UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STANTON SQUARE, LLC, Plaintiff, v. THE CITY OF NEW ORLEANS, THE NEW ORLEANS CITY COUNCIL, and FREDDIE KING, III, in his official capacity as a member of the New Orleans City Council, Defendants.	CIVIL ACTION NO. 2:23-cv-05733

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT (R. DOC. 45)

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Plaintiff Stanton Square, LLC ("Plaintiff") challenges, under federal and state fair housing laws, the unlawful and discriminatory actions of Defendants City of New Orleans, New Orleans City Council, and Freddie King, III ("Defendants" or the "City"), alleging that they prevented the construction of a multi-family housing development in Lower Coast Algiers that would be disproportionately occupied by racial minorities and families with children. Defendants' Motion to Dismiss ignores Plaintiff's well-pleaded allegations, misstates the case law, and suggests an erroneous pleading requirement. Defendants' Motion must be denied.

FACTUAL BACKGROUND

In March 2021, Plaintiff purchased property in Lower Coast Algiers, New Orleans, to build a multi-family rental housing development named "The Village at English Turn," (the "Village").[1] The project was designed to be a residential complex on 16.8 acres with 278 rental units, 230 of which would be affordable under HUD metrics.[2] It would include a swimming pool, clubhouse, playground, and other amenities.[3] Since the 1980s, the site for the Village has been zoned as Suburban Multi-Family Residential (S-RM1), permitting lower-density multi-family housing as of right.[4] In 2016, the City noted that S-RM1 zones are "high opportunity" areas where it is "highly important that zoning laws assist private development of affordable housing to address the overwhelming need."[5]

Defendants initially had no objection to the project, and Plaintiff's team engaged in regular communication with City agencies to ensure that the development was in accord with all applicable regulations. Plaintiff's plans for the development satisfied the City's Master Plan and

[1] Plaintiff's First Amended Complaint ("FAC"), Docket No. 44, ¶ 39.
[2] *Id.* ¶ 45.
[3] *Id.* ¶ 48.
[4] *Id.* ¶¶ 41–45.
[5] *Id.* ¶ 35.

were in full compliance with applicable law.[6] Because of its size, Plaintiff's design required review by the City Planning Commission's ("CPC") Design Advisory Committee before it could receive permits, but it did not require a variance.[7]

Within weeks of Plaintiff's application, residents of the surrounding area—in particular a group called the English Turn Property Owners Association ("ETPOA")—launched a discriminatory campaign in opposition to the development.[8] The ETPOA's campaign was based on stereotypes about who lives in multi-family affordable housing.[9] These neighbors challenged what they characterized as an "a[f]front to our lifestyles" and suggested concerns about the prospective residents, crime, and how renters would taint the area and drive away economic investment.[10] They predicted, *inter alia*, that the Village would be a "crime ridden slum," populated by "people who bring the same mentality of violence from New Orleans to outlining [sic] areas."[11] The ETPOA campaigned the City Council, attending meetings and sending communications about the development's "high crime rates," influx of disease and other "health concerns," and "deplorable conditions."[12]

The campaign worked. The ETPOA helped the City Council introduce a moratorium to halt construction on the Village.[13] The City Council's initiatives were led by Defendant King, who is a resident of English Turn.[14] In October 2022, the City Council passed a motion directing

[6] *Id.* ¶¶ 42–47, 59–63.
[7] *Id.* ¶¶ 43, 59–62.
[8] *Id.* ¶¶ 52–53, 63–68.
[9] *Id.* ¶ 67.
[10] *Id.*
[11] *Id.* ¶¶ 67, 125.
[12] *Id.* ¶¶ 67–68; *see also id.* ¶¶ 133-159.
[13] *Id.* ¶¶ 71–72, 133-159.
[14] *Id.* ¶ 20.

the CPC to consider whether to enact an interim zoning district ("IZD") to temporarily prohibit the development of multi-family housing on S-RM1 zoned property in Lower Coast Algiers.[15]

In December 2022, the CPC, however, unanimously voted to *reject* the Council's IZD proposal.[16] The CPC found that the Village proposal would advance the goals of the City's Master Plan, and the CPC's Executive Director determined that the Village met applicable review standards.[17] Nonetheless, at a February 2023 meeting, the City Council overruled the CPC's decision.[18] It enacted the IZD, halting Plaintiff's project—no other proposal was affected by the IZD.[19] The Council's stated basis was no more detailed than the generalized assertion that the IZD was "deemed necessary and in the best interest of the City of New Orleans."[20]

The original IZD was set to expire on March 19, 2024, but on March 7, 2024, the City Council extended it for 180 days.[21] During the hearing, Councilmember Oliver Thomas asserted that affordable housing developments are by their very nature a threat to neighborhoods where they are located. He described the issue as "pitting affordable housing against folk who are trying to protect neighborhoods," and opined that affordable housing should be in inner cities, not the suburbs.[22]

The Village would have significantly helped with New Orleans's housing crisis. As a rental development with affordable rates and 278 units, the Village's housing would have been of particular benefit to the City's racial minorities and families with children. Of the residents who currently live within a twenty-minute drive from the Village, African American households

[15] *Id.* ¶¶ 71–77.
[16] *Id.* ¶¶ 82–88; *see also id.* ¶¶ 42, 45–46, 79–88, 108–116.
[17] *Id.*
[18] *Id.* ¶¶ 89–97.
[19] *Id.* ¶ 72.
[20] *Id.* ¶¶ 89–99, 101.
[21] *Id.* ¶ 103.
[22] *Id.* ¶¶ 103–104.

