelop or improve the Gardens, but which they allege the Township refused to consider or failed to adequately support. (JA2386-2389, ¶¶29, 30 & 32).

However, the New Jersey Courts have already concluded that the Township's prior actions with respect to the Gardens up through August 30, 2005 reveal "not a scintilla of evidence of discriminatory motivation by defendants." (JA1960). It was specifically acknowledged that "[t]he historical background of the redevelopment effort has been explored in detail in the Court's prior opinions. So, too, have the procedural and substantive sequences of events. Nothing nefarious has been suggested nor has anything of that nature been uncovered." Id.

Yet, despite this explicit finding, Appellants still cite to the same Township actions, specifically found by State Courts to be non-discriminative, as evidence of

discriminatory intent, which is simply irrelevant to a claim of intentional discrimination. Such facts are insufficient to establish discriminatory intent. See Rogers v. Lodge, 458 U.S. 613, 625 (1982) (historical background evidence is relevant "where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo"). See also In re Graham, 973 F.2d 1089, 1097 (3d Cir.1992) (citations omitted) (explaining when issue preclusion applies). The historical background of the Township's actions clearly shows a lack of discriminatory intent by the Township.

d. The Administrative History and Sequence of Events Leading Up to the Adoption of the Redevelopment Plan Show No Discriminatory Intent.

As to the third factor in the Arlington Heights/Rizzo test, the administrative history and sequence of events leading up to the adoption of the Redevelopment Plan, the evidence is clear that the Townships actions were not racially motivated. Again, it must be noted these allegations were litigated in State court and found without merit. (JA1960).

The relevance of the sequence of events is explained by the following:

> "Environment illuminates the meaning of acts, as context does that of words. What a man is up to may be clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and sequence of his acts with those of others, the

> interchange between him and another, the give and take of the situation."

Cramer v. U.S., 325 U.S. 1, 33 (1945).

Similarly, legislative or administrative history is "highly relevant" when accompanied by "contemporary statements by members of the decision making body, minutes of its meetings, or reports." Arlington Heights, supra, 429 U.S. at 268. When considering the underlying motive of a multi-member decision-making body, "an element of causation is a necessary part of plaintiff's showing." Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 819, n.2 (4th Cir., 1995). This is because "'[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high to eschew guesswork." McCauley v. City of Jacksonville, N.C., 739 F. Supp. 278, 281-82 (E.D.N.C. 1989), quoting U.S. v. O'Brien, 391 U.S. 367, 383-84 (1967).

The legislative record and statements made by the Planning Board and Township Council members demonstrate that the Township was concerned first and foremost with finding a plan for redevelopment that would actually and realistically result in the redevelopment of the Gardens and that would improve the quality of life for the residents there and for the town at large. "There is no reason to look for hidden reasons and racial motivation" behind a government action when there is an obvious alternative explanation for the action. Jones v. U.S. Dept.

of Housing and Urban Devel., 390 F. Supp. 579, 587 (D.C.La. 1974).

Various entities, including the Township, had repeatedly attempted to improve the Gardens and the quality of life for the residents in the Gardens over the years, but nothing has worked. As explained by the former Mayor,

> [M]any people over the years have tried many, many projects, many things to address the problem in the Gardens. Two of those problems have not been able to be resolved. One is the large volume of absentee landlord held units…. The last and the next problem is the specific condition of some of the houses … one alternative might have been to try to do it with the buildings that we have now. To move people out, to rebuild the buildings and to move them back in. That process had been tried.

(JA0870-0871). These sentiments were echoed by a former Mayor and Council person,

> Fifteen years ago when I sat where you are sitting the Council applied for and received millions of dollars in grants, in rental rehab monies, a lot of different programs to make the Gardens… Many of our residents and in the County were members of Mount Holly 2000 and devoted an enormous amount of time without pay to upgrade units on Saul Place, South Martin. And it just seems that no matter what was done or what was invested, the stigma did not go away.

(JA2536-2537). Planning Board members also recognized the limited effect of past attempts to resolve the problems of the Gardens,

> As you know, many, many years sitting on Council, patchwork attempts by Mount Holly 2000 and other, you know, well-intentioned groups that picked up a few houses. But this group was so small it didn't make any major impact on the neighborhood. I think it's long overdue that we take a comprehensive look. And I think this is the first step towards it.
> …

> I know I for one have long been concerned about the quality of life in the Mount Holly Gardens. There have been plans, Mount Holly 2000. I was with it when it was brainstormed, when the Committee first came together with the idea that they would have Mount Holly Gardens renovated by the year 2000.
>
> I saw Genesis come in with their plans. I've seen Hearts of Hope come in with a group from the mid-west work on the houses. All that was very, very good, but there was no large scale development plan. And this is what we need and this is I hope the direction we're going in.

(JA2495 & JA2504-2505).

Nothing in the legislative history nor the sequence of events leading up to the adoption of the Redevelopment Plan suggested that the Township's motivation was anything other than to find a workable solution that appropriately and permanently addresses the blighting conditions found in the Gardens. Appellants make no credible allegation of intentional discrimination.

e. There were no Departures from Normal Procedural or Substantive Norms.

Finally, as to the fourth and fifth factor in the Arlington Heights/Rizzo test, Appellants failed to point to sufficient facts to show substantial departures from normal procedural or substantive norms. The District Court observed the record showed that the Township took extra measures to listen to and consider the Gardens' residents' concerns regarding redevelopment. (JA0026).

