UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

JANELL WINFIELD, TRACEY STEWART, and SHAUNA NOEL,

Plaintiffs,

-against- 15-CV-5236 (LTS) (KHP)

CITY OF NEW YORK,

Defendant.

----------x

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S FEBRUARY 1, 2018 OPINION AND ORDER (ECF 259) REGARDING DELIBERATIVE PROCESS PRIVILEGE AND OTHER OF DEFENDANT'S PRIVILEGE AND WORK-PRODUCT CLAIMS**

Craig Gurian
Anti-Discrimination Center, Inc.
1745 Broadway, 17th Floor
New York, New York 10019
(212) 537-5824

Mariann Meier Wang
Cuti Hecker Wang LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2603

*Attorneys for Plaintiffs*

*On the Brief:*

Craig Gurian
Roger D. Maldonado

March 8, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

# TABLE OF AUTHORITIES

## CASES

CASES (CONT.)

CASES (CONT.)



STATUTES



ADMINISTRATIVE MATERIALS

## INTRODUCTION

This action seeks to enjoin the City's outsider-restriction policy in its affordable housing lotteries by proving plaintiffs' claims that the policy is intentionally discriminatory, has a disparate impact, and perpetuates racial segregation.[1] Central to proving these claims (and to dispelling the justifications that defendant interposes) is: (a) evidence that defendant is aware of and acts in accordance with and in response to the desire to maintain the racial and ethnic status quo in New York City – as expressed or espoused by elements of the public, community boards, local politicians, advocacy groups, or others; (b) evidence about what defendant knows of the actual impact of the policy or available, less-discriminatory alternatives thereto; (c) what defendant knows about its affirmatively furthering fair housing obligations; and (d) evidence of the reasons for opposition to affordable housing development, and strategies defendant used or failed to use to try to counter this opposition.[2] As "the threat of liability takes that which was once overt and makes it subtle," *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 609 (2d Cir. 2016) (citation

[1] Defendant denominates the policy as "community preference," but the policy in fact functions to restrict outsiders (that is, New York City households who do not live in the community preference area for a lottery) from the neighborhood where the housing is being built. *See* trans. of Jan. 18, 2018 deposition of Margaret Brown, defendant's Assistant Commissioner for Policy and Operations at HPD, at 219:5-220:4 (assuming that a lottery is taking place, "the community preference does mean that there are ultimately fewer non-community preference applicants that will be processed"); *see also* trans. of Nov. 3, 2017 deposition of defendant's Deputy Mayor for Housing and Economic Development Alicia Glen ("Glen Depo."), at 167:5-168:18 (following the Deputy Mayor's acknowledgment that the "likelihood you are going to get a unit is higher with the community preference than if you were just in the citywide lottery," the Deputy Mayor was asked if the point of the policy is "to increase the odds of insiders compared to what they would be if there were no community preference policy," to which she answered, "yeah, that's the point"). Excerpts of the transcripts are annexed to the Mar. 8, 2018 Declaration of Craig Gurian ("Gurian Mar. 8 Decl.") as Ex. 1 and Ex. 2, respectively.

[2] This list is not intended to be comprehensive. With regard to the last item listed, evidence that opposition to affordable housing development (to which defendant is admittedly responsive) was based on the desire to maintain the racial status quo would point to defendant having been influenced by race-based views. Evidence that opposition has many other causes (*e.g.*, the household income-level for which apartments are being made affordable) and that the City has a variety of carrots with which to combat that opposition (*e.g.*, development of neighborhood infrastructure) would point to the outsider-restriction policy not being necessary, contrary to defendant's justification.

omitted), plaintiffs must be permitted to examine both what defendant – in the form of the various government officials and bureaucrats who comprise it – says and does *not* say, and to scrutinize reasons given for action or inaction to determine whether those reasons are, in fact, pretextual.

The Opinion and Order being objected to herein, *Winfield v. City of New York*, 2018 WL 716013 (S.D.N.Y. Feb. 1, 2018), grants the City permission to keep secret, on the basis of the qualified, deliberative process privilege ("DPP"), numerous plainly relevant documents and responsive information – including, *inter alia*, a document that the City at first produced, but then clawed-back, entitled "Affirmatively Furthering Fair Housing:[3] A Preliminary Guide to NYC's Submission," dated September 2016 (the "CBD," shorthand for clawed-back document)[4]; and the answers to a number of deposition questions.[5] The Opinion and Order is referred to hereafter as the "DPP Opinion."[6] It was issued after two rounds of *in camera* briefing, and includes an analysis of a number of sample documents that it examined *ex parte* and which plaintiffs have never seen.[7]

---

[3] The term affirmatively furthering fair housing will be referred to hereafter as "AFFH."

[4] Bates 21052-89. The redacted version that plaintiffs possess is annexed to the Gurian Mar. 8 Decl. as Ex. 3. The non-redacted version is in the possession of the Magistrate Judge and defendant. By Order of Mar. 7, 2018, posted to ECF, the Magistrate Judge ordered defendant to provide this Court with courtesy copies in paper format of all documents that defendant had submitted *in camera* to her.

[5] There are four deposition-question rulings in connection with the deposition of former HPD Commissioner Vicki Been to which plaintiffs are objecting: those denominated in the DPP Opinion as Been 4, 5, 9, and 10. *See DPP Opinion*, at *4, *19, and *20. *See also* excerpts of trans. of Aug. 2, 2017 deposition of Vicki Been ("Been Depo."), at 178:4-186:23, 225:7-229:20, and 236:12-237:23, annexed to the Gurian Mar. 8 Decl. as Ex. 4. Of the document rulings being objected to, Bates 56994, as still redacted per the DPP Opinion, is annexed to the Gurian Mar. 8 Decl. as Ex. 5. The other document rulings being objected to are those made in connection with documents denominated with an "NYCPRIV" prefix with the numbers (omitting leading zeros) of: 17, 218, 242, 393, 399, 548, 726, 885, 1023, 1556, and 1648.

[6] The DPP Opinion is annexed to the Gurian Mar. 8 Decl. as Ex. 6.

[7] Together with the Gurian Mar. 8 Decl., plaintiffs are submitting each the following to the Court *in camera*: an initial brief and declaration, both dated Jun. 30, 2017; a reply brief, dated Jul. 14, 2017; an initial supplemental brief and declaration, both dated Oct. 6, 2017; and a supplemental brief and declaration in reply, both dated Oct. 20, 2017. The supplemental briefing was directed principally in response to the following question from the Magistrate Judge: when is an issue "tangential to such an extent that it would

The DPP Opinion failed, *inter alia*, to apply properly the balancing test it had adopted, specifically the test used in *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100-01 (S.D.N.Y. 2003), which was adopted from *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979). *See DPP Opinion*, at *6. The balancing test obliges a court to examine at least these factors and identify whether and to what extent they favor disclosure:

(i) the relevance of the evidence sought to be protected;

(ii) the availability of other evidence;

(iii) the 'seriousness' of the litigation and the issues involved; and

(iv) the role of the government in the litigation.

*Id.* These factors then need to be balanced against a final consideration -- the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Id.* at *10. The Court, *id.* at *5, rejected the procedure used in the extensive line of cases categorically denying the application of the qualified DPP where the decision-making process is itself the subject of the litigation. *Children First Found., Inc. v. Martinez*, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007) ("The historical and overwhelming consensus and body of law within the Second Circuit is that when the decision-making process itself is the subject of the litigation, the deliberative process privilege cannot be a bar to discovery.").

Plaintiffs respectfully submit that the DPP Opinion be reversed. Even assuming *arguendo* that a balancing test should be used, all of the factors (save the role of the government in the litigation) were analyzed or weighed incorrectly in the decision, and the purported "balance" that was reached is fatally flawed.

For example, the DPP Opinion drastically curtailed the definition of relevance, failing to

---

mean that there would not be a waiver" of DPP. Trans. of July 21, 2017 Court Conf. ("July 21 Trans.") (ECF 167), at 51:24-52:2. An excerpt of the transcript is annexed to the Gurian Mar. 8 Decl. as Ex. 7.

recognize that evidence not specifically labeled "community preference" can nevertheless be strongly probative. Hence it failed to make any connection at all between evidence in the CBD bearing on the critical question of whether defendant was knowingly influenced by those who want to maintain the racial status quo – like the fact that [Redacted]

[8] *Cf. Winfield v. City of New York*, 2016 WL 6208564, at *7 (S.D.N.Y. Oct. 24, 2016) (citation omitted) (identifying as a route to proving intentional discrimination a demonstration that race-based views factored significantly in positions taken by those to whom the decision-makers were knowingly responsive).

The DPP Opinion even fails to treat as relevant emails *that discuss potential alternatives to the outsider-restriction policy*.

The analysis applied in the DPP Opinion also failed to consider how deliberations actually work in practice, and how they are intertwined, as pertinent to this case. Specifically, it did not recognize (a) that there are multiple, interrelated decision-making processes central to this litigation; (b) that there are several issues, not one, central to claims and/or defenses; (c) what those issues are; and (d) that one must look to the varieties of *proof* appropriately available to prove or rebut claims and justifications that have been raised in the case in order to determine which deliberative processes are central to proving or disproving those claims or justifications.

The DPP Opinion improperly modified the "availability of the evidence" factor by treating it as little more than an echo of the relevance determination factor, and, *inter alia*, failed to understand why plaintiffs' analysis of data is no substitute for information about what defendant knows about segregation and the impact of that knowledge on application of the policy.