are 1.48 times more likely to rent than White households, and Latino households are 1.46 times more likely to rent than White households.[23] Additionally, African American households within a twenty-minute drive from the Village are 1.58 times more likely than White households to have incomes less than 100% of Area Median Income (AMI) and Latino households are 1.36 times more likely than White households to have incomes less than 100% of AMI.[24] A disproportionate percentage of families with children (over 30% percent) in New Orleans live below the poverty level.[25] The Village would have also helped to dismantle long-standing segregation in Lower Coast Algiers, which has no multi-family developments.[26] The census block group in which the Village was slated to be built is 32.8% African American and Latino, whereas the two northern census block groups abutting English Turn are 85.8% African American. The census block group to the south, within Plaquemines Parish, is just 0.5% African American and Hispanic. Plaintiff's development would predictably have led to an estimated 427 African American residents moving into English Turn.[27]

As a result of the IZD, Plaintiff cannot seek necessary permits, and it cannot start construction until those permits have been obtained. If Defendants' recent recommended change to the property's designation in the Future Land Use Map—from "residential multifamily" to "residential single family"—is adopted, the Village will be permanently barred.[28]

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[23] *Id.* ¶¶ 118-122. The Census Bureau uses the term "Hispanic" for people of Mexican, South or Central American or other Spanish culture of origin. Plaintiff will use the now more commonly accepted term "Latino" to describe this population and the Census Bureau's Hispanic data. *See* US Census Bureau, "Why We Ask Questions About Hispanic or Latino Origin," https://www.census.gov/acs/www/about/why-we-ask-each-question/ethnicity/#:~:text=OMB%20requires%20federal%20agencies%20to,or%20origin%20regardless%20of%20race.

[24] *Id.* ¶¶ 117–123 (citing statistics on populations with household incomes under AMI).

[25] *Id.* ¶ 122.

[26] *Id.* ¶¶ 5–7, 21–26, 55–58.

[27] *Id.* ¶ 25.

[28] *Id.* ¶¶ 42, 144–156.

LEGAL ARGUMENT

In reviewing a Rule 12(b)(6) motion, the Court must "accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff." *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507, 513 (5th Cir. 2018). Factual disputes are inappropriate for resolution on a motion to dismiss, and only factual allegations contained in the pleadings may be considered. *See Morgan v. Swanson*, 659 F.3d 359, 401 (5th Cir. 2011).

I. Plaintiff Plausibly Alleges Intentional Discrimination Under the Fair Housing Act.

The FAC sufficiently alleges that Defendants acted with discriminatory intent in blocking the development of the Village. To survive a motion to dismiss on a disparate treatment claim, a plaintiff need only allege facts that indicate that a protected trait was "one significant factor" in the defendant's dealings to present a plausible claim of disparate treatment. *See Greater New Orleans Fair Hous. Action Ctr. v. Kelly*, 364 F. Supp. 3d 635, 648 (E.D. La. 2019); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977) (holding that intentional discrimination exists if "discriminatory purpose was a motivating factor" behind the challenged action). A discriminatory motive can result from a municipal decisionmaker's own bias, or it can result from municipal decisionmakers capitulating to the discriminatory animus of their constituents. *See LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995) (discriminatory motive violates the Fair Housing Act if it belongs to "municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive."); *see also, e.g.*, *Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 497 (9th Cir. 2016)); *United States v. City of New Orleans*, No. CIV.A. 12-2011, 2012 WL 6085081, at *9 (E.D. La. Dec. 6, 2012).

In seeking dismissal, Defendants incorrectly ask the court to hold Plaintiff responsible for establishing, at the motion to dismiss stage, that Defendants' explanation for the challenged acts is pretextual. Not so. A factual dispute over the credibility of a defendant's explanation is a trial

issue; on a motion to dismiss, a plaintiff need only meet "a minimal burden of showing facts suggesting an inference of discriminatory motivation." *Harmony Haus Westlake, LLC v. Parkstone Prop. Owners Ass'n, Inc*., 468 F. Supp. 3d 800, 811 (W.D. Tex. 2020).

A. The *Arlington Heights* Factors Support an Inference of Intentional Discrimination.

Assessing whether a plaintiff has presented sufficient allegations in support of a disparate treatment claim requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights,* 429 U.S. at 266. In *Arlington Heights*, the Supreme Court held that discriminatory intent may be inferred from the totality of the circumstances and set forth a non-exhaustive set of factors for determining whether an inference can be drawn. *Id.* at 266–68. These factors are: (1) the disproportionate impact of the official action; (2) the historical background of the challenged decision, (3) the specific sequence of events leading up to the challenged decision; (4) departures from normal procedural sequence; (5) substantive departures; and (6) legislative history. *See Arlington Heights*, 429 U.S. at 266–68; *see also, e.g.*, *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 641 F. Supp. 2d 563, 568–69 (E.D. La. 2009) ("*St. Bernard Parish I*").

Consideration of these factors establishes that Plaintiff has more than met its "minimal burden" at the motion to dismiss stage to suggest an inference of discriminatory motivation. *Harmony Haus Westlake*, 468 F. Supp. 3d at 811.