Appellants' allege violations of the Open Public Meetings Act in adopting 2008 amendments to the redevelopment plan and other earlier procedural

irregularities as evidence of departures from procedural and substantive norms. (JA0026-0027, n.17). The State Courts have concluded the redevelopment process was completed in compliance with State law, finding no evidence of any discriminatory intent. Moreover, if Appellants believed any later Township actions carried out after the State court litigation violated statutory requirements under redevelopment or Open Public Meeting laws, they should have appealed such actions to State Court. The Appellants have shown no reluctance to litigate and yet they never challenged the recent actions they continue to complain of.

As to substantive departures, Appellants essentially argue that because the Township has not undertaken redevelopment in the manner in which Appellants have dictated, the Township is discriminating against them. However, these allegations show nothing more than Appellants' dissatisfaction with the legislative process in the adoption of the Redevelopment Plan, which is insufficient to show intentional discrimination. See Moore v. Detroit School Reform Bd., 293 F.3d 352, 369-70 (6th Cir. 2002) ("rejection of amendments and choice of methods to address the perceived problems of the DPS is simply the operation of the democratic process" and "allegations that the Legislature acted with haste and did not engage in extensive fact-finding might be a legitimate and even a valid critique of its behavior, but it does not lead to an inference of racial discrimination").

Rather, the undisputed evidence showed that the Township appropriately

evaluated the factors normally considered by public entities undertaking redevelopment. (JA2547). The Township's first and foremost consideration was the adoption of a plan that would actually and realistically result in the redevelopment of the area.

The evidence supports the Township's focused interest in assisting all Gardens' residents during the redevelopment process. The Township voluntarily bought houses and/or provided relocation benefits to residents who sought assistance from the Township for personal reasons, such as personal economics, pending/threatened foreclosures and/or evictions, and illegal tenancies (i.e. overcrowded conditions). (JA1850-1874, ¶11.a, ¶12.b, ¶23a&b, ¶26.a-c & e-f, ¶27.b & d, ¶29.b). In addition, the Township provided a variety of social services to residents who sought relocation assistance, which was not required by the relocation laws. (JA1844-1847, ¶6); N.J.S.A. 20:4-1 et seq. and N.J.S.A. 52:31B-1 et seq.

In addition, the Township provided relocation benefits above and beyond what was required by law. Specifically, the Township provided double the relocation benefits required under law to anyone who has relocated. Compare $7,500 given to tenants with N.J.S.A. 40:4-6 (assistance "not to exceed $ 4,000…") and $35,000 given to homeowners with N.J.A.C. 5:11-3.7(a) (assistance "not to exceed $ 15,000"). (JA0073, ¶40).

It is clear that the Township went above and beyond any legal requirements it had in undertaking redevelopment to ensure that the needs of the residents within the Redevelopment Area were adequately met. The District Court noted that "evidence in the record shows that many relocated residents have been pleased with the process, and are now in a much better place as a result. (JA0027-0028). It also noted that "evidence demonstrates that many residents now have significantly improved living conditions and are in better circumstances financially." (JA0025, n.16).

Appellants fail to make any credible allegations of intentional discrimination.

3. The Township Established a Bona Fide Interest and Proof of No Less Restrictive Means.

In this case, all levels of the New Jersey State Courts considered and upheld the Township's Redevelopment designation of the Gardens and the Redevelopment Plan. (JA1125 at *14, JA1133, & JA1368-1370. Both the N.J. and U.S. Supreme Courts have recognized that community redevelopment constitutes a legitimate and bona fide interest of the State.[10] Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 459 (N.J. Sup. Ct. 2007) and Kelo v. New London, 545 U.S. 469, 484-85 (2005). When addressing FHA claims, the courts have said, "if

[10] Appellants never challenged the Township's legitimate interest in redevelopment. Rather, they focus their arguments on the less restrictive means.

the defendant is a governmental body acting within the ambit of legitimately derived authority, we will less readily find that its action violates the Fair Housing Act." Arlington Heights, supra, 558 F.2d at 1293. Thus, it was undisputed that the Township's interest in redeveloping the Gardens was a bona fide governmental interest.

Once the bona fide interest is shown, the government entity must show there is no less restrictive means. Rizzo, supra, 564 F.2d at 149. In upholding the blight designation, the New Jersey Appellate Division noted that the blighting conditions in the neighborhood included dilapidation of the units, overcrowding, excessive land coverage, diverse ownership and faulty arrangement. (JA1124-1125). It noted that

> [A] majority of the rear yards were paved or covered with gravel to accommodate additional parking spaces … the alleyways created a faulty arrangement or design for the Gardens because it increased the amount of crime in the area. The dilapidated, overcrowded, poorly designed community, in addition to the high level of crime in the area, is clearly detrimental to the safety, health, morals and welfare of the community.
> . . .
> "And the problems created by that diverse ownership pattern is that there was an inability to address portions of this development that have common-that function in common with each other. One was the driveway, one other is roof systems, building facades. One unit is effected [sic] by the lack of maintenance to the exterior, including the sides and the rooftop and the landscaping of the property next door. And its just exacerbated because you have all of these lots in diverse ownership without any type of mechanism for ensuring that they are maintained and adequately kept up, so that the area as a whole can improve."

> . . .
> [The Township's Planner] also explained how the diverse ownership in the form of absentee landlords contributed to maintenance issues. Because many of the residents in the Gardens are renters, there is less incentive to invest in the property and improve it.

Id. None of the problems that caused the blight, the overcrowding, excess land coverage, faulty arrangements due to the alleys, the absentee landlords and lack of homeowner's association to address common areas, can be remedied without redesigning and rebuilding the entire area. Thus, there is no less restrictive means to redevelop the area. As explained by the former Mayor,

> [M]any people over the years have tried many, many projects, many things to address the problem in the Gardens. Two of those problems have not been able to be resolved. One is the large volume of absentee landlord held units…. The last and the next problem is the specific condition of some of the houses … One alternative might have been to try to do it with the buildings that we have now. To move people out, to rebuild the buildings and to move them back in. That process had been tried.