The DPP Opinion improperly undermined the "seriousness of the case" element,

[8] CBD, at 25.

effectively discounting the importance of civil rights claims and mitigating their interest, weighing the importance of those civil rights claims against the *government's* interest in keeping deliberations secret, prior to the stage of the process when the governmental interest is actually supposed to be assessed. In other words, it literally double-counted the value of keeping deliberative materials secret.

The ultimate "balancing" applied by the DPP Opinion was fundamentally skewed by the errors described above, serving to exaggerate both the threat of disclosure and the importance of non-disclosure, and improperly minimizing the interest of robust fact-finding, especially in the important, civil rights context. Indeed, one would never know from reading the DPP Opinion that, "[i]n a civil rights action where the deliberative process of State or local officials is itself genuinely in dispute, privileges designed to shield that process from public scrutiny *must yield to the overriding public policies expressed in the civil rights laws*." *Grossman v. Schwarz*, 125 F.R.D. 376, 381 (S.D.N.Y. 1989) (emphasis added).

This brief will proceed as the DPP Opinion did, first focusing on the CBD and the various factors in the balancing process (encompassing Points I to V). The Court should note, however, that much of the discussion is applicable to plaintiffs' objections to rulings on privilege log documents[9] and deposition questions.

The DPP Opinion replicated and magnified all of the DPP errors it had made in connection with its analysis of the CBD when it turned to the privilege log documents and deposition questions, and added others both related to the DPP assertion with respect to many of the documents and other privileges (attorney-client privilege and work-product doctrine). In respect

[9] Reference to "privilege log documents" is actually reference to a subset of documents that the Magistrate Judge had defendant submit *in camera* for her review, and which plaintiffs have never seen. *See DPP Opinion*, at *3.

to these other privileges, the DPP Opinion, *inter alia*, ignored evidence that so-called "work-product" was, according to defendant, work that would in any event have been performed even absent the litigation; and ignored evidence that [Redacted], even as the City purports to rely on the continuance of that process to justify both attorney-client and work-product claims. Critically, the DPP Opinion failed to distinguish between defendant's *communications involving advice*, which may be protected by attorney-client privilege, and defendant's *knowledge of underlying information or facts*, which is not protected.

The Court will note that many of the documents have a DPP claim along with a claim of other privileges. Plaintiffs respectfully submit that it is important for the Court to resolve the DPP aspect regardless of its determination as to other privileges. There is a strong practical reason: the most recent privilege log produced by defendant contains almost 1,500 claims of DPP privilege (alone or in combination with claims of other privileges) out of almost 2,000 claims of privilege total.[10] As such, correcting erroneous determinations in the DPP Opinion will provide important guidance for the handling of a large number of other privilege claims, both in terms of raw number and in terms of the share of documents that defendant acknowledges are responsive.[11]

[10] *See* Gurian Mar. 8 Decl., at ¶ 3.

[11] Separate from the claims of privilege described above are about another 150 documents that had been on defendant's privilege log, but as to which defendant is now claiming non-responsiveness, while at the same time maintaining the privilege claims. *Id.*

# ARGUMENT

## POINT I

### THE DPP OPINION ASSUMES THAT ONLY EVIDENCE SPECIFICALLY DISCUSSING THE OUTSIDER-RESTRICTION POLICY IS RELEVANT, AND THUS EXCLUDES A VARIETY OF EVIDENCE CLEARLY PROBATIVE OF PLAINTIFFS' CLAIMS.

Relevance – whether in connection with discovery generally or with the relevance part of the five-factor balancing test adopted by the DPP Opinion for the applicability of DPP[12] – is not properly determined by whether a document is labeled with the name of the policy being challenged. It is, rather, a determination that can only be properly made by looking at the elements of plaintiffs' claims (or defendant's justifications) that are at issue, and then considering the evidence that tends to assist a party to prove or disprove one or more of those elements. This is nowhere truer than in the discrimination context. As this Court has recognized, "[b]ecause discriminatory intent is rarely susceptible to direct proof, a district court facing a question of discriminatory intent must make a 'sensitive inquiry into *such circumstantial and direct evidence of intent as may be available.*'" *Winfield*, 2016 WL 6208564, at *7 (emphasis added) (citation omitted).

The DPP Opinion chose to invent a new, specialized, and narrow definition of relevance. For example, in its analysis of the CBD, the DPP Opinion addressed the "relevance of the evidence sought to be presented" part of the balancing test as follows:

> There are no admissions or analyses in the [CBD] that are *specific* to the Community Preference Policy and, accordingly, consideration of the 'relevance' factor (pursuant to the narrower definition discussed above) weighs against disclosure here.

*DPP Opinion*, at *11 (emphasis added). The statement misses the point, and reflects a confusion

[12] *See* delineation of the *Rodriguez* factors, *supra*, at 3.

between a claim on the one hand, and the evidentiary proof bearing on that claim on the other.[13]

*Evidence* need not be *identifiably labeled* with the name of a claim in order to be *relevant* to a claim. There are a host of routes by which plaintiffs can prove elements of their case using information not "specific" to the policy. Indeed, one of plaintiffs' central theories explicitly posits that defendant's conduct is *not* specific to outsider-restriction, but that defendant "has an overarching policy of being responsive to those who do not want the residential status quo to change, and that the outsider-restriction policy is one manifestation of that overarching policy."[14] There is no indication that the DPP Opinion considered any of these things.

Thus, for example, plaintiffs have alleged that defendant's outsider-restriction policy:

> is racially motivated, arising from efforts to maintain the support of community boards, local politicians, and advocacy groups who want to preserve the existing racial or ethnic demographics of particular districts, and apprehension that the abandonment of the policy would generate "race– or ethnicity-based" opposition from those same actors.

*Winfield*, 2016 WL 6208564, at *7 (referencing plaintiffs' First Amended Complaint, ECF 16, at ¶¶ 161-63). In denying defendant's motion to dismiss, this Court cited these allegations as among those "from which an inference of discriminatory intent can be drawn." *Winfield*, 2016 WL 6208564, at *7.[15] This is because plaintiffs "can establish a *prima facie* case of disparate

[13] As it happens, the DPP Opinion's disclaimer of the presence of material explicitly about outsider-restriction is wrong. [Redacted]

[14] Plaintiffs' Initial Reply Brief, Jul. 14, 2017, at 9.

[15] *See also* First Amended Complaint, at ¶ 171 (alleging "the City's responsiveness, for reasons of political expediency and otherwise, to racially- and ethnically-influenced community and political opposition to permitting neighborhood demographics to change . . ."). Excerpts of the First Amended Complaint are annexed to the Gurian Mar. 8 Decl. as Ex. 8.

treatment" by showing that the existence of race-based views was a significant factor "in the position taken by the municipal decision-makers themselves *or by those to whom the decision-makers were knowingly responsive*." *Id.* (emphasis added) (citation omitted).

Municipal decisions may be impermissibly influenced by pro-segregation views without defendant having specifically been told the words: "I support the outsider-restriction policy because I want to maintain the racial status quo." If defendant learns about a *generalized* desire to maintain the racial status quo, and then adopts or maintains the policies it believes it needs in order not to alienate forces expressing that desire, then it has been influenced impermissibly by race-based views. As such, it does not matter how defendant learns of the race-based views (whether they emerge in the context of proposed changes in the zoning of housing, of proposals for the siting of homeless shelters, of proposed changes in school attendance zones, or otherwise). Once defendant has that knowledge, regardless of the source, it can then decide to execute an overarching policy of responsiveness to those race-based views, of which creating, expanding, and maintaining an outsider-restriction policy is one manifestation.[16]

Plaintiffs therefore must be permitted to obtain evidence that defendant does *know* (and considers, in its deliberations, the fact that) there are members of the public, local politicians, advocacy groups, and others who want to maintain the racial status quo of neighborhoods – or, to put it another way, those who are resistant to fair housing.[17] So, when the CBD observes that

[16] The DPP Opinion also fails to appreciate that there was no reason for those opposed to racial neighborhood change to direct comments specifically to the outsider-restriction policy because defendant had made clear over a very long period of time, reinforced repeatedly by the current administration, that it continues to stand behind the policy.

[17] The definition of "affirmatively furthering fair housing" pursuant to the regulations by which defendant was developing an Assessment of Fair Housing ("AFH") included taking meaningful actions to replace "segregated living patterns with truly integrated and balanced living patterns . . . ." 24 C.F.R. § 5.152 (2018).

[Redacted]

*Cf. United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1221 (2d Cir. 1987) ("Both the Council and the community equated low-income family housing with minorities and senior citizen housing with whites.").

Defendant of course remains entitled to put on contrary evidence that it was *not* being responsive to the broad spectrum of New Yorkers that are resistant to fair housing, but that does not change the fact that evidence going directly to the "knowing" prong is of core relevance for plaintiffs' claims.

There is additional material of core relevance in the CBD. As this Court has observed, plaintiffs "allege that the City has had a history of enacting discriminatory zoning and housing policies . . . ." *Winfield*, 2016 WL 6208564, at *7. The "historical background" of a decision is among "relevant considerations for discerning racially discriminatory intent . . . ." *Id.* (citation omitted).