1. Disproportionate impact of the official action

Arlington Heights held that the discriminatory effect of an official action carries substantial persuasive weight in determining whether a government action had a discriminatory motive; indeed, in some cases, a "stark" disproportionate impact alone can be enough to establish an inference of discriminatory intent. 429 U.S. at 266. As more fully explained *infra,* Section

II.A, the allegations demonstrate that the IZD has a disproportionate adverse effect on African American and Latino people and families with children. The IZD blocked construction of 278 rental units in Lower Coast Algiers, at least 230 of which would have been affordable under HUD metrics.[29] Of the residents who currently live within a twenty-minute drive from the Village, African American households are 1.48 times more likely to rent than White households, and Latino households are 1.46 times more likely to rent than White households.[30] Additionally, African American households within a twenty-minute drive from the Village are 1.58 times more likely than White households to have incomes less than 100% of AMI, and Latino households are 1.36 times more likely than White households to have incomes less than 100% of AMI.[31] Moreover, a disproportionate percentage of families with children are also eligible for affordable housing; over 30% of families with children under the age of 18 in New Orleans are living below the poverty line, as compared to 18.9% of families generally.[32] Under *Arlington Heights*, this disproportionate effect is a strong indicator of Defendants' discriminatory motive.

2. Historical background of the decision

Plaintiff alleges that the City's actions to block the Village occurred against a historical backdrop of discrimination. "Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination." *See Rogers v. Lodge*, 458 U.S. 613, 625–26 (1982).

The FAC describes how Defendants have—despite being on notice of their residents' need for housing opportunities[33]—routinely taken actions to reduce housing stock disproportionately occupied by African American and Latino people.[34] The FAC also describes

[29] *Id.* ¶ 45.
[30] *Id.* ¶ 119.
[31] *Id.* ¶ 120.
[32] *Id.* ¶ 122.
[33] *Id.* ¶¶ 28–29.
[34] *Id.* ¶¶ 31–33.

the City's own recognition of the discriminatory harms caused by neighbors lobbying the City Council for the use of restrictive zoning measures to exclude housing developments.[35] It notes a lawsuit filed against the City by the U.S. Department of Justice for engaging in discriminatory zoning practices.[36] These allegations show an "invidious" series of official actions by the City to block affordable, integrated housing, which limits housing opportunities for African Americans, Latinos, and families with children. *Arlington Heights*, 429 U.S. at 267.

3. The specific sequence of events leading up to the decision

The "specific sequence of events" factor also supports an inference of discrimination. The FAC describes how the City initially had no objection to the Village, but abruptly reversed course when community members expressed discriminatory opposition.[37] *See United States v. City of New Orleans*, 2012 WL 6085081, at *9 (denying motion to dismiss, finding that discriminatory denial of zoning variance application because of "community opposition expressed at the hearings" met *Arlington Heights* factors).

This opposition—expressed through written communications with the City, public posts on social media, and oral statements at public meetings—was rife with coded language connoting racial animus. Opponents asserted that the Village was "an a[f]front to [their] lifestyles"; referenced "deplorable conditions," "crime", and "health concerns"; and claimed that the Village would "encourage economic disinvestment or flight from the area."[38] They stated:

- "[A]ffordable housing . . . creates crime because people don't know how to govern themselves. Since Katrina St. Bernard Parish has seen more murders now that ever. The school is overran [sic] with people who bring the same mentality of violence from New Orleans to outlining areas."

[35] *Id.* ¶¶ 34–35.
[36] *Id.* ¶ 33.
[37] *Id.* ¶¶ 59–63.
[38] *Id.* ¶¶ 67–68.

- "[T]hese affordable housing communities . . . will allow criminals of all elements to take over in time to come, which will degrade the properties surrounding area substantially."
- "Nobody wants section 8 by their million dollar homes."
- "If you wanna talk a big game about putting affordable housing up in high income areas [do] it in your own area before you try and f**k up someone else's neighborhood."
- "I wouldn't want the crime, grass non existent because of cars parked in the yard, cars on stands, and the crime that seems rampant in these 'affordable housing developments' . . . ."
- "Orleans Parish is famous for these Large Scale, Cookie Cutter, Section 8 Housing Projects that Degenerate into Crime Ridden Slums!"[39]

It is well-established that "[r]acially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications." *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 609 (2d Cir. 2016). References to crime, Section 8, broken down cars, overcrowded schools, and changing the character of a neighborhood have all been found to be racially charged by numerous courts. *See St. Bernard Parish I*, 641 F. Supp. 2d at 571 ("The references to 'ghetto,' 'crime,' 'blight,' and 'shared values' are similar to the types of expressions that courts in similar situations have found to be nothing more than 'camouflaged racial expressions.'"); *see also Mhany*, 819 F.3d at 608-09 (affirming an inference of racial animus in statements that a development would change the "flavor" and "character" of a community and that multifamily housing might "depress the market" for current residents); *Ave. 6E Invs.*, 818 F.3d at 506 (same for comments about "large households," and residents who "own numerous vehicles which they parked in the streets and in their yards"); *Valentin v. Town of Natick*, 707 F. Supp. 3d 88, 94 (D. Mass. 2023) (comments that a proposed development was "completely out of character" with a neighborhood "would destroy the culture of the neighborhood," and an "attack" on the suburbs connoted

[39] *Id.* ¶ 125.

discriminatory intent); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1062 (4th Cir. 1982) (concerns about sanitation services pretext for discriminatory bias).