(JA0870-0871).

The evidence was also clear that past attempts to rehabilitate the Gardens were unsuccessful. (JA2495, JA2504-2505 & JA0934). A former Mayor and Council person stated,

> Fifteen years ago when I sat where you are sitting the Council applied for and received millions of dollars in grants, in rental rehab monies, a lot of different programs to make the Gardens…Many of our residents and in the County were members of Mount Holly 2000 and devoted an enormous amount of time without pay to upgrade units on Saul Place, South Martin. And it just seems that no matter what was done or what was invested, the stigma did not go away.

(JA2536-2537).

The evidence amply shows that less restrictive means had been tried unsuccessfully over the years and redevelopment was the Township's last resort.

4. Appellants Failed to Make Credible Allegations of Less Restrictive Means.

The Trial Court correctly found that Appellants failed to make credible allegations of less restrictive means. Once a defendant introduces evidence that no less restrictive alternative course is available, the burden shifts back to the plaintiff to demonstrate the existence of less restrictive means. Rizzo, supra, 564 F.2d at 149, n.37. In granting Summary Judgment, the District Court stated that even if Appellants had proved its prima facie case under the FHA, "they have not rebutted the Township's legitimate interest in the redevelopment, and they have not shown how an alternative course of action would have a lesser impact." (JA0017).

The District Court correctly found that Appellants had insufficient allegations to support the rehabilitation of the Gardens as a viable means of redevelopment. In doing so, it noted that Plaintiffs' rehabilitation plan "relies upon governmental subsidies and upon costs based on property conditions in 1989" and did not take into consideration extra costs, such as relocation costs. (JA0019-0020). The Court concluded "[s]imply because the properties could have been rehabilitated does not mean that rehabilitation was the feasible option." (JA0020).

In short, Appellants failed to allege sufficient facts that would show their rehabilitation plan was viable.

a. Appellants' Fact Allegations Show that Rehabilitation is Financially Unfeasible.

Appellants own allegations showed that financial feasibility was a crucial element to successful redevelopment. The Township Mayor explained, "[t]he final analysis for the success of any plan is whether it can be effectively implemented, whether it can be accepted both at the local and at the State level, whether it can be financed and whether it can be built." (App. 129). Appellants' allegations failed to establish that rehabilitation was financially plausible.

In support of its rehabilitation plan, Plaintiffs relied on affidavits submitted by their expert, Gray Smith[11]. His affidavit, however, is insufficient to defeat Summary Judgment. Affidavits in opposition to summary judgment must contain facts, not opinions and conclusions. Maldonado v. Ramirez, 757 F.2d 48, 51 (3d Cir. 1985); see also Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 161 (3d Cir. 2009) (stating "'conclusory, self-serving affidavits are insufficient to withstand a motion for summary judgment'") and Yokem v. Griffith, 167 F. Supp. 120, 123 (D.N.J. 1958) (an affidavit can be disregarded if its contents "consist[] of conclusions drawn by the defendant and not affirmations of fact" and is "nothing more than a self-serving declaration").

[11] Gray Smith passed away on April 29, 2010.

This is equally true for expert affidavits. As explained in Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1198 -1199 (3d Cir. 1995),

> [E]xpert testimony without such a factual foundation cannot defeat a motion for summary judgment. "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.... Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."

Rather, "[t]he factual predicate of the opinion of an expert must find some support in the record." Lynch v. J.P. Stevens & Co., Inc., 758 F.Supp. 976, 1006 - 1007 (D.N.J. 1991). "An expert opinion which contains no support for factual assertions should be rejected." Id. A court may disregard an expert affidavit which is "'essentially conclusory' and lacking in specific facts" or where the opinion assumes facts which are unsupported by the record. Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1144 & 1139 (3d Cir. 1990).

Moreover, "[a] trial court is not precluded from granting summary judgment merely because expert testimony is admitted. If, even given the proffered expert testimony, the proponent 'still has failed to present sufficient evidence to get to the jury,' summary judgment is appropriate." In re TMI Litig., 193 F.3d 613, 716 (3d Cir. 1999) amended 199 F.3d 158 (3d Cir. 2000). See also J & J Snack Foods Corp. v. Earthgrains Co., 220 F. Supp. 2d 358, 368 (D.N.J. 2002) (stating "a court may grant summary judgment even where the opponent presents admissible expert

testimony, if that testimony is insufficient to support a jury verdict in favor of the party offering the evidence on a crucial element of the claim").

In this case, the Trial Court correctly concluded that the record as a whole demonstrates that there was no violation of the FHA and no intentional discrimination by the Township.

Mr. Smith's Declaration contains numerous conclusory statements, without citing to any factual evidence to support them. For example, Mr. Smith states that because the units were "structurally sound" and due to high costs of demolition, recycling, disposal and replacement of housing components, "the houses were economically feasible to rehabilitate." (JA2373-2375, ¶15 & JA0396, ¶24). Mr. Smith's Declaration is filled with similar unsupported statements as to the economic feasibility of rehabilitation. (JA2382, ¶25). While Appellants' expert opines that rehabilitation would be less costly than new construction and that affordable housing could be "easily and economically retained at little or no expense to the Township", he fails to provide any facts or figures to support his opinion. (JA0400, ¶28-29). He cites to no facts to support any of his conclusions. Nowhere does he ever provide an estimate of the actual cost of rehabilitation.