For example, plaintiffs have alleged that defendant knows that, as a matter of policy, it causes housing to be developed in a way that results in the housing being built generally in areas

[18] CBD, at 25 (emphasis added).

[19] *Id.* (emphasis added).

[20] *Id.* (emphasis added).

of relatively higher racial/ethnic minority concentrations and lower-income households than can be found in areas of higher opportunity.[21] Defendant denied the allegation.[22] [Redacted]

In the face of the foregoing, there is no legitimate way for the DPP Opinion to have reached the conclusion that "[t]here is nothing in the presentations that indicates the Community Preference Policy is designed to placate race-based community opposition to affordable housing." *DPP Opinion*, at *11. The failure to recognize any of the ways in which a municipal discrimination case of this type is built circumstantially – including defendant's knowledge of opposition to neighborhood demographic change and the pattern of where defendant builds housing – is clearly

[21] First Amended Complaint, ¶ 135.

[22] Amended Answer (ECF 51), at ¶ 45. An excerpt of the Amended Answer is annexed to the Gurian Mar. 8 Decl. as Ex. 9.

[23] CBD, at 28 (emphasis added).

[24] *Id.* (emphasis added).

[25] *Id.* at 26 (emphasis added).

erroneous and contrary to law.

The DPP Opinion attempts to buttress its no-relevance conclusion by trying to characterize the CBD as having "even less relevance than a draft of the City's submission [of a final Assessment of Fair Housing in 2019], which itself would be subject" to revisions and changes. *Id.* at *10 (citation omitted). But the function of the CBD was *not* to be a draft of a document that was at that time due three years away.[26] On the contrary, it was the final document used:

[Redacted]

The fact that defendant was at an early stage of the AFFH process does nothing to change the fact that the team [Redacted] [28] had made a series of observations that are directly on-point, and provide fruitful avenues for further inquiry, precisely what discovery is supposed to do (avenues such as, *e.g.*, "What were the bases for your observation

[26] On Jan. 5, 2018, HUD issued a notice extending the deadline for submission of an AFH under the next submission deadline that falls after Oct. 31, 2020. AFFH: Extension of Deadline for Submission of Assessment of Fair Housing, 83 Fed. Reg. 683, 2018 WL 287980 (Jan. 5. 2018). The notice explained that program participants like defendant "must continue to comply with existing, ongoing obligations to affirmatively further fair housing," and that they must, until the deadline for AFH submission, continue to provide AFFH certifications that certify that a jurisdiction "will affirmatively further fair housing, which means that it will conduct an analysis of impediments (AI) to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions." *Id.* These are not simply future-oriented obligations; on the contrary, each time a jurisdiction submits a request for payment under a covered program, it impliedly certifies that is *has* complied with its obligations. *See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, N.Y.* ("*ADC v. Westchester*"), 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

[27] *See* July 12, 2017 Declaration of David Quart ("Quart Decl."), at 4, ¶ 7. The declaration is annexed to the Gurian Mar. 8 Decl. as Ex. 10.

[28] Quart Decl., at 1-2, ¶¶ 1-2.

that [Redacted] ? Where have you found that to be the case? What statements of [Redacted] were made? Who made them? Who knew about them? How did defendant try to [Redacted] , if at all?"). The fact that HPD might choose to ignore or modify these observations in a report to HUD that will be made years from now does not change what defendant's personnel knew or believed at the time of the presentation.

The DPP Opinion also minimizes the significance of the document by stating that it was prepared subsequent to the commencement of this litigation and "provide[s] no insight into the City's decisions to implement, expand, or maintain the Community Preference Policy . . . ." *DPP Opinion*, at *10. This is a *non-sequitur*. First, the litigation involves a continuing violation – the policy is still being maintained. Second, information gathered for the CBD reflects facts on the ground, and was among the information that defendant should have been using to assess the accuracy of its implied certifications of current compliance.[29] Third, the information ranges back over time (*e.g.*, [Redacted] ). Fourth, to the extent that there are viewpoints expressed (in the CBD or other documents at issue), it is error to assume that the viewpoints were born at the moment that the document in question was created. *Cf. Kazolias v. IBEWLU 363*, 806 F.3d 45, 49-50 (2d Cir. 2015) (finding that remarks from the defendant union's business manager "constituted evidence that, at the time he spoke, he (and consequently the union) harbored retaliatory animus against Plaintiffs for their complaints," and further finding that, "[a] jury could reasonably infer that [the business manager's] resentment against [plaintiffs] was not born at the instant he expressed it, but had been brewing ever since they brought their age discrimination charges in September 2008"). The timing of the document does not in any way reduce its relevance.

[29] *See* discussion of implied certification, *supra*, at 12 n.26.

The DPP Opinion mounts two further attacks on the relevance of the CBD, both of which would reflect improper fact determinations even at the summary judgment stage, let alone the discovery stage. First, the DPP Opinion states that the "document does not reflect a disregard of federal fair housing requirements; rather, it reflects the opposite—that the City takes its obligations seriously and created a preliminary presentation to fully analyze and discuss how to comply with the new rule." *DPP Opinion*, at *10. Ironically, even if the DPP Opinion's selected interpretation of the facts were true, that would not reflect a lack of relevance, but would rather be of direct relevance to one of the allegations that this Court ruled was among those from which an inference of discriminatory intent can be drawn: that defendant "has implemented the Policy without studying policy questions relating to its impact on housing segregation or fair housing goals." *Winfield*, 2016 WL 6208564, at *7.

As it happens, there are multiple ways that defendant can, and has, ignored its fair housing obligations under federal law and regulation in connection with the outsider-restriction policy.[30] One is to ignore it altogether. Plaintiffs already have evidence of this happening when defendant, in 2002, raised the percentage of units in a development subject to outsider-restriction from 30 percent to 50 percent. The HPD Commissioner at the time did not even bother to investigate why defendant had limited the preference to 30 percent in the first place;[31] it never occurred to or "dawned on" her that raising the percentage could risk perpetuating segregation – the issue was

[30] Presumably, defendant's position is that its normal practice is to *obey* federal laws and regulations; a departure from that normal practice would represent a departure both procedurally and substantively. *Cf. id.* (citations omitted) (identifying both procedural and substantive departures from the norm as among relevant considerations for an inquiry into discriminatory intent).

[31] *See* trans. of Oct. 26, 2017 deposition of Jerilyn Perine ("Perine Depo."), at 187:21-189:9. An excerpt of the Perine Depo. is annexed to the Gurian Mar. 8 Decl. as Ex. 11.

"never raised."[32] [Redacted]

But another way to ignore one's federal fair housing obligations would be to study the policy, *recognize* its impact, and continue with a policy that has a disparate impact anyway. Thus, the import of the document can very well *not* be that defendant "takes its obligations" seriously, but the opposite. The [Redacted] defendant knew what its obligations were [Redacted], and would (if not kept from plaintiffs) allow inquiry as to whether [Redacted] was avoiding questions that might cast doubt on the legality of defendant's policy, or whether the decision to stick with the policy was made notwithstanding [Redacted]. Without the document, plaintiffs would only have Ms. Been's disclaimer of review having been done.[34]

Finally, the DPP Opinion evades the fact that the CBD demonstrates defendant's knowledge [Redacted] by arguing that "the City's alleged knowledge that segregation exists—according to HUD's data and suggested initial methodology—does not indicate any acceptance of the data or methodology or bear on knowledge

[32] Perine Depo., at 191:8-192:6.

[33] CBD, at 3. (It may say more on the subject, but the material directly below the quoted material was redacted, and has not been made available to plaintiffs.).

[34] Ms. Been stated that, outside of the context of a HUD compliance review and this litigation, "[w]e have reviewed the implementation of the policy *but not the policy itself*." Been Depo., at 286:15-287:8 (emphasis added).

about the impact, if any, of the Community Preference Policy on the racial demographics of community districts." *DPP Opinion,* at *11. This is the DPP Opinion's response to the portion of the document which [Redacted]

."[36]

Even were it the case that defendant's "preliminary findings" did not "indicate any acceptance of the data or methodology," that obviously does not reduce the relevance of the document. To what extent does defendant agree or disagree that New York City [Redacted]

Did defendant accept that [Redacted]

? This, again, is the essence of discovery.

And, lastly, the DPP Opinion's conclusion that [Redacted] do not bear on *knowledge* about the racial impact of the policy ignores the "overarching intuitive principle" that, "where a community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants [. . .], a selection process that favors its residents *cannot but work* a disparate impact on minorities." *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 62 (D. Mass. 2002) (emphasis added).

[35] CBD, at 8.

[36] *Id.*

In sum, the DPP Opinion directly contravenes the requirement of a "sensitive inquiry," *Winfield*, 2016 WL 6208564, at *7 (citation omitted), ignores numerous issues that bear on plaintiffs' claims, and actively interprets the CBD in a manner that favors defendant, instead of simply identifying the document as one with core relevance. In doing so, the DPP Opinion is clearly erroneous and contrary to law.

## POINT II

### THE DPP OPINION IMPROPERLY RESTRICTS THE DEFINITION OF RELEVANCE, FAILS TO LINK THE CONCEPT OF RELEVANCE TO THE KINDS OF PROOF NEEDED TO ESTABLISH CLAIMS OR TO REBUT JUSTIFICATIONS, AND DOES NOT RECOGNIZE THAT THERE ARE MULTIPLE, INTERRELATED DECISION-MAKING PROCESSES CENTRAL TO THIS CASE.