The neighbors' thinly veiled discriminatory opposition had an impact on Defendants' decision-making process. In direct response to, and in collaboration with,[40] the opposition, Defendants overruled the unanimous recommendation of the CPC and enacted the IZD.[41] Prior to the discriminatory opposition, the City had identified the Village location as one where it was "highly important that zoning laws assist private development of affordable housing to address the overwhelming need [for housing]."[42] That support "immediately eroded" after the community's opposition, suggesting a discriminatory intent. *See St. Bernard Parish I*, 641 F. Supp. 2d at 573.

4. Procedural and substantive departures from ordinary procedures

The next two *Arlington Heights* factors are "departures from ordinary procedures" and "substantive departures from procedures." Delaying routine processes and unexplained denials support an inference of discrimination under the procedural departures factor. *See Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par.*, 648 F. Supp. 2d 805, 813 (E.D. La. 2009), (finding a departure from the normal procedural sequence where applications were on track for approval, then suddenly derailed without justification). When a body that regularly relies on the recommendations of its experts suddenly defies them, it evinces a departure from norms. *Id.*; *see also Valentin*, 2023 WL 8815167, at *7. Substantive departures exist when "factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *St. Bernard Parish I*, 641 F. Supp. 2d at 574.

[40] *Id.* ¶¶ 65, 71, 137–156.
[41] *Id.* ¶¶ 89–97, 103–107.
[42] *Id.* ¶ 35.

The City Council's rejection of the CPC's unanimous recommendation against the IZD is a significant departure. The CPC routinely makes recommendations to the City on whether to adopt IZDs, and the City Council routinely accepts the CPC's recommendations.[43] Here, the CPC voted unanimously to deny the IZD request—with some commissioners concluding that the IZD "went against the intent of the Master Plan" and others expressing incredulity that it was even proposed.[44] The City Council, however, made the "exceedingly rare" decision to overrule the CPC's recommendation.[45] It did so even though the further studies called for under the IZD were already incorporated into the design review and permitting process and had been satisfied by Plaintiff.[46] The Council also deleted an appeal procedure for the IZD that would have set less discretionary standards for Plaintiff to meet in order to proceed with the development process.[47]

An inference of discrimination is also met where a municipality "provided no explanation" for its decision. *U.S. v. City of New Orleans*, 2012 WL 6085081 at *9. Here, no councilmember offered any reasoning regarding their vote and the only written explanation was that the IZD was "necessary and in the best interest of the City of New Orleans."[48]

5. Legislative history and contemporary statements

Courts have found that the final *Arlington Heights* factor, the legislative history, supports a discrimination inference where bias is suggested in "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 268. The FAC alleges that, during the March 7, 2024 hearing on extending the IZD, Councilmember Thomas argued that affordable housing should be created in the inner city and

[43] *Id.* ¶¶ 82, 101.
[44] *Id.* ¶¶ 82–88.
[45] *Id.* ¶ 101.
[46] *Id.* ¶¶ 112–114, 109–116.
[47] *Id.* ¶¶ 92–93.
[48] *Id.* ¶¶ 96–99.

described the issue at hand as "pitting affordable housing against folk who are trying to protect neighborhoods."[49] Courts have found these types of comments as suggesting discrimination. *See St. Bernard Parish*, 641 F. Supp. 2d at 571; *Mhany*, 819 F.3d at 608–09.

B. Defendants' Arguments Against Intentional Discrimination Lack Merit.

Each of the *Arlington Heights* factors supports an inference that Defendants' actions in blocking the construction of the Village were motivated in part by discriminatory intent. Defendants' arguments are not grounded in case law and are irrelevant to the pleading stage.

1. A Plaintiff Need Not Establish Pretext to Survive Motion to Dismiss.

Defendants argue that Plaintiff must allege "the stated reasons for the complained of action were false (i.e., pretext)." Defendants' Mem. in Support of Mot. to Dismiss, Dkt. No. 45-1, at 9 ("Def. Br."). As described *supra* p. 5-6, Plaintiff does not need to allege pretext at the pleading stage, nor may Defendants prevail on a motion to dismiss by suggesting competing factual explanations for their actions. In any event, the FAC includes allegations showing how Defendants' stated purposes for enacting the IZD were pretextual.[50] Defendants argue that the IZD was "necessary while additional information is studied and evaluated," Def. Br. at 11, but the FAC clearly alleges that those requested studies were already incorporated into the design review and permitting process, and, a year after passage of the IZD, work had not even begun on any of the studies supposedly justifying its passage.[51]

Defendants also claim that "[t]he stated purposes and timing of the IZD are appropriate when considering the need to maintain the status quo while additional information is studied and

[49] *Id.* ¶¶ 103–105.
[50] *Id.* ¶¶ 108–116.
[51] *Id.*

evaluated." Def. Br. at 11. But, as the FAC alleges, the IZD did not "maintain the status quo"—it changed fifty years of consistent zoning and defied the City's long-standing master plan.[52]

2. Defendants' Minimal Discussion of the Arlington Heights *Factors Misapplies the Law and Raises Inappropriate Factual Disputes.*

Defendants do not comprehensively review the *Arlington Heights* factors, Def. Br. at 10-11, and what little analysis they do offer is unpersuasive. First, Defendants assert that "a normal sequence of events is shown where a zoning decision is made concerning the need to preserve the long-standing characteristic of a tract of property." *Id.* at 10. That proves *Plaintiff's* point: the FAC alleges that the long-standing zoning characteristic of the Village property was to allow a project like the Village as of right. The City departed from, and did not preserve, the long-standing land use plan for the tract.