Smith's opinions regarding the feasibility of rehabilitation is based in part on his assumption that many of the units, especially the homeowner units, are well maintained or have "minor cosmetic issues". (JA0390, ¶15 & JA0406, ¶32).

However, of the four houses Mr. Smith cites to as examples of homes in "good condition", two of those homes (154 Levis Drive and 354 South Martin Avenue) were Mount Holly 2000 homes, wherein $42,240 and $36,845 in grant funds, respectively, were spent on renovating the properties in 1996. (JA0396-0399, ¶25 & JA1382). There is no evidence in the record that these houses were representative of the other homes within the Gardens.

By contrast, the Township provided photographic evidence demonstrating several of the unoccupied homes had more than "minor cosmetic issues." (JA1929-1934 & JA1766-1767). The President of Keating explained that due to the extensiveness of the damage, gut rehabilitation of many of the units would be required. (JA1413-1414, ¶4-7). The Township provided evidence that rehabilitation costs would be substantial, about $150,000 to $200,000 per unit. (JA1415-1416, ¶14-15 & JA1372-1373, ¶6-9 & JA1381 & JA1383-1384).

Moreover, Appellants' expert admits that the units are not consistent with today's design standards, which would result in increased rehabilitation costs.

> The units in the Gardens, while meeting health and safety standards, are small from a market standpoint; i.e., relative to what a middle-income buyer paying a market price would seek with respect to a townhouse. While large units that would reflect market preferences could be created by combining existing units, that would significantly increase the cost and complexity of undertaking rehabilitation rather than new construction.

(JA0671). Thus, the facts set forth indicate substantial unarticulated costs

associated with rehabilitation without any identifiable funding source.

Smith opines that "[t]o overtly conclude that a Rehabilitation Plan is not feasible without performing a feasibility study is unacceptable" and to conclude wholesale demolition and new construction "is less costly without a comparative cost analysis is also unacceptable." (JA1508, ¶7). Yet despite the fact that he touts "[m]y firm has conducted feasibility studies" (JA1505-1506, ¶1), he never undertook a feasibility analysis to support his claims that Appellants' rehabilitation plan was feasible.

Instead of performing his own feasibility study, Smith cites to a 1989 report by Joseph Biber, who undertook a full analysis, including financial feasibility of rehabilitating the Gardens. (JA2386, ¶29). It identified several public funding sources, as well as resale income and concluded that in 1989 dollars that there would still be a financial gap of $3,242,396. (JA1211). The report surmised that additional public, governmental sources **might** be able to fill the gap, assuming that those governmental sources would provide extra funding. Id. Moreover, it identified a $793,149 and $288,639 gap needed to address a capital subsidy and operating support for a projected 100 lease-purchase units, for which no accompanying funding source was identified. Id. Finally, it identified another $1,749,058 as a funding gap for operating expenses for certain rental units and hoped that this gap could be addressed through the federal Section 8 program. Id.

The problem with the Biber analysis is three-fold. First, it relies, almost exclusively, on governmental subsidies to fund the program. (JA1202-1211). In today's climate of program cuts, and with the State and Federal Government's significant budget deficits which need to be filled, the availability of governmental funding is tenuous at best, and is most likely going to be significantly reduced over the upcoming years. Second, the rehabilitation cost figures in this report were done in 1989. (JA1163). Since that time, many of the units have experienced greater deterioration, thereby increasing rehabilitation costs, and many have been demolished, as documented by the Township. (JA1413-1414, ¶¶4-7, & JA1923-1928 & JA2373, ¶¶13-14 & JA2379-2380, ¶¶19 & 20, JA2027, ¶177). It also does not account for increased construction costs.

Third, this report does not take into consideration the additional costs that would necessarily need to be incurred to ensure proper rehabilitation. For example, this report excludes costs to rehab owner-occupied homes. (JA1166-1167). Utilizing the rehabilitation figures in the Report (JA1172), that is another $2,697,192 to $2,860,164 that needs to be subsidized. (JA1166) (stating 108 owner-occupied units). Finally, the Report does not take into consideration the relocation costs for the displaced individuals. Each of the 225 tenants displaced as a result of the acquisition would need to receive the statutory $4,000 in relocation benefits. N.J.S.A. 20:4-6. This is another $900,000 that needs to be subsidized. In

addition, if homeowner rehabilitation occurs, it is likely that the homeowners will need to relocate during the rehabilitation, depending upon the severity of the rehabilitation needed (i.e. rehab to electrical or plumbing systems), adding another $1,620,000 to the cost. (108 x $15,000). N.J.S.A. 20:4-5. This is a minimum of $5,217,192 in additional unaccounted for costs.

It is clear that Plaintiffs' are seeking affirmative relief that requires the Township and/or a private redeveloper to undertake significant financial obligations, without identifying viable funding sources. (JA2385, ¶27). However, the court has made clear, "[c]ourts should be more reluctant to grant affirmative relief: 'To require a defendant to appropriate money, utilize his land for a particular purpose, or take other affirmative steps toward integrated housing is a massive judicial intrusion on private autonomy.'" Hispanics United of DuPage County v. Village of Addison, Illinois, 988 F. Supp. 1130, 1163 (N.D.Ill 1997, quoting Arlington Heights, supra, 558 F.2d at 1293.

As to funding sources to cover the gap, Mr. Smith asserts that governmental funding sources are available to offset the cost of rehabilitation, but fails to provide any figures as to the amount of funding which can be secured from these unnamed sources. (JA2385, ¶27 & JA0401-0403, ¶30). Township evidence demonstrates that the funding sources identified by Mr. Smith have either limited funds or are not truly funding sources. (JA1373-1376, ¶9).