In Point I, we focused on numerous ways in which the DPP Opinion failed to understand the relevance of the CBD. Here, we step back to analyze more broadly how the DPP Opinion's concept of "relevance" for purposes of a balancing test was clearly erroneous and contrary to law. The DPP Opinion, before turning to relevance, did, in fact, acknowledge that the CBD mentioned community opposition to affordable housing, which the DPP Opinion further acknowledged "is one of the City's primary defenses," and also that other portions of the CBD "implicate issues that are *similarly pertinent* to the claims and defenses in this litigation." *DPP Opinion,* at *9 (emphasis added). So how did the DPP Opinion then conclude that pertinent information was not relevant?

The first error is that the DPP Opinion designated the CBD (and the other documents or deposition questions dealt with in the DPP Opinion) as "presumptively privileged." *DPP Opinion*, at *10. There is an important distinction between a document that is "deliberative" and one that is "presumptively privileged" pursuant to DPP. A document could be "deliberative," as that term

is used,[37] but the whole point of the balancing test is to allow that test to be performed without already having made a presumption about whether it is privileged or not prior to that analysis.[38]

Second, the DPP Opinion holds that information will be deemed relevant *only* if it is central to the proper resolution of the controversy. *DPP Opinion*, at *10. But the lone authority cited for this proposition, *Five Borough Bicycle Club v. City of New York*, 2008 WL 4302696, at *1 (S.D.N.Y. Sept. 16, 2008), does not set forth this limitation. Instead, *Five Borough Bicycle Club* states, unexceptionally, that "[t]he more important the presumptively privileged information is to the proper resolution of the controversy, the more likely the party seeking the discovery is to prevail on the point." *Id.* So there is no bright-line exclusion of anything a court decides is not "central."[39] And yet that is what the DPP Opinion did throughout.

---

[37] Given the numerous *factual* observations in the CBD, plaintiffs maintain their view that the document is largely not deliberative. Moreover, the document was post-decisional in respect to outsider-restriction. Deputy Mayor Glen stated in her deposition that "we didn't see any reason why we should change the policy" and, so, "pending any external pressure to do anything, any legal reason to change it . . . , we were going to continue to do what we were doing." Glen Depo., at 301:23-302:8. Deputy Mayor Glen did not put a specific time to that conclusion, but we do know that, by Nov. 13, 2015, well before the creation of the CBD, defendant had already decided to lock the policy in place during the litigation. *See* Been Depo., at 281:20-282:23 (demonstrating then-HPD Commissioner Been acknowledges that she said, at a Nov. 13, 2015 public presentation, that "while that litigation is pending, I won't be changing anything," and then explained that "I didn't think that we would be changing the percentage except as part of the litigation. We weren't going to do it. We weren't going to do something independent of the litigation").

[38] If any pre-balancing presumption is to be made, it is that a document is *not* deemed protected under DPP unless and until the resisting party proves that the document clearly falls within the ambit of DPP. *See In re The Reserve Fund Sec. & Derivative Litig.*, 2010 WL 11248673, at *11 (S.D.N.Y. Nov. 30, 2010) (citation omitted) ("While the deliberative process privilege protects important government interests, it still must be construed narrowly, as sustaining any privilege prevents a party from obtaining access to otherwise relevant information.").

[39] The only other case relied on by the DPP Opinion for the idea of "narrower" relevance is *Torres v. CUNY*, 1994 WL 502621, at *4 (S.D.N.Y. Sept. 14, 1994). That case, a reconsideration of an earlier decision, occurs in the specialized context of an academic peer review process where, when an applicant for tenure has been provided a detailed statement of reasons, as was the case with plaintiff Torres, the balance shifts away from disclosure and in favor of confidentiality, per *Gray v. Bd. of Higher Educ., City of N.Y.*, 692 F.2d 901, 908 (2nd Cir. 1982). The fact that collateral information was not required to be produced, in the circumstances where "disagreements over the merits of an individual's scholarship do not prove discrimination" and where plaintiff "has failed to point to any evidence or to even articulate any substantial basis to support a suggestion that the reasons offered by Defendants are either false or a pretext for

Similarly, the DPP Opinion states that "'relevance' for purposes of invading a privilege is defined narrowly. . ." *DPP Opinion*, at *17 (citation omitted). That is incorrect. As the decision acknowledged in the section discussing the attorney-client privilege (but equally applicable to DPP or the relevance prong of it), "courts should construe assertions of privilege narrowly, sustaining the privilege 'only where necessary to achieve its purpose.' *In re Cty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)); *see also In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000)." *DPP Opinion*, at *8. Neither DPP nor the relevance prong of the balancing test is properly an exception to that rule.

Third, the DPP Opinion states in connection with an intentional discrimination analysis that "the scope of evidence relevant to that analysis has been circumscribed by the courts." *Id.* at *11.[40] This, too, is error. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977), is cited by the DPP Opinion for the proposition. In fact, *Arlington Heights* did no such thing. On the contrary, in addition to stating that its summary of factors did not purport "to be exhaustive," *id.* at 268, *Arlington Heights* emphasized the need for a thorough and wide-ranging inquiry: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into *such circumstantial and direct evidence of intent as may be available*." *Id.* at 266 (emphasis added).[41] It did *not* hold that the "sensitive inquiry" was one that had to be

---

discrimination," *Torres*, 1994 WL 502621, at *4, is both entirely inapposite to this case, and, as to relevance, is not different from a routine proportionality assessment pursuant to Fed. R. Civ. P. 26(b)(1).

[40] According to the New Oxford American Dictionary, "circumscribe" means to "[r]estrict (something) within limits."

[41] The DPP Opinion also cited *United States v. Yonkers*, 837 F.2d 1181, 1221 (2nd Cir. 1987) for the idea that courts have "circumscribed" the circumstantial evidence that is available to a plaintiff seeking to prove intentional discrimination. *DPP Opinion*, at *11. There is no indication in *Yonkers*, explicit or implicit, that it was trying to circumscribe evidence any more than there was in *Arlington Heights*.

limited to a circumscribed subset of the evidence available. *See also Winfield*, 2016 WL 6208564, at *7 (emphasis added) (citation omitted) (explaining that discriminatory intent may be inferred from "the *totality* of the relevant facts").

Fourth, and tightly related to the previous error, the DPP Opinion fails to distinguish between *claims* and *evidence supporting claims*. Hence, the DPP Opinion cuts itself off from relevant evidence when it asserts that defendant's "decisions to implement, expand, or maintain the Community Preference Policy" are "significantly" the "only City decisions at issue in this case." *DPP Opinion*, at *10. While the *ultimate* issue of "did discrimination play a role" only has to be reached in connection with defendant's decisions to implement, expand, or maintain outsider-restriction,"[42] it is still the case that other of defendant's decisions (like where defendant chooses to site or not site affordable housing), or motivations (like why defendant wanted to apply the outsider-restriction policy to referrals of homeless New Yorkers to affordable housing, or to house the homeless "close to home" regardless of how that concentrates the homeless population in certain neighborhoods),[43] can powerfully *shed light on* the resolution of the ultimate question (as

[42] There are, of course, other ultimate questions to be resolved in connection with plaintiffs' claims that defendant's outsider-restriction policy causes a disparate impact and perpetuates segregation. These ultimate questions include: "did defendant prove that its policy is *necessary* to fulfill a substantial, legitimate, and non-discriminatory governmental interest of defendant," and, if so, "are there less discriminatory alternatives available?" (The ultimate questions, and burdens, are different under the New York City Human Rights Law than under the Fair Housing Act, and the parties differ as to whether a governmental interest can be looked at in isolation or must be examined in the context of co-existing governmental interests – like providing residential mobility to residents – but it is not necessary for this briefing to go into those details.)

[43] *See* excerpts of transcript of Mayor de Blasio's speech on the City's homelessness plan, Feb. 28, 2017 (ECF 122-16), at 7 and 13, annexed to Gurian Mar. 8 Decl. as Ex. 12 (critiquing explicitly previous efforts to site homeless shelters by saying that government has made it harder because "we've sent people all over and there's not a sense of the people who are being served are from my very own community – they are just like me – and that's something we need to change"; and stating that, "[i]f [a] community board has 50 people in [the] shelter system, we want [them to] have some kind of capacity like that. If they have thousands, we want them to have capacity for the people from their neighborhood, even if it means enough capacity for thousands of people.").

illustrated in Point I, *supra*).

Fifth, just as the DPP Opinion artificially narrowed pertinent evidence to that which is specifically identified by the correct label, it improperly assumed a discrete, siloed, outsider-restriction decision-making process. Regardless of the name given to a decision-making process, it should have treated as relevant *any* related process that bore on defendant's motivations and intentions. *See, e.g.*, *Dep't of Econ. Dev. v. Arthur Andersen & Co. (U.S.A.)*, 139 F.R.D. 295, 299 (S.D.N.Y. 1991) (emphases added) (citation omitted) (holding that "when the *factors shaping decisions* made by government officials are at issue, privileges designed to shield the deliberative process 'may not be raised as a bar against disclosure,'" and further holding that, where the adjudication of a claim "turns upon issues of knowledge, reliance, and causation, direct evidence of the deliberative process is *irreplaceable*"); *see also Grossman*, 125 F.R.D. at 384 (where part of the alleged retaliation was how New York City's Corporation Counsel and Review Board handled the plaintiff's appeal, the deliberative process regarding that appeal was the crux of the case; accordingly, the "thinking process" of the defendants was not to be protected).