Second, Defendants assert that the coded language used by the neighborhood opposition signifies class-based, rather than race-based, animus. *See* Def. Br. at 12–13. This argument fails: not only does it ignore many of the comments in the FAC,[53] but it runs contrary to a long line of case law holding that references to crime, lifestyle, Section 8, economic disinvestment, slums, and residents not caring for themselves and their homes are evidence of thinly veiled discriminatory bias.[54] At most, Defendants' argument raises a factual dispute regarding the underlying motivation of the neighbors' opposition that cannot be resolved at this stage in the proceedings.

Third, Defendants' reliance on *Hallmark Devs., Inc. v. Fulton Cnty., Ga.*, 466 F.3d 1276 (11th Cir. 2006) is misplaced. In addition to being at a different procedural posture—the *Hallmark* court examined the factual record at the post-trial stage—*Hallmark* is factually

[52] *Id.* ¶¶ 35, 41–44.
[53] *Compare supra* Section I.A.3 *with* Def. Br. at 12–13.
[54] *See supra* Section I.A.3 (collecting cases).

distinct. In contrast to the detailed comments discussed in the FAC here, the *Hallmark* plaintiff did not specify what comments were made, and the court referred to comments about "the apartment challenge" and a desire to keep the neighborhood "pristine." *Id.* at 1281. These are of an entirely different kind of character than the comments made in this case. *See supra* Section I.A.3. Additionally, the officials in *Hallmark* immediately and thoroughly rejected any potential bias contained in the opponents' comments, saying:

> That's a bad argument to bring to me. . . . Let's not bring our personal aesthetic prejudices and biases to the table . . . this County Commission is not going to close its doors to ordinary working people who also want to live and have nice houses.

Hallmark, 466 F.3d at 1281. Here, rather than rejecting the discriminatory bias of the neighborhood opponents, Defendants adopted the neighborhood's positions and collaborated with the opposition—the ETPOA described their counsel as "pretty much joined at the hip with the representation from the City"[55]—to enact and extend the IZD.

* * *

Defendants have presented no viable response to Plaintiff's well-pleaded allegations of intentional discrimination.

II. Plaintiff Plausibly Alleges Two Independent Theories of Disparate Impact Liability.

Defendants' challenge to Plaintiff's disparate impact claims is based on the assertion that the FAC fails to allege sufficient "robust causality." *See* Def. Br. at 14–18. But the FAC details how the IZD directly precludes rental housing opportunities that would be disproportionately occupied by African American and Latino households. The FAC's allegations meet all possible interpretations of the robust causality requirement. And the FAC alleges that the enactment and

[55] FAC ¶ 137.

enforcement of the IZD reinforces segregated housing patterns and perpetuates segregation—an independent way of demonstrating a disparate impact that Defendants ignore.

A. The IZD Has a Disproportionate Effect on African American and Latino Renters.

A *prima facie* case of disparate impact liability can be shown through allegations that (1) a policy or practice (2) caused or predictably will cause a discriminatory effect. *See Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 527 (2015) ("*ICP*"). A plaintiff must show that the challenged policy or practice, and not a different factor, caused the discriminatory effect; this is sometimes referred to as "robust causality." *See ICP*, 576 U.S. at 543 (giving examples of alternative causal factors that fail to meet robust causality standard); *see also Inclusive Communities Project, Inc. v. Lincoln Prop. Co.* ("*Lincoln Property"*), 920 F.3d 890, 902–05 (5th Cir. 2019).

The Supreme Court has stated that suits like this one, "targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification," are at the "heartland of disparate-impact liability." *ICP*, 576 U.S. at 521, 540 (citing, *inter alia*, *St. Bernard Parish I*, 641 F.Supp.2d at 569, 577–578). The Fifth Circuit has recently described that disparate impact is useful in zoning cases involving "indefensible government policies that operate[] to perpetuate segregation by unreasonably restricting private construction of multi-family housing that would increase affordable housing options for minorities." *Lincoln Property*, 920 F.3d at 908. The instant case is a heartland disparate impact case.

Plaintiff's FAC readily meets the requirements for pleading a disparate impact claim under the Fair Housing Act ("FHA"). First, the FAC alleges that Defendants enacted the IZD, a

facially neutral zoning policy that prohibited the development of multi-family housing.[56] Second, Plaintiff alleges that the IZD had a disproportionately adverse effect on African Americans and Latinos. The FAC describes that among households within a twenty-minute drive time from the Village (those most likely to rent a unit in the Village),[57] African Americans are 1.58 times more likely to rent than White households (72% of African American households as compared to 45% of White households), and Latino households are 1.46 times more likely to rent than White households (62% of Latino households as compared to 45% of White households).[58] The FAC also alleges that African American and Latino households within a twenty-minute drive from the Village are more likely than White households to have household incomes less than 100% of the AMI.[59] Finally, the FAC alleges that the Village would have created 278 rental units and that 482 (or 55.83%) of the Village's residents would be African American or Latino.[60] Taken together, the allegations in the FAC show that, by enacting the IZD, Defendants "unreasonably restrict[ed] private construction of multi-family housing that would [have] increase[d] affordable housing options for minorities." *Lincoln Property*, 920 F.3d at 908.