Smith also suggests that rehabilitation could have been feasible if the Township had retained an affordable housing developer, citing to numerous entities active in rehabilitating affordable housing in Burlington County. (JA1515-1516, ¶20). This statement assumes that an affordable housing developer is interested in and willing to undertake this project. There are no facts or evidence to support this assumption.

Smith asserts that the "Township has never attempted to engage housing developers in The Gardens redevelopment that have an interest in and capacity for housing rehabilitation." (JA2387, ¶30). However, this contradicts another of Appellants' expert's statements, namely, that Keating and Penrose, the named redevelopers, has undertaken affordable housing projects in the past. (JA1517, ¶20). He also asserts that the Township "engaged, by a non-competitive Redevelopment Agreement" Defendant Keating and Penrose Properties. (JA0389, ¶10). However, such allegations are contrary to the proofs. The Township's selection of the Redeveloper was undertaken pursuant to open public bidding through a Request for Proposals ("RFP"). (JA1101, ¶23-25). There was no allegation that **any** affordable housing developer submitted a viable proposal to the Township in response to the RFP. There was certainly no allegation that any of the entities cited in the Smith Declaration submitted a proposal to the Township or otherwise showed any interest or ability to undertake a rehabilitation project in the

Gardens.

Appellants do not allege that the Township received, but rejected, a valid, workable, realistic, financially feasible proposal to rehabilitate the Redevelopment Area in such a way that would both eliminate the blighting conditions and correct or resolve the problems historically plaguing the Redevelopment Area, while having no impact on minorities.

The bottom line is that there needs to be an enormous private investment in order to make any rehabilitation redevelopment of then-existing Gardens units financially feasible. Appellants allege no private entity, nor any non-profit group who is willing and able to undertake the type of commitment necessary to ensure that redevelopment of the Gardens actually and realistically occurs.

b. The Facts of Record Show that Rehabilitation is Not Less Discriminatory.

Appellants allege that their rehabilitation plan is the only less discriminatory option available. Appellants' expert opined that "severe disparate impact with respect to Hispanic and African-American residents will hold … short of a plan that replaces or rehabilitates the current units with other units that are affordable to 'very low income and extremely low income tenants and homeowners.'" (JA0072, ¶39).

However, Appellants' rehabilitation plan is not less discriminatory than the Township's proposed redevelopment. Under rehabilitation, Plaintiffs seek to

perpetuate segregation by requiring the Township to maintain the heavily minority populated low-income community. (JA1990-1991, ¶¶P27 & 28). Plaintiffs' intent is to ensure that all of the former residents, and therefore the exact prior racial composition of 75% minority vs. 25% non-minority, remain in the area. This Circuit has recognized the damaging effects of such action, stating an "[i]ncrease or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy." Shannon v. U.S. Dept. of Housing and Urban Dev., 436 F.2d 809, 821 (3d Cir. 1970).

The continuation of minority concentrated areas, particularly low-income areas, is discriminatory under the Title VIII. "According to floor debates in the Senate, which ultimately enacted the legislation that became the Fair Housing Act, the underlying policy behind Title VIII is to encourage the dispersion of urban ghettos and to create more integrated neighborhoods. See 114 Cong. Rec. 2985 (1968)." S. Camden Citizens in Action, supra, 254 F. Supp. 2d at 500. See also Sadler v. 218 Housing Corp., 417 F. Supp. 348, 358 (N.D.Ga. 1976) (stating "[u]nder the fair housing provisions, it has been uniformly held that it is impermissible for governmental agencies to confine and isolate low-income blacks to racially compacted and concentrated areas").

To date, the Township has been providing sufficient compensation and relocation assistance to enable Gardens residents to purchase a replacement unit

within Mount Holly or some other area of their choosing. (JA1843-1874). By using both monetary and non-monetary relocation assistance, the Township has been able to provide sufficient compensation and relocation benefits to the over 100 families who have relocated thus far, without a problem. In many cases, it was the non-monetary relocation assistance provided by the Township that allowed the families to be able to afford more expensive housing, without increasing their costs of living. (JA1850-1870, ¶¶12.d-g & 14.d-e & 18 & 26.b & 26.d-f & 27.e). There is no evidence in the record that any family who has relocated has been dissatisfied with, filed any complaint regarding their compensation and relocation assistance, or have been otherwise unable to live comfortably in their new homes. Appellants also presented no credible allegation to suggest that they would not be equally able to relocate with the Township's help.

Appellants continue to rely on a report prepared by the New Jersey Public Advocate. The Public Advocate's Report suggests that the housing costs for those who have relocated have increased. (JA1705-1706 & JA1730). However, those figures do not account for the relocation assistance they were provided. Just because a person's rent may have increased after relocation, does not mean that they cannot afford the rent increase. Relocated residents were given $7,500 in relocation benefits if they were tenants. (JA2021, ¶148). That is an additional $125 per month, if spread over five years, an extra $156.25 per month if spread

over four years, an extra $208.33 per month if spread over three years, and an extra $312.50 per month if spread over two years. Based on the average rental increase set forth in the Public Advocate's report (JA1730), accepting that these figures are true, the average family who moved could afford to live in their new place, without paying any more rent, for approximately 2 1/3 years.