The DPP Opinion, although rendered after supplemental briefing on the question of when an issue is "tangential to such an extent that it would mean that there would not be a waiver" of DPP[44] was provided, failed to appreciate that the decision-making process in this case was *complex and multifaceted*.[45] This despite the fact that, as plaintiffs pointed out, Ms. Been:

> has admitted that it is not as though there is a mandatory inclusionary housing ("MIH") policy; or a particular subsidy; or standalone policies as to mobility strategies, neighborhood investment that complements housing, density decisions, or housing siting decisions that exist "in isolation." Been Depo., at 252:10-253:11. Rather, defendant has "*a* multipronged approach" to "meet the affordable housing challenge," and all of the elements referenced above are "prongs of the city's *multipronged strategy* for

[44] July 21 Trans. at 51:24-52:2.

[45] *See especially* Point II of plaintiff's Oct. 6, 2017 Supplemental Brief.

> affordable housing." *Id.* at 251:22-253:11 (emphases added). As such, the ORP – which, like the other so-called prongs, is intended to help defendant "achieve its ambitious affordable housing goals" – is properly understood within the context of a single, multipronged affordable housing strategy.[46]

Likewise with the relationship between AFFH decision-making, on the one hand, and decision-making about outsider-restriction or other aspects of defendant's affordable housing policy on the other. As plaintiffs pointed out:

> According to Ms. Been herself, everything that defendant developed regarding affordable housing was crafted "certainly against the backdrop of fair housing." Been Depo., at 253:12-20. When asked, "It's not like there is some fair housing silo over there. You were thinking about fair housing when you think about the other things [prongs of the affordable housing policy]?" she confirmed, "That is correct." *Id.* at 253:21-254:3. Accordingly, fair housing policy is appropriately described as being a decision process (to the extent it occurs) that exists across the various prongs of the affordable housing strategy (not just fair housing standing alone or fair housing in relation to the ORP). It cannot be treated for DPP purposes as a separate and protected silo.[47]

The DPP Opinion failed to recognize any of this undisputed interconnectedness.

In the final analysis, the DPP Opinion's insistence on narrowing the definition of relevance has the peculiar result that, if defendant prevails on DPP, plaintiffs do not get evidence that they need; if plaintiffs prevail, they still only get a subset of the relevant evidence that they need to prove their case or disprove defendant's justifications. There is no proper reason for the narrowing beyond the proportionately analysis already built into Fed. R. Civ. P. 26(b)(1).

The DPP Opinion erred in each of the ways described above, and thus its analysis of the various documents and deposition questions was necessarily unfairly weighted in defendant's favor. As such, the DPP Opinion was clearly erroneous and contrary to law.

---

[46] Oct. 6, 2017 Supplemental Brief, at 8-9 (citation omitted). The citation for the stated purpose of the ORP, omitted in the block quote, is the Oct. 2, 2015 Declaration of Vicki Been ("Been 2015 Decl.") (ECF 18), at 4, ¶ 8. The Been Decl. is annexed to the Gurian Mar. 8 Decl. as Ex. 13.

[47] Been 2015 Decl., at 10.

## POINT III

### THE DPP OPINION FAILED TO ASSESS "AVAILABILITY OF OTHER EVIDENCE" AS AN INDEPENDENT FACTOR AND IGNORED THE IMPORTANCE OF DEFENDANT'S KNOWLEDGE OF HOW SEGREGATED NEW YORK CITY IS.

The DPP Opinion's cursory discussion of the "availability of other evidence" factor in connection with the CBD resulted in another conclusion that this factor, too "tips the balance against permitting an invasion of the City's privilege." *DPP Opinion*, at *11. In fact, except for a comment that reflects a failure to appreciate the importance of *defendant's* understanding of the data, *id.*, the DPP Opinion does not actually base its conclusion on the availability or unavailability of other evidence at all. Instead the DPP Opinion simply restates its view that the evidence in the document is not "central" (and, thus, availability or unavailability does not matter). *Id.* This, without warrant, effectively erases the availability of other evidence factor from the balancing test that was ultimately supposed to be performed.

After the DPP Opinion (erroneously) concludes that plaintiffs' have the *data* they need, the DPP Opinion fails to discuss *at all* everything else in the CBD – "[a]ny remaining privileged material in the AFFH Presentations that cannot be gathered from the data" (very substantial portions of the CBD) – on the dimension of unavailability of evidence. *Id.*

The error is significant, as can easily be discerned when [Redacted], on the one hand, alongside the evasiveness of defendant's witnesses' live testimony when it came to their contorted reluctance to acknowledge their familiarity with those who wish to maintain the racial status quo – let alone with the commonness of that viewpoint – on the other. For example, former HPD Commissioner Rafael Cestero insisted that he "never" heard anyone "express any concern – any person or organization express any concern that the racial or

ethnic composition of a neighborhood was going to change . . . ."[48] Steve Banks, defendant's current Commissioner of Social Services, who oversees Homeless Services, insisted that, in his time in government, he had not heard "anyone or any groups making an appeal to maintain the racial status quo of a neighborhood," either explicitly or implicitly.[49] He asserted that he could recall only one circumstance where he communicated with Mayor de Blasio "about the role, if any, that race plays in terms of the difficulty the city encounters either in siting shelters or in placing homeless New Yorkers in housing . . . ."[50]

Carl Weisbrod, defendant's Director of City Planning during the first de Blasio administration, claimed not to have heard concerns about neighborhood change either explicitly or implicitly in racial terms.[51] Alicia Glen, who acknowledged at her deposition that, "When I became Deputy Mayor for housing and economic development . . . racial patterns was not – or race discrimination issues were not front and center at all with what we were deeming to be the challenges facing the housing market,"[52] also was resistant to acknowledging race-based opposition to neighborhood change. After avoiding the question with a non-responsive answer, she said that opposition to affordable housing development was never at all based on race or

[48] *See* trans. of Nov. 14, 2017 deposition of Rafael Cestero at 214:2-215:7. An excerpt of the deposition is annexed to the Gurian Mar. 8 Decl. as Ex. 14.

[49] *See* trans. of Nov. 29, 2017 deposition of Steven Banks ("Banks Depo.") at 182:3-18. An excerpt of the Banks Depo. is annexed to the Gurian Mar. 8 Decl. as Ex. 15.

[50] *Id.* at 179:20-180:25. The circumstance arose in connection with a meeting where intense opposition to a shelter in Maspeth, Queens was expressed where Mr. Banks did understand the phrases "Go back to East New York" and "Maspeth Lives Matter" to be race-linked or race-coded." *Id.* at 175:13-25. The witness repeatedly resisted attempts to get him to quantify the extent of race-based opposition to homeless shelters or to homeless persons residing in a neighborhood. *See, e.g., id.* at 170:11-180:25.

[51] *See* trans. of July 27, 2017 deposition of Carl Weisbrod ("Weisbrod Depo."), at 102:17-22. An excerpt of the Weisbrod Depo. is annexed to the Gurian Mar. 8 Decl. as Ex. 16.

[52] Glen Depo., at 110:13-20.

ethnicity, and that she never had a conversation where a "pushback against the prospect of change in a neighborhood's racial or ethnic demographics" was either articulated or implied.[53] And Vicki Been went to the extreme of asserting that she did not know "which is a greater fear" about people coming into a neighborhood looking different: whether they have "green or purple hair" or are "of a different racial or ethnic background."[54]

It is clear that witnesses are reluctant to acknowledge the scope and breadth of resistance to fair housing; [Redacted] .[55]

As for the DPP Opinion's point about the ability of plaintiffs to analyze data, it ignores altogether the fact that defendant's *own* knowledge of the scope of segregation and its obvious implications regarding the impact of the outsider-restriction policy is quite relevant, (*see, supra,* at 15-16), [Redacted] , and not available by plaintiffs' conducting their own analysis.

Thus, just as the DPP Opinion altered, constricted, and failed to analyze properly the relevance factor so as to achieve a result pointing away from disclosure, it did the same with the availability of other evidence factor. Doing so was clearly erroneous and contrary to law.

---

[53] Glen Depo., at 38:13-41:7.

[54] Been Depo., at 144:13-145:7.

[55] It should also be noted here that the discordance between the evasiveness of the witnesses and [Redacted] should properly be taken into account as another piece of the relevance factor: evidence of consciousness of guilt. *Cf. United States v. Apple*, 952 F.Supp.2d 638, 693, n. 59 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S.Ct 1376 (2016) (finding that defendants' "denials at trial that they discussed the Apple Agreement with one another in those communications, or that those conversations occurred at all, in the face of overwhelming evidence to the contrary, strongly supports a finding of consciousness of guilt").

## POINT IV

### THE DPP OPINION IMPROPERLY MODIFIED THE FACTOR ASSESSING THE "SERIOUSNESS OF THE LITIGATION AND THE ISSUES INVOLVED" IN ORDER TO AVOID RECOGNIZING THAT THE FACTOR CLEARLY POINTS IN FAVOR OF DISCLOSURE.