B. Plaintiff's Allegations Meet All Interpretations of Robust Causation.

Defendants argue that robust causation is not sufficiently pled. Def. Br. at 15–18. But Plaintiff's allegations meet Fifth Circuit causation requirements, because the sole cause of the disproportionate impact of the diminished rental opportunities for African American and Latino

[56] *Id.* ¶¶ 72, 75, 77.
[57] The FAC also offers statistics from Orleans Parish, another reasonable measure of the geographical area from which most Village renters would originate, noting that within that geography, African American households are 1.24 times more likely to rent than White households, and Latino households are 1.35 times more likely to rent than White households. *Id.* ¶ 119. Defendants argue that Plaintiff's comparators are speculative, but they are sufficient to meet pleading requirements and will be borne out by expert testimony in discovery.
[58] *Id.* ¶ 120.
[59] *Id.*
[60] *Id.* ¶¶ 45, 121.

renters was Defendant's decision to enact the IZD.[61] *See Lincoln Property*, 920 F.3d at 903–05, 908 (holding that a plaintiff must allege "a policy attributable to the defendant *and* the requisite causal connection"). Put another way, the Village was blocked exclusively and completely by the IZD, and the Court is not "left wondering whether members of a protected class" face diminished rental opportunities "because of [the IZD] or because of some other factor." *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 966 (9th Cir. 2021).

Defendants' discussion of *Lincoln Property* does not suggest a different conclusion. In *Lincoln Property*, the Fifth Circuit reviewed four possible approaches to "robust causation" that had been discussed in opinions from other Circuits. 920 F.3d at 904–5. Those approaches can be summarized as requiring (1) the challenged policy be "artificial" and "arbitrary," *id.* at 904; (2) the challenged disproportionate effect be a result of "a change in defendant's [] policy," *id.* at 906; (3) the challenged disproportionate effect not be a result of "geographical happenstance," *id.*; and (4) the disparate impact challenged be based on more than merely a showing of "racial imbalance," *id.* at 905. *Lincoln Property* did not endorse any one of the four approaches or require that future claims meet any particular test. *Id.* at 906–07. Regardless, Plaintiff's allegations satisfy the standards and considerations central to all four approaches.

First, the allegations support a finding that the IZD is artificial and arbitrary. *See id.* at 904. The IZD is artificial because it was adopted with no articulated or reasonable legitimate basis: in fact, it was adopted contrary to the advice of the City's expert body on zoning matters and without further explanation.[62] The IZD is arbitrary because it is premised on the need for studies that were already existing requirements in the applicable application process. The arbitrary and artificial nature of the IZD defeats Defendants' argument that allowing a disparate

[61] *Id.* ¶ 117.
[62] *Id.* ¶¶ 82, 96–99, 101.

impact challenge to the IZD would expose "any City policy or zoning ordinance affecting any rental properties to a lawsuit based on the FHA." Def. Br. at 17. Because this matter challenges an artificial and arbitrary measure, allowing the action to proceed would not suggest general disparate impact liability for all rental-related zoning ordinances or policies.

Second, the disproportionate effect results from a change in policy, as described in *Lincoln Property*. *See* 920 F.3d at 906. Defendants' contention that the IZD did not change anything, Def. Br. at 18, is facially false: the IZD upended nearly 50 years of consistent zoning and a stable master plan vision, abruptly halting the by-right ability to construct affordable multi-family housing. Defendants' preexisting policy would have allowed housing opportunities that would be disproportionately used by racial minorities; the subsequent change in Defendants' policy eliminates housing options for that population.

Third, the disproportionate effect is not caused by geographical happenstance. *See* 920 F.3d at 906. In *Lincoln Property*, the Fifth Circuit noted that a showing of less "minority habitation" after the implementation of a "no vouchers" policy did not necessarily establish a link between the policy and a diminished number of minority households in the area. *Id.* at 907. In other words, *Lincoln Property* involved an indirect subsidy that could have been used for multiple housing opportunities. This case is different because the housing opportunities—over 200 affordable rental units—themselves are precluded by Defendants' policy.

Fourth, Plaintiff does not merely rely on a showing of "racial imbalance" in support of its disparate impact claim. *Id.* at 905. The "racial imbalance" approach discussed in *Lincoln Property* is based on the court's interpretation of the Eleventh Circuit's *Oviedo* decision where the plaintiffs challenged a utility rate increase that affected properties with significant percentages of racial minorities. *See Lincoln Property*, 920 F.3d at 905 (citing *Oviedo Town*

Center II, L.L.L.P. v. City of Oviedo, Fla., 759 F. App'x 828, 830 (11th Cir. 2018)). The *Oviedo* plaintiffs attempted to show disparate impact merely by noting that a large percentage of people in their properties were racial minorities but did not compare the racial composition of *all people affected* and *all people unaffected* by the rate increase. *Oviedo*, 759 F. App'x at 835. If the plaintiffs had done a "citywide comparison demonstrat[ing] that a disproportionate percentage of racial minorities in multifamily properties were impacted across the city," a *prima facie* case of disparate impact "might have been presented." *Id.* at 835–36. Here, Plaintiff have made this precise comparison. The FAC pleads that African American and Latino households in the area make up a significantly greater percentage of people needing rental housing opportunities like the Village as compared to White households in the area.[63] Unlike in *Oviedo*, Plaintiff's FAC shows how the Defendants' policy caused African American and Latino households to disproportionately bear the burden of the unavailable rental housing opportunities as compared to White households.