More importantly, the rents in the two charts in the Public Advocate's report do not match up. The Gardens Rents set forth in the second chart are significantly higher. For example, although there are only four (4) properties over $900 in the Rent Change Chart (Chart 1) (JA1730), there are 29 properties over $900 in the Triad Referrals Chart ("Chart 2") (JA1731). Similarly, there are eight (8) properties under $600 in Chart 1, but only two (2) properties under $600 in Chart 2. As a result, the average rent in the Gardens based on the rents set forth in Chart 2 is $864.43. When that is compared with the average "new rent" set forth in Chart 1 ($971.53), that is an average rental increase of only $107.10. With $7,500 given in relocation benefits, the average Gardens resident can live in their new unit without **any** increased cost for 70 months, or over 5 ¾ years. If the rents in Chart 1 and Chart 2 are combined and averaged, the average rent in the Gardens becomes $786.45. This means that with the $7,500 relocation benefits, the average resident could live in a new place for over 40 months or 3 ½ years without any increased cost.

Thus, there is no credible allegation or evidence that Appellants will not receive sufficient compensation and relocation assistance to enable Gardens residents to purchase a comparable replacement unit. The District Court's finding that the Township has already employed the least restrictive means supports the granting of Summary Judgment.

5. Adoption of Appellants Standard for a Fair Housing Violation in the Redevelopment Context Will Severely Limit Municipal Redevelopment.

The practical impact of Appellants' standard for a Fair Housing violation, is that disparate impact and intent to discriminate can be assumed whenever a municipality or other governmental entity wants to proceed with redevelopment and blight clearance. The reality is in nearly every occasion, redevelopment of blighted urban areas will involve an area which is predominately low-income minority. City of Memphis, supra, 451 U.S. at 128. Plaintiffs in their Brief acknowledged that redevelopment impacts minorities more often than non-minorities (Appellants' Brief, p. 40, n.9)

Moreover, the homes in blighted redevelopment areas will generally be affordable to low-income households. These rents or mortgage payments are cheap because they are severely deteriorated or located in a blighted area with a significantly depressed market value. The New Jersey Courts have recognized that

by its very definition, a blighted area is an area where the property values have fallen dramatically. As explained in Gallenthin, supra, 924 A.2d at 457 - 458,

> "Certain sections of [the older cities in the State] have fallen in value, and have [become] what [are] known as "blighted" or "depressed" areas ...
>
> These depressed areas go steadily downhill. The original occupants move away, the rents fall, landlords lose income and they make up for it by taking in more families per house. It's impossible to keep the properties in good condition, the houses deteriorate more and more, and what was once a good section of the town is on the way to becoming a slum.
>
> Naturally, this slump in value is not confined to the original area affected. It spreads to neighboring blocks. No one person ... can counteract this spread, because no one can afford to sink money into a blighted area ... **458 because the improvement is so small that it cannot turn the tide of deterioration.

In New Jersey, to designate an area in need of redevelopment, the area as a whole must meet one or more of the criteria set forth in N.J.S.A. 40A:12A-5. The New Jersey Supreme Court has said that the criteria in N.J.S.A. 40A:12A-5 must be read as consistent with the definition of "blight" in order to avoid the statute being considered unconstitutional. Gallenthin, 924 A.2d at 460 - 461. This means that an area designated a redevelopment area must be an area "with economic deterioration" or severely deteriorated properties, and such stagnation or deterioration must have a "decadent effect on surrounding property." Id. at 460. Thus, any residential area designated as a redevelopment area will necessarily be predominated by properties that are affordable to low and moderate income

households because the properties are either economically deflated or severely deteriorated.

Disparate impact under the FHA cannot possibly mean that the only thing that a plaintiff has to prove is that the redevelopment area is occupied by more minorities than non-minorities or even a greater percentage of minorities live in the redevelopment area than in other areas of the municipality. If this were the case, any time a municipality in New Jersey designates a residential area in need of redevelopment, the residents will be able to come to court, allege disparate impact, and according to Appellants, establish a prima facie case under the FHA. Even though redevelopment will be considered a legitimate governmental interest, the municipality will then be required to set forth all of its possible redevelopment options for the Courts to determine which is the least discriminatory.

Essentially, the Courts will be sitting in place of the municipal governing body deciding what course of action is best to take in order to achieve redevelopment of the area. Federal courts have recognized, "[l]and use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong." Izzo v. Borough of River Edge, 843 F.2d 765, 769 (3d Cir. 1988). "'[I]t is not the Court's function to act as a 'super zoning board' substituting its judgment for that of a democratically elected body on debatable issues of land use policy.'" Eastampton Center, supra, 155 F.

Supp. 2d at 120. Nor should a federal court act as a "super redevelopment authority." This is especially true for a redevelopment designation that has been upheld by every level of the New Jersey State Courts.[12] This is why the District Court concluded that "[u]nder plaintiffs' logic, any action by the Township to do anything with regard to the Gardens would result in a disparate impact, simply because of the racial composition of the Gardens." (JA0016).

In the redevelopment context, where any redevelopment activity will necessarily impact minorities more than non-minorities simply because minorities predominate the redevelopment area, something more must be shown in order to establish a prima facie case under the FHA, such as that the action will have a segregative effect, or that the minorities in the municipality or the county (not just the redevelopment area) are disproportionately in need of affordable housing. See Edwards, supra, 885 F.2d at 1223.

a. Amicus United States Misstates Appellants Statistical Allegations.

Amicus United States argues that "[b]ecause plaintiffs presented sufficient evidence that the redevelopment would have a disproportionate adverse effect upon minorities in Mount Holly Township, as well as Burlington County, the district court erred in granting summary judgment to defendants on the ground that

[12] The Appellate Court and Supreme Court decisions in this matter were issued after Gallenthin was decided.

plaintiffs had failed to present a prima facie case of disparate impact under the FHA." (Amicus Brief, p.10). If Plaintiffs had submitted evidence to establish this fact, amicus would be correct. However, the evidence does not show that minorities within Mount Holly or Burlington County are disproportionally adversely affected. Rather, Plaintiffs' statistics only apply to the Gardens residents.