The factor involving the "seriousness of the litigation and the issues involved" should have been easily resolved to conclude that the factor weighs in favor of disclosure. This is a matter involving whether racial discrimination – whether intentionally and/or by effect – deprives hundreds of thousands of New York City households of the opportunity to compete on an even playing field for affordable housing. It implicates defendant's knowledge of resistance to change in neighborhood demographics; it requires the testing of defendant's subjective motivations, including its claims about the need and purpose of the outsider-restriction policy; the relationship, if any, between the policy and anti-displacement efforts; alternative means available to defendant to achieve support for affordable housing development; etc.

Nominally, the DPP Opinion appears to understand this: "It is indisputable that claims of racial discrimination raise serious issue of public concern and that, in such cases, the public has a significant interest in a plaintiff's ability to obtain all the information needed to prosecute her claims." *DPP Opinion*, at *11. The foregoing should have been enough to have identified the factor as one weighing in favor disclosure. Doing so would have been consistent with how courts treat the seriousness of civil rights claims in the context of evaluating DPP. *See, e.g.*, *Favors v. Cuomo* ("*Favors II*"), 2013 WL 11319831, at *11 (E.D.N.Y. Feb. 8, 2013) (citations omitted) (holding that, while some of the balancing factors varied among discovery categories, "the seriousness of the claims" factor was a constant that favored disclosure across discovery categories because it is "indisputable" that racial discrimination and malapportionment claims in redistricting cases "raise serious charges about the fairness and impartiality of some of the central institutions

of our state government"). The importance of full and fair litigation of civil rights claims is also a theme of cases that ruled that DPP was altogether inapplicable. *See, e.g., Grossman*, 125 F.R.D. at 381 (emphasis added) (holding that, "[i]n a civil rights action where the deliberative process of State or local officials is itself genuinely in dispute, privileges designed to shield that process from public scrutiny *must yield to the overriding public policies expressed in the civil rights laws*.").

But the DPP Opinion did not stop where the factor required it to, and then, engage later in a balancing process. Instead, the DPP Opinion trivialized the civil rights interest involved, and, invoking the idea that "every federal case is serious," fundamentally changed the factor from "seriousness of the litigation" to *"seriousness of the litigation" as weighed against "the ability of City officials to function properly in their roles without the distraction of civil litigation." DPP Opinion*, at *11 (emphasis added) (citation omitted).

There is *no* authority for this proposition, save a decision from the same Magistrate Judge several months ago, which itself cited no authority for modifying the "seriousness of the litigation" factor. *See Citizens Union of City of N.Y. v. Att'y Gen. of N.Y.*, 269 F. Supp. 3d 124, 168-69 (S.D.N.Y. 2017) (expressing dissatisfaction with the "seriousness of the case" factor, and modifying it so that there would be fewer cases where the factor points towards disclosure).

*Citizens Union* insists – and the *DPP Opinion* relies only on this reasoning – that there has to be a mechanism *within the "seriousness of the case" factor* to have a rule "distinguishing among those cases that are, and are not, serious enough to warrant" the disclosure of deliberative (or legislative) materials. *Citizens Union*, 269 F. Supp. 3d at 168; *DPP Opinion*, at *11 (adopting the *Citizens Union* test).

This is egregious error. First, of course, there is a case-by-case determination as to seriousness that is fact- and subject-matter based. In reality, not every federal case has the same

importance. Even in the subset of cases against a governmental entity, not every case turns on the motivation of the government or is equally serious in terms of the *public* interest involved (certainly not all are as serious in that sense as civil rights matters). *See, e.g.*, *Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 110 (S.D.N.Y. 2005) (distinguishing between a more serious case in terms of the public policies involved – one where the litigation implicated "state and federal policies that would effect [sic] living conditions of thousands of New York City tenants" – and a less serious one in terms of the public interest – one involving the restructuring of a debt).

Most importantly, the departure from the normal definition of the "seriousness of the case" factor represents an unwillingness to allow the balancing test to play out. The potential interest in preserving government deliberations as confidential is *already accounted for* with its own factor that has to be balanced against the other four factors.[56] In other words, there is a pre-existing framework that is designed to distinguish "among those cases that are, and are not, serious enough to warrant" the disclosure of deliberative materials. That is the *Rodriguez* balancing test on which the DPP Opinion is purportedly relying.

What the DPP Opinion sees as a problem (because the test for seriousness is "too often" met) is no more of a problem than the fact that, in cases against government entities, the "role of the government in the litigation" factor is met all the time. The fact that there are many cases where the government is the only actor has not led courts to change that factor. Likewise, the fact that there are many serious civil rights cases cannot and should not lead courts to avoid the reality that

[56] The DPP Opinion is not unaware of this procedure, and purports to engage in it at the end of its discussion of DPP in the context of the CBD: "When these first four *Rodriguez* factors are balanced against the fifth factor – the potential chilling effect that disclosure will have on government employees . . . ." *DPP Opinion*, at *12.

there can be many reasons in many cases why DPP – which, after all, is a *qualified* privilege – should not be upheld. That is not, as the DPP Opinion would have it, a bug in the system that needs to be fixed, but rather a feature of a system that recognizes that privileges "must be strictly construed" and only accepted to the limited extent that excluding relevant evidence has a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citation omitted).

As with relevance and availability of other evidence, the DPP Opinion improperly altered the "seriousness of the case" factor and consequently did not analyze the factor correctly. Doing so was clearly erroneous and contrary to law, and, by definition, rendered the balancing process that was ultimately engaged in clearly erroneous and contrary to law.

## POINT V

### THE DPP OPINION DID NOT PROPERLY BALANCE THE RELEVANT FACTORS, MINIMIZING THE PRO-DISCLOSURE FACTORS THAT ARE ESPECIALLY IMPORTANT IN THE CIVIL RIGHTS CONTEXT, AND EXAGGERATING THE CLAIMED NEED FOR NON-DISCLOSURE.

By definition, the ultimate balancing process that the DPP Opinion purported to perform (balancing four factors against the interest in non-disclosure, *DPP Opinion*, at *12) was fundamentally flawed by its earlier failure to identify relevance correctly, lack of availability of other evidence, and the seriousness of the case as factors all pointing in the direction of disclosure.

What we focus on here is the DPP Opinion's radical departure both from the traditional understanding of the limitations that need to be placed on the application of DPP and from the traditional understanding of how important it is that full fact-finding be allowed in the civil rights context. The DPP Opinion – which at one point calls the public's interest in non-disclosure

"overriding," *id.* at *18, ominously describes the risk that, "[i]f all preliminary internal assessments of federal requirements were subject to disclosure, internal communications on these topics would be chilled." *Id.* at *11. That, of course, has nothing to do with what is at issue. *All* preliminary assessments are *not* going to be subject to disclosure; most will not involve civil rights or other claims where defendant's knowledge and motivations across a relevant, multi-faceted decision-making process is key to the case.

And there is no explanation in the DPP Opinion of *why* internal deliberations here would be chilled. To the extent that the operative theory is that disclosure *always* chills deliberations, that analysis would effectively (and improperly) replace a balancing test with a *per se* rule that deliberative materials are not to be disclosed. There is no explanation of why there would be a chill in this particular circumstance, especially because the requisite submissions to the federal government are required, and defendant is required to comply with specific elements of analysis.[57] Indeed, failure to meet the requirements can result in serious financial penalty to a jurisdiction.[58] There is no reason to presume that defendant's officials would not be sufficiently incentivized to provide the required analysis.

Most remarkably, the DPP Opinion fails to acknowledge or heed the long line of cases that explain that it is the civil rights interest that must be held paramount. *See, e.g.*, *Skibo v. City of*

[57] Under the regime in existence prior to the enactment of the 2015 AFFH Rule, an "analyses of impediments" to fair housing had to be submitted, and records reflecting the analysis and actions taken to overcome impediments had to be maintained. 24 C.F.R. § 91.225(a)(1) (2015). Under the submissions now delayed until October 2020, an Assessment of Fair Housing must be submitted, 24 C.F.R. § 5.154 (2018), and record of analysis and action maintained. 24 C.F.R. § 5.168 (2018).

[58] In *ADC v. Westchester*, the court found that defendant had "utterly failed" to meet its AFFH obligations and that each of more than 1,000 express and implied certifications were false or fraudulent. *ADC v. Westchester*, 668 F. Supp. 2d at 563, 559, 565-67. Subsequently, a consent decree was entered requiring the defendant to expend a total of $62.5 million, more than the total amount of federal housing funds it had received in the period for which its AFFH compliance had been challenged. *See* Gurian Mar. 8 Decl., at ¶ 4.

*New York*, 109 F.R.D. 58, 61 (E.D.N.Y. 1985) (citations omitted) (holding full disclosure "serves the 'paramount public interest in the fair administration of justice,'" a consideration of special importance in the civil rights context: "In a federal civil rights action, a claim that the evidence is privileged 'must be so meritorious as to overcome the fundamental importance of a law meant to insure each citizen from unconstitutional state action'"); *Grossman*, 125 F.R.D. at 381 ("[i]n a civil rights action where the deliberative process of State or local officials is itself genuinely in dispute, privileges designed to shield that process from public scrutiny must yield to the overriding public policies expressed in the civil rights laws"); *MacNamara v. City of New York*, 2007 WL 755401, at *10 (S.D.N.Y. Mar. 14, 2007) (citation omitted) (quoting same).