C. The IZD Perpetuates Segregated Housing Patterns.

Plaintiff also alleges that Defendants violated the FHA because their actions perpetuate segregation, which is an independent path to establishing disparate impact.[64] "Discriminatory effect may be proven by showing either (1) adverse impact on a particular minority group or (2) harm to the community generally by the perpetuation of segregation." *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 531 (N.D. Tex. 2000). A perpetuation of segregation claim is established when a defendant's challenged conduct precludes housing opportunities in predominately white areas that would be disproportionately occupied by racial minorities. *See Huntington Branch, N.A.A.C.P. v. Town of Huntington, N.Y.*, 844 F.2d 926, 937 (2d Cir.), *aff'd*

[63] *Id.* ¶¶ 117-121.
[64] *Id.* ¶¶ 123-124.

in part sub nom. Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P., 488 U.S. 15 (1988); *see also ICP*, 576 U.S. at 540.

The FAC includes allegations that both the City of New Orleans and Lower Coast Algiers are highly segregated based on well-accepted measures of segregation: while the census block group where English Turn and Plaintiff's proposed development are located is 32.8% African American, the two census block groups abutting English Turn to the north are 85.8% African American, and the census block group to the south is just 0.5% African American and Hispanic.[65] The FAC alleges that Defendants prevented an estimated 427 African American residents from moving into, and advancing the integration of, English Turn.[66] The FAC also highlights that the City's own Housing Authority has admitted that ceding to discriminatory neighborhood associations "perpetuate[s]" and in fact "increases the severity of segregation."[67] These allegations—which Defendants do not specifically challenge—are sufficient to withstand a motion to dismiss on Plaintiff's perpetuation of segregation theory of liability.

III. Plaintiff Plausibly Alleges Unlawful Interference Under § 3617 of the FHA.

Plaintiff has sufficiently pled a claim of unlawful interference in violation of § 3617 of the FHA. Section 3617 prohibits "interfer[ence] with any person in the exercise or enjoyment of . . . any right granted or protected by" the FHA. 42 U.S.C. § 3617; *see also* 24 C.F.R. § 100.400(c)(2) (2016). In the zoning context, it is unlawful for a municipality to interfere with the construction of housing because of race or familial status of the prospective residents. *See, e.g.*, *United States v. City of Black Jack,* 508 F.2d 1179, 1182 (8th Cir. 1975); *United States v. City of Parma*, 494 F. Supp. 1049, 1100 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562 (6th Cir. 1981).

[65] *Id.* ¶¶ 21–22, 25.
[66] *Id.* ¶ 121.
[67] *Id.* ¶ 34.

A plaintiff may show interference by showing that (1) the plaintiff exercised or enjoyed a right guaranteed by §§ 3603–3606; (2) the defendant's conduct constituted interference; and (3) a causal connection exists between the exercise or enjoyment of a right and the defendant's conduct. *See Revock v. Cowpet Bay W. Condo. Ass'n*, 853 F.3d 96, 112–13 (3d Cir. 2017).

Here, the Complaint establishes all three elements. Plaintiff exercised a right protected under the FHA to construct multi-family, affordable housing that would have provided rental opportunities for significant numbers of African American and Latino families. By enacting the IZD and blocking the construction, Defendants' conduct interfered with this right. Plaintiff has alleged that Defendants' decision to enact the IZD was taken in direct response to Plaintiff's attempt to build multi-family housing.

Defendants' sole argument in response is that Plaintiff does not allege a § 3617 claim because, they assert, Plaintiff failed to state a § 3604 claim. For the reasons described in Section I, Plaintiff has plausibly alleged that Defendants violated § 3604. *See, e.g., Black Jack*, 508 F.2d at 1182 (8th Cir. 1974) (zoning ordinance that prohibited construction of multi-family dwelling "interferes with the exercise of the right to equal housing opportunity").

IV. Plaintiff Plausibly Alleges a Violation of Title VI of the Civil Rights Act.

Under Title VI, "[n]o person in the United States shall, on the ground of race, color, or national origin, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. To establish a Title VI claim, Plaintiff must allege "(1) that there is race [] discrimination, and (2) that the entity engaged in discrimination is receiving federal financial assistance." *Russell v. City of Tupelo*, 544 F. Supp. 3d 741, 762 (N.D. Miss. 2021), *reconsideration granted on other grounds*, No. 1:20-CV-3-SA-DAS, 2021 WL 4979005 (N.D. Miss. Oct. 26, 2021). The FAC meets both requirements. As discussed *supra* Section I, Plaintiff has alleged that Defendants, motivated by discriminatory intent, enacted the

IZD to delay and block Plaintiff's multi-family housing development. This discrimination was carried out by the City, a recipient of Federal financial assistance.[68]

Defendants argue in passing that their actions did not "remove housing options" available to members of a protected class. Def. Br. at 19. But the law does not distinguish between existing housing that is demolished and planned housing that was prevented from being built. Plaintiff has adequately described how, but for Defendants' actions, it would have brought units onto the market as early as last year,[69] and that its development would increase housing opportunities for minorities.[70] That is more than enough to allege a claim under Title VI.

V. Plaintiff Plausibly Alleges a Violation of the Louisiana Equal Housing Opportunity Act.

Plaintiff has sufficiently pled a claim for relief under the Louisiana Equal Housing Opportunity Act ("LEHOA"), La. R.S. § 51:2601, *et seq*. As Defendants point out, the LEHOA is substantially equivalent to the FHA. Def. Br. at 20. Both establish that all persons should be allowed to obtain housing regardless of race, sex, color, religion, handicap, familial status, or national origin. *See* La. R.S. § 51:2602(a); 42 U.S.C. § 3601, *et seq.* As set forth *supra* Sections I-II, the Complaint sufficiently states claims for relief under the FHA and, therefore, also does so under the virtually identical LEHOA. *See Kelly*, 364 F. Supp. 3d at 648 n.90.