Amicus claims that "[i]n this case, plaintiffs' expert opined that – at least by some measures – African-American and Hispanic families are respectively 8 and 11 times more likely than white families to be negatively affected by the redevelopment." (Amicus Brief, p.16). However, a review of these statistics, rather than just a reading Appellants' Brief, reveal that what Plaintiffs' expert is really saying is that minorities in the Gardens are overrepresented by 8 and 11 more times than white families.[13] The reality is that when the figures are evaluated based on county-wide statistics, the proportionate number of minorities verses non-minorities who need affordable housing is only a few percentage points different.[14] This does not rise to the level of a disparate impact.

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[13] Beveridge arrived at these numbers by comparing the percentage of whites and Hispanics and African American residents who live in the Township with those living in the Gardens (JA0071, ¶35). Since the Gardens is one of the most heavily concentrated minority populations in the Township, (JA1991, ¶28), the redevelopment will necessarily impact more of the Township's minority residents.

[14] There were no figures for the number of households in Mount Holly Township who are low and moderate income households.

B. The Township was Properly Granted Summary Judgment on Appellants' Equal Protection Claims.

The Township was properly granted Summary Judgment on Appellants' Equal Protection Claims because Appellants did not establish a prima facie case of an Equal Protection violation. The Fourteenth Amendment of the U.S. Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. This is not a command that all persons be treated alike, but, rather, a direction that all persons similarly-situated be treated alike. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985) and Chambers ex rel. Chambers v. School Dist. of Philadelphia Bd. of Educ., 587 F.3d 176, 196 (3d Cir. 2009).

To succeed on a denial of Equal Protection claim, a plaintiff "must demonstrate that they received different treatment from that received by other individuals similarly situated." Chambers, 587 F.3d at 196. The critical issue is whether "persons similarly circumstanced" are being treated alike. Alexander v. Whitman, 114 F.3d 1392, 1406 (3d Cir. 1997). Whether people are "similarly circumstanced" is a matter left to legislative discretion.

> The Equal Protection Clause does not require that things which are different in fact be treated in law as though they are the same. "The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States." Accordingly, "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." Therefore, "a statutory classification that neither proceeds

> along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

Alexander, 114 F.3d at 1407 (internal citations omitted)

Here, the group of people who are similarly situated are the residents of the Gardens. This decision was made in 2002 when the Township Council of the Township of Mount Holly directed the Planning Board to undertake an investigation of whether properties within the Gardens qualified as an area in need of redevelopment within the meaning of N.J.S.A. 40A:12A-1 et seq. (JA1996, ¶55). In declaring the area in need of redevelopment, the Township determined that the properties within the redevelopment area were different than the properties elsewhere in the Township because they were blighted. (JA0860). The validity of this group as similarly situated was confirmed by the New Jersey Courts when they upheld the Township's redevelopment designation. (JA1806, ¶¶100 & JA1810, ¶120 & 121). None of these facts are in dispute.

Once the group of similarly situated people is identified, the court must determine whether any of these people are being treated differently. Under both the Federal and New Jersey Constitutions, an Equal Protection violation does not exist absent different treatment of similarly situated members of a class. See City of Cleburne, supra, 473 U.S. at 439 and Chambers, surpa, 587 F.3d at 196 (Federal Constitution); see also Felicioni v. Administrative Office of Courts, 961 A.2d

1207, 1216 (N.J. Super. Ct., A.D. 2008) (New Jersey Constitutional Equal Protection Claims) ("[a]n equal protection violation does not exist in the absence of disparate treatment of persons who are or ought to be considered to be members of the same class") and Lewis v. Harris, 908 A.2d 196, 211-12 (N.J. Sup. Ct. 2006).

As indicated above, it was undisputed that everyone within the Redevelopment Area is being treated alike regardless of race. The 2008 Redevelopment Plan "calls for acquisition and demolition of **all** existing homes in the Gardens." (JA2009, ¶100) (emphasis added). Appellants never alleged that any resident within the Redevelopment Area was treated differently from any other similarly situated person and present no facts that establish any differing treatment. Absent such proof, there can be no Equal Protection violation under either the New Jersey or Federal Constitutions.

C. No Violation of Civil Rights Act.

The District Court properly granted Summary Judgment on Plaintiffs Civil Rights Act Claims pursuant to 42 U.S.C. §1982. A §1982 claim required proof of the following: "'(1) the defendant's racial animus; (2) intentional discrimination; and (3) that the defendant deprived plaintiff of his rights because of race.'" Brown v. Philip Morris Inc., 250 F.3d 789, 797 (3d Cir. 2001). As indicated above, there was no evidence of intentional discrimination. Thus, the District Court's decision

granting Summary Judgment should be affirmed.

III. APPELLANTS FAILED TO DEMONSTRATE HOW ADDITIONAL DISCOVERY WOULD BENEFIT THEM.

Initially, the obvious must be stated. Plaintiffs claim they need discovery in papers accompanied by a 7 volume, 2783 page Appendix. Nearly 10 years of litigation, public records requests, participation in public meetings with transcripts of each, access to all records and participation with an "investigation" by the State Public Advocate, and hundreds of Certifications - and yet Plaintiffs contend with one more piece of paper, they will sustain their allegations.