The importance of the ability to vindicate civil rights claims through their effective prosecution is a basic principle of modern jurisprudence; that principle would be hollowed out if it is not understood that discovery in civil rights actions is meant to be particularly broad. *See, e.g.*, *Bailey v. City of New York*, 2015 WL 4523196, at *3 (E.D.N.Y. July 27, 2015) (underscoring "particularly broad" discovery, citing cases); *see also King v. Conde*, 121 F.R.D. 180, 195 (E.D.N.Y. 1988) (citation omitted) ("The interest that without doubt looms largest in these cases is the public interest in giving force to the federal civil rights laws. '[T]hrough constitutional amendment and national legislation the people have made it clear that the policies that inform the federal civil rights laws are profoundly important"; as such, in a civil rights matter, the "defendants' case for restricted disclosure must be extremely persuasive.").

Likewise, it is important to understand (the DPP Opinion did not) that the raison d'être for the qualified DPP is not present when, as here, the government's intent and motivation are at issue:

> If the plaintiff's cause of action is directed at the government's intent . . . it makes no sense to permit the government to use the privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place in a Title VII action or in a constitutional claim for discrimination . . . . [I]f

> either the Constitution or a statute makes the nature of governmental officials' deliberations the issue, the privilege is a nonsequitur. The central purpose of the privilege is to foster government decisionmaking by protecting it from the chill of potential disclosure . . . . If Congress creates a cause of action that deliberatively exposes government decisionmaking to the light, the privilege's raison d'être evaporates.

*In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (footnote and citation omitted), *modified on reh'g on other grounds*, 156 F.3d 1279, 1280 (D.C. Cir. 1998) (clarifying that the holding of DPP unavailability was "limited to those circumstances in which the cause of action is directed at the agency's subjective motivation"). The Fair Housing Act (and the New York City Human Rights Law) do deliberatively expose government decision-making to the light.[59] *In re Franklin Nat. Bank Sec. Litig.* (the source for the *Rodriguez* balancing test; *see supra*, at 3) makes a similar point to *In re Subpoena*:

> Government documents are protected from discovery so that the public will benefit from more effective government; when the public's interest in effective government would be furthered by disclosure, the justification for the privilege is attenuated. Thus, for example, where the documents sought may shed light on alleged government malfeasance, the privilege is denied.

*In re Franklin Nat. Bank*, 478 F. Supp. at 582. Here, where the right of hundreds of thousands of households to compete for affordable housing on an equal playing field without regard to race is at issue, there is a strong "public interest in opening for scrutiny the government's decision making process." *Id.*

That the balance weighs in favor of disclosure when the government's decision-making process is genuinely at issue has been repeatedly observed. *See, e.g.*, *In re Delphi*, 276 F.R.D. 81, 85 (S.D.N.Y. 2011) (surveying cases and noting that, "[w]here the deliberative or decisionmaking

[59] Moreover, Congress specifically decided to allow a particular privilege (for self-testing in the context of residential real estate related lending transactions) in a 1996 amendment to the Fair Housing Act. *See* 42 U.S.C. § 3614-1(a) (2018). If Congress wished to protect other potential evidence (either by specifying additional privileges or by not covering governmental entities), it could have done so.

process is the 'central issue' in the case, the need for the deliberative documents will outweigh the possibility that disclosure will inhibit future candid debate among agency decision-makers"); *Dep't of Econ. Dev.*, 139 F.R.D. at 299 (where the adjudication of a claim "turns upon issues of knowledge, reliance, and causation, direct evidence of the deliberative process is *irreplaceable*"); and *Children First Found.*, 2007 WL 4344915, at *7 (citing cases and holding that, "when the decision-making process itself is the subject of the litigation, the deliberative process privilege cannot be a bar to discovery").

Cases that treat the "central issue" exemption as reason for *per se* inapplicability of DPP (like *Children First Found.* and those cited therein) remain important to demonstrate how much of an outlier the DPP Opinion is. In other words, there are some courts that rule that, where a central issue is the defendant's decision-making, a balancing test is resolved in favor of disclosure; others rule that, in those circumstances, there is *per se* disclosure. The DPP Opinion is the stark exception to the rule.

It is certainly true that a significant portion of the error in the ultimate balancing is traceable back to the DPP Opinion errors in assessing relevance of the evidence. But at root, there is simply an unwillingness to subject defendant's decision-making process to scrutiny; *i.e.,* an unwarranted emphasis on vindicating non-disclosure above all else. This is made crystal clear in the DPP Opinion's treatment of Bates 56994, one of the documents on defendant's privilege log,[60] an email chain that includes two emails that "reflect preliminary thoughts and deliberations about potential alternatives to the Community Preference Policy." *DPP* Opinion, at *15. It is difficult to imagine something more central than the thought process of defendants in connection with whether and

[60] As noted at the outset, the main discussion of documents on the privilege log and of deposition questions will be treated later (at Point VI, *infra*), but the illustration is necessary here to show how extreme the DPP Opinion is in refusing to allow central-issue decision-making to be intruded upon.

why to continue, modify, or abandon the policy (including exploration of reasons that may turn out to be pretextual). Yet the DPP Opinion treats the two emails as, *inter alia*, subject to DPP. *Id.*

In a discussion of the relevance part of the balancing test that follows the DPP Opinion's laying out of all of the privileged documents being reviewed, there is simply no discussion of this document specifically, and no general proposition cited that would lead to the conclusion that it was not relevant. *Id.* at *17. Remarkably, the DPP Opinion states that, with respect to *all* documents at issue (embracing thereby the document under discussion), the interest of protecting government deliberations outweighs the public's "significant interest in a plaintiff's ability to obtain all the information needed to prosecute her discrimination claims." *Id.* at *18. In short, if deliberations directly about what to do regarding the challenged policy are not enough to outweigh the DPP Opinion's view of the importance of non-disclosure, the DPP Opinion is applying a clearly disproportionate and erroneous conception of the value of non-disclosure across-the-board.

One final consideration. "The burden of justifying the application of the governmental deliberative process privilege rests with the party seeking to invoke it . . . . The privilege, as it is in derogation of the search for truth, is not to be expansively construed." *Kaufman v. City of New York*, 1999 WL 239698, at *4 (S.D.N.Y. Apr. 22, 1999) (citations omitted); *see also Grossman*, 125 F.R.D. at 380 ("It is axiomatic that the burden is on a party claiming the protection of a privilege to establish the facts essential to its applicability."). Thus, even were the interests in disclosure and non-disclosure closely balanced (unlike the circumstances here, where the pro-disclosure factors strongly outweigh the non-disclosure factor), defendant's claim of qualified privilege would not have tipped the balance, and thus would have to be rejected. The DPP Opinion did not consider this.

The errors that plagued consideration of whether to keep secret the CBD similarly plagued the DPP Opinion's review of the sample documents from its privilege log and of deposition questions, and it is to those documents and questions we now turn.

## POINT VI

THE DPP OPINION'S PROTECTION OF OTHER DOCUMENTS AND DEPOSITION TESTIMONY IMPROPERLY SHIELDED FROM DISCOVERY INFORMATION EXPLICITLY ADDRESSING THE OUTSIDER-RESTRICTION POLICY; FAILED TO UNDERSTAND THE NATURE OF GATHERING EVIDENCE IN A DISCRIMINATION CASE; AND IMPROPERLY SUSTAINED OTHER PRIVILEGES.

Even when the DPP Opinion turned to address documents and deposition questions that unquestionably dealt directly and explicitly with the challenged policy, it *still* prioritized non-disclosure. In doing so, it sustained DPP claims without engaging in any sort of genuine balancing process. It also erroneously sustained DPP claims about other issues that bear on the intent of, and justifications for, the outsider-restriction policy. And it improperly sustained work-product and attorney-client claims.

As an initial matter, the premise (effectively adopted by the DPP Opinion) that the outsider-restriction policy is not "final" is contradicted by the evidence.[61] As such, ongoing discussions around the policy are not "deliberations," but are *post*-decisional discussions, and should not be hidden by DPP. Separately, the City's position that that the HUD "compliance review" is somehow *continuing*, just because [Redacted] "[62] is profoundly misleading. In fact, [Redacted]

[61] *See* testimony of Ms. Been and Deputy Mayor Glen, quoted, *supra*, at 18 n.37.

[62] Oct. 6, 2017 Declaration of Vicki Been ("Been 2017 Decl."), at 8, ¶ 17 n.4, annexed to the Gurian Mar. 8 Decl. as Ex. 17.

[Redacted]

63

A. Explicit and direct discussion of outsider restriction

In this first section, we will address documents and deposition testimony that even the DPP Opinion understood directly addressed the outsider-restriction policy, but as to which the decision nevertheless sustained, in whole or in part, a DPP claim. In all but one instance, the Magistrate Judge shielded the items from discovery by also relying on the work-product doctrine. We will first address the DPP considerations for each of the pertinent documents. Then we will return to each document to address the work-product issues. Given that the sample documents (submitted *in camera* to the Magistrate Judge) and shielded testimony represent only a tiny fraction of the overall assertions of DPP privilege that defendant has interposed, it is crucial to plaintiffs' ability to prosecute this case properly that the Court find the DPP Opinion was clearly erroneous and contrary to law insofar as it upheld the DPP protection to these types of documents – regardless of how the Court may resolve the work-product questions.