Defendants cite to Louisiana case law regarding a presumption of validity that attaches to zoning decisions. Def. Br. at 20. But it is axiomatic that zoning decisions can enjoy a presumption of validity yet still violate laws that prohibit, for example, discriminatory housing and zoning practices. *See, e.g.*, *Esplanade Ridge Civic Assoc. v. City of New Orleans*, 2013-CA-1062 (La. App. 4 Cir. 2/12/2014), 136 So. 3d 166, 169 (holding that although a decision of the

[68] *Id.* ¶ 30.
[69] *Id.* ¶ 51.
[70] *Id.* ¶¶ 117–124.

BZA is afforded presumption of validity, that decision is nevertheless subject to the requirements of FHA). And Defendants' citation to *Sullivan Properties, Inc. v. City of Winter Springs,* 899 F. Supp. 587, 595 (M.D. Fla. 1995), is misplaced. *Sullivan* asks whether Eleventh Circuit law requires substantive due process claims to be pled under the state Constitution, as opposed to the federal Constitution, and has no bearing on the LEHOA, a statutory claim.

VI. Plaintiff Plausibly Alleges Substantive and Procedural Due Process Violations.

Finally, Plaintiff has sufficiently pled that Defendants' actions violate its constitutional right to substantive and procedural due process.

A. Plaintiff Has Sufficiently Pled a Violation of its Substantive Due Process Rights.

In the zoning and land use context, "[s]ubstantive due process . . . protects citizens from being subject to 'arbitrary or irrational zoning decisions.'" *Paterek v. Vill. of Armada, Mich*., 801 F.3d 630, 648 (6th Cir. 2015). A plaintiff is required to show that "(1) a constitutionally protected property or liberty interest exists, and (2) the constitutionally protected interest has been deprived through arbitrary and capricious action." *Id*. Plaintiff meets both requirements.

First, in the zoning context, to establish a property interest, a landowner must show a "legitimate claim of entitlement" to the benefit in question. *Standard Materials, Inc. v. City of Slidell*, 96-0684 (La. App. 1 Cir. 9/23/97), 700 So. 2d 975, 986. A legitimate claim of entitlement exists when "there is either a certainty or a very strong likelihood that the application or permit would have been granted" under state or local law. *Homeowner/Contractor Consultants, Inc. v. Ascension Parish Planning*, 32 F. Supp. 2d 384, 391 (M.D. La. 1999). Here, Plaintiff plausibly alleges a strong likelihood that permits would have been granted were it not for the IZD. The

project was by-right, meaning no variance was required,[71] and it met each of the six review standards and the goals of the Master Plan.[72]

Second, Defendants do not appear to contest that Plaintiff has alleged arbitrary and capricious actions. These include: the constructive denial of Plaintiff's by-right development,[73] the imposition of an IZD to conduct entirely unnecessary and redundant studies,[74] the overruling of the CPC's unanimous recommendation against the IZD,[75] the last-minute deletion of an appeal procedure,[76] and the failure of the City Council to provide any rationale for the IZD.[77] All of these constitute arbitrary and capricious actions that interfere with Plaintiff's property interests.

B. Plaintiff Has Sufficiently Pled a Violation of its Procedural Due Process Rights.

Defendants erroneously claim that Plaintiff's procedural due process claim[78] should be dismissed because Plaintiff received notice and an opportunity to be heard. Def. Br. at 20. This fails for two reasons. First, Plaintiff has plausibly alleged that it was not afforded notice or an opportunity to be heard when Defendants passed the initial IZD Motion in October 2022, which immediately placed a moratorium on the processing of any permit application for Plaintiff's land.[79] Second, Plaintiff was denied a fair and impartial hearing. A quasi-judicial or administrative decision that is tainted by a decisionmaker's bias or conflict of interest deprives

[71] *Id.* ¶¶ 43, 62.
[72] *Id.* at ¶¶ 84–88, 152; *see also* ¶¶ 22-26, 108–116.
[73] *Id.* at ¶¶ 72, 75, 77.
[74] *Id.* at ¶¶ 109–111.
[75] *Id.* at ¶¶ 86, 96–99.
[76] *Id.* at ¶¶ 92–93.
[77] *Id.* at ¶¶ 96–99.
[78] A municipal body's adjudicative conduct must be afforded procedural due process. *See County Line JV v. City of Grand Prairie*, 839 F.2d 1142, 1145 (5th Cir. 1988).
[79] FAC ¶¶ 72–73, 75.

the landowner of due process and must be invalidated. *See Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975) (holding that a fair and impartial decisionmaker is a basic requirement of due process).

Plaintiff has also alleged that Defendants' actions were tainted by bias. Because he owned property in English Turn, Councilmember King initially was instructed by the City Council Clerk to recuse himself from bringing and voting on the initial IZD Motion.[80] Despite this conflict, Councilmember King drafted the IZD Appeal Motion that overruled the CPC Director's reasoned recommendation; proceeded in February 2023 to lead the hearing on the IZD and IZD appeal; moved to call a vote on the IZD Appeal Motion without allowing any other councilmember to raise questions; and then voted in favor of the IZD.[81] As a result, Stanton Square was deprived of a fair and impartial hearing on its appeal due to personal bias.

CONCLUSION

For the above-stated reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion to Dismiss.

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Respectfully submitted,

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[80] *Id.* ¶ 76.
[81] *Id.* ¶¶ 72, 97, 100.

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