The District correctly concluded that lack of discovery does not prevent summary judgment, especially in this case, where the procedural history and factual circumstances are unique. Plaintiffs have had more than ample opportunity to "discover" any relevant fact in issue, and either have in their possession, or otherwise have access to the information alleged to be necessary by means other than discovery.

In deciding whether or not to allow additional discovery for summary judgment purposes, the court's decision "'depends, in part, on 'what particular information is sought; how if uncovered, it would preclude summary judgment; and why it has not previously been obtained.'" Horvath v. Keystone Health Plan East, Inc., 333 F.3d 450, 458 (3d Cir. 2003). A court is free to deny the request for additional discovery where "'the information [sought] is otherwise available to the

non-movant.'" In re Northwestern Mut. Life Ins. Co. Sales Practices Litigation, 70 F. Supp. 2d 466, 482 (D.N.J. 1999). Similarly, "'if the non-moving party has had an adequate opportunity to discover the information, then summary judgment may be granted even if the information is solely in the possession of the moving party.'" E.C. v. Antar, 120 F. Supp. 2d 431, 440 (D.N.J. 2000).

The vast majority of the information claimed to be needed by Appellants has already been obtained through other means, namely numerous Open Public Records Act requests. Unlike a normal defendant in a lawsuit, the Township is a public entity who is obligated to provide documents to the public, including the Plaintiff, upon request pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). Thus, information alleged to be needed regarding any official action by the Township were all available, and produced, to the Plaintiffs through OPRA.

Similarly, any information sought regarding the relocation activities and relocation benefits given to former residents is available through other means. All such information is available directly from the former residents themselves and from the Office of the Public Advocate, who undertook an investigation of the Township's relocation practices. (JA1688-1731).

Finally, Plaintiffs had prior opportunity to depose and/or call as witnesses Township officials and employees as part of the State Court litigation. As

explained in Judge Sweeney's August 30, 2005 Opinion,

> First, a public official's state of mind is rarely an issue and can usually be determined from the record below. There are transcripts, tapes, minutes and the like…[T]here has already been one hearing in this matter. Although I limited plaintiffs to two expert witnesses, I also afforded them the right to call township officials to testify. They elected, for whatever reason, not to do so.

(JA1957) It is important to note that an issue contended by Plaintiffs before the State Trial Court was that the Township's blight designation had a discriminatory intent. Thus, it is clear that Plaintiffs have already had the opportunity, and chose not to take advantage of it, to obtain information from Township employees and officers regarding their intent.

Finally, with respect to the depositions of the Township officials alleged to be necessary, decision-making governmental officials have Morgan protection ("mental process privilege") from depositions. U.S. v. Sensient Colors, Inc., 649 F.Supp.2d 309, 318 (D.N.J. 2009). This is because "[a]bsent extraordinary circumstances, good cause exists to preclude the deposition of a high level governmental official because there is a public policy interest in ensuring that high level government officials are permitted to perform their official tasks without disruption or diversion." Buono v. City of Newark, 249 F.R.D. 469, 470, n.2 (D.N.J. 2008).

As recognized by the District Court, even if Plaintiffs were able to depose any Township official, it is not likely that such a deposition would result in the

"smoking gun" Appellants seek as to discriminatory intent. "'Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority.'" U.S. v. City of Birmingham, Mich., 727 F.2d 560, 564 (6th Cir. 1984). Through 10 years of litigation, Appellants have not uncovered one scintilla of improper motive of any Township official.

Therefore, the District Court's decision to grant summary judgment without allowing Appellants' requested discovery was entirely consistent with Rule 56 and does not warrant reversal.

CONCLUSION

Appellants have failed to allege credible facts necessary to present their case to a fact finder. The District Court's decision granting Summary Judgment should be upheld.

MALEY & ASSOCIATES
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Dated: June 10, 2011

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COMBINED REQUIRED F.R.A.P. & 3RD CIR. L.A.R CERTIFICATIONS

In accordance with the Federal Rules of Appellate Procedure and the 3rd Circuit Local Appellate Rules, I hereby certify that:

1. M. James Maley, Jr. is a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. This Brief exceeds type-volume limitations of F.R.A.P. 32(a)(7)(B) because the principal portions of the Brief contain 14,342 words according to the "Word Count" function of the MS Office Word 2007 software program, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii). A Motion to file an oversized brief is being filed herewith.

3. This Brief complies with the type-face limitations of F.R.A.P. 32(a)(5) and the type-style requirements of F.R.A.P. 32(a)(6) because the brief has been prepared in proportionally spaced typeface using 14 point Times New Roman in MS Office Word 2010. The text in this Brief is identical to the text in the paper copies filed with the Court and served on each party.

4. This Brief complies with 3rd Cir. L.A.R 3l.l(c) because text in the electronic copy of this Brief is identical to the text in the paper copies. The electronic copy of this Brief was scanned for viruses by SUPERAntiSpyware (Version 4.53.1000) and no viruses were detected.

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CERTIFICATION OF SERVICE

I hereby certify that on June 10, 2011, I electronically filed the foregoing BRIEF FOR APPELLEES, TOWNSHIP OF MOUNT HOLLY, TOWNSHIP COUNCIL OF MOUNT HOLLY, KATHLEEN HOFFMAN, AND JULES THEISSEN with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I further certify that on June 10, 2011, ten (10) paper copies, identical to the brief filed electronically, were sent to the Clerk of the Court by first class regular mail.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I certify that in addition to electronic service and in accordance with F.R.A.P. 25(c)(1)(B) & (4) and 3rd Cir. L.A.R. 31.1(a), one paper copy of

Appellees' Brief was served on June 10, 2011, to each of the following counsel of record for Appellants and Co-Appellees by first class regular mail at their offices listed below:

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