Evidence of what the defendant did and did not consider in terms of the alternatives to the challenged policy itself – including *why* particular alternatives were rejected and *why* defendant thought it was important to retain the policy – plainly goes to the heart of plaintiffs' ability to establish, for example, what defendant's motivations are in sticking with the policy. The evidence about alternatives considered sheds light on whether defendant's stated justifications are pretextual (*e.g.*, defendant claims it wishes to provide an advantage to those who have spent long years in a community district persevering against difficult conditions;[64] did defendant consider changing the

[63] *See* first page of email chain denominated as Bates 20343, annexed to the Gurian Mar. 8 Decl. as Ex. 18.

policy so that it might actually fit that claimed purpose?). The evidence about alternatives could also help establish that defendant knew there were ways to proceed that would have less discriminatory effect, but did not care – strong circumstantial evidence of intent. The evidence about alternatives would, of course, additionally provide insight into what less discriminatory alternatives are available – the essence of Phase III of a disparate impact case. The same probative value attaches to *analyses* that defendant did of the policy or potential alternatives. And, as discussed in relation to the CBD, defendant's knowledge of segregation is relevant, too.[65]

**Bates 56994** includes two emails that "reflect preliminary thoughts and deliberations about potential alternatives to the Community Preference Policy." *DPP* Opinion, at *15. Although plaintiffs cannot know what is precisely in those documents, having never seen them, **Priv. Log 393** reflects that it includes analysis "conducted as part of the City's consideration of alternatives to the Community Preference Policy." *Id.* at *16. **Priv. Log 218 and 1648** are apparently communications that relate to "the statistical analyses the City conducted as part of its consideration of alternatives to the Community Preference Policy." *Id.* at *15. Ms. Been described them providing [Redacted]

[66] (Defendant's thought process as to the challenged policy is

[64] Been 2015 Decl., at 3-4, ¶ 8.

[65] How defendant chooses to *define* segregation is part of this inquiry. *See DPP Opinion*, at *11 (stating that the CBD "does not indicate any acceptance of the data or methodology" suggested by HUD), and discussion, *infra*, at 38-39, (showing that HPD elected to use, at least in part, a discrimination measure that cannot pick up the almost complete absence of a racial group from an otherwise "diverse" neighborhood).

[66] Been 2017 Decl., at 6-7, ¶ 15.

highly relevant, of course; even if the document only had information that could lead to the referenced analyses, it would be relevant.) **Priv. Log 17 and 242** also apparently deal with potential alternatives to the outsider-restriction policy. *Id.* at 12, 13.

**Been Nos. 4 and 5** sought testimony about the things HPD did to assess whether the policy resulted in a disparate impact or perpetuated segregation.[67] After establishing that Ms. Been had thought about whether it would be a good idea to get rid of outsider-restriction in low-poverty areas,[68] **Been No. 9** asked "what the positives of doing so would have been."[69] (Among the answers, one might imagine, would be the fact that doing so would increase access to disproportionately white neighborhoods of opportunity.) Finally, **Been No. 10** sought Ms. Been's testimony about the use of the "racial diversity index," a measure of "diversity" that the Furman Center for Real Estate & Urban Studies produces,[70] to explore "different approaches to the community preference" in the context of the HUD compliance review.[71] This is an index that does not necessarily reflect the fact that, for example, African-Americans are almost completely absent from a community district.[72] (An obvious question about defendant's motivation would be whether it was trying to use a racial diversity index to convey integration when continuing

[67] *See* Been Depo., at 178:4-186:23.

[68] *Id.* at 228:19-229:7.

[69] *Id.* at 229:8-20.

[70] Ms. Been, having returned to the Furman Center from HPD in 2017, participated in the production of the Furman publication that provides the racial diversity index for each community district. *Id.* at 236:12-20, 240:9-18.

[71] *Id.* at 236:12-237:12.

[72] One of the limitations of the racial diversity index is that a community district characterized as "relatively diverse" can still be segregated. *Id.* at 245:18-247:7. So, for example, Queens Community District 2 is considered relatively diverse, but has an African-American population of only 1.5 percent; that is, the racial diversity index does not convey the "stark absence of African Americans." *Id.* at 248:16-250:14.

segregation still existed.)

Whatever may be said about work-product claims, it is incomprehensible that such documents would not be both relevant and, in the context of a balancing test, clearly subject to disclosure. Yet for most of the above, relevance was not mentioned; for all of the above, the DPP Opinion imported its earlier analysis that the evidence did not involve "core issues," *DPP Opinion*, at *11, which was not reexamined and remained unchanged. *Id.* at *18. In short, there simply was not a genuine application of the *Rodriguez* balancing test. Application of DPP is stark error.[73]

Turning to those sample documents for which work-product protection was also provided,[74] the result is contrary to the legal principle that the DPP Opinion itself acknowledges: that the work-product doctrine cannot shield documents that are "prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of litigation." *DPP Opinion*, at *8 (quoting *Schaeffler v. United States*, 806 F.3d 34, 43 (2d Cir. 2015);[75] *see also In re Weatherford Int'l Sec. Litig.*, 2013 WL 4007531, at *4 n.3 (S.D.N.Y. Aug. 5, 2013) (if "investigations were part of the ordinary course of business or would have been conducted irrespective of the threat of litigation, then the work product doctrine would not apply").

During her deposition, Ms. Been testified that the questions of whether outsider-restriction operated to cause a disparate impact or perpetuate segregation had been examined by HPD

---

[73] The final document specifically addressing the outsider-restriction policy is **Priv. Log 548**, dealing with issues regarding [Redacted] The DPP Opinion shielded this only partly pursuant to DPP. But the matters involved are routine, administrative issues relating to the policy, and hence DPP should not apply *at all*. *See, e.g., Bailey*, 2015 WL 4523196, at *7 (citations omitted) (collecting cases holding that DPP does not apply to documents that are prepared "as part of the agency's routine processes" or dealing with "logistical issues" that are not related to "policy matters").

[74] In respect to Priv. Log 242, plaintiffs only seek a determination from the Court that it was error to apply DPP; they are not challenging the work-product determination.

[75] *Schaeffler* itself was quoting *United States v. Adlman,* 134 F.3d 1194, 1202 (2d Cir. 1998).

"through a variety of statistical techniques that were conducted that I discussed with my attorneys."[76] Asked if she would have done the analysis anyway, absent the litigation, she responded that she would have.[77]

Moreover, evidence from the CBD – [Redacted]

[79] Since the analyses and consideration of alternatives by the documents discussed in this section are the essence of work that "would have been conducted irrespective of the threat of litigation," the work-product claims cannot stand.

The documents said to be created in connection with the HUD compliance review (Priv. Log 218, 242, and 1648) are not exempt from this same analysis. Even leaving aside Ms. Been's answer regarding litigation, [Redacted] , it cannot be said that defendant met its burden to prove applicability of the assertion of work-product doctrine. *See, e.g., Grossman*, 125 F.R.D. at 380 ("It is axiomatic that the burden is on a party claiming the protection of a privilege to establish the facts essential to its applicability.")

We also note that, in relation to **Priv. Log 17**, Ms. Been's declaration makes clear that the focus of the memo [Redacted] .[80] There is likewise no indication that **Bates 56994** or **Priv. Log 393** were anything other than substantive; and the questions identified as **Been Nos. 4,**

[76] Been Depo., at 180:9-181:5.

[77] *Id.* at 181:25-182:5.

[78] *See* Quart Decl., at 4, ¶ 7.

[79] *See* CBD, at 3.

[80] *See* Been 2017 Decl., at 8, ¶ 18.

**5, 9, and 10** were posed to elicit the *substance* of what Ms. Been knew in her mind, not *communications about those topics*. (In respect to **Been No. 9**, for example, the question asked for what the "positives" of adopting a particular alternative would be.[81])

By providing work-product protection, the DPP Opinion creates the untenable result that, once a policy-maker has come into contact with settlement discussions, all that the policy-maker knows or can assess is shielded (here, already shielded for many years, and shielded into the indefinite future; or, in other words, a period longer than Ms. Been's entire tenure as Commissioner). That which is in the mind of a policy-maker concurrent with or to subsequent to consideration of settlement possibilities that constitutes the policy's maker *knowledge* of substantive policy assessments and facts is properly disclosable. *Cf. Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . .");[82] *Allen v. W. Point-Pepperell Inc.*, 848 F. Supp. 423, 428 (S.D.N.Y. 1994) (ordering that "plaintiffs and [their attorney] must disclose to defendants all facts of which they were aware at all times relevant to this action, whether or not those facts were communicated by plaintiffs to [their attorney] and whether or not those facts were learned by plaintiffs from [their attorney]").

Finally, it is important to note that even where the DPP Opinion directed the disclosure of a portion of the material, its reasoning reveals the overall flaws in its approach to the evidence. *DPP Opinion*, at *20 (discussing **Been No. 9)**. Specifically, the Magistrate Judge found that

[81] Been Depo., at 229:8-9.

[82] *Upjohn* further explained that: "A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Id*. at 395-96 (quoting *City of Philadelphia, Pa. v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

testimony should not be shielded if the decision-making process explicitly "considered race, or otherwise implicated race-based concerns . . . ." *Id.* But this approach is altogether inadequate to the searching and sensitive process needed to *discern* whether race-based concerns are implicated. One cannot simply expect a defendant to admit that those concerns were present; identifying all explanations for action (or inaction) is basic to the credibility and pretext assessments so central to discrimination cases. As we have seen even in the testimony in this case, rarely do high level City officials admit to race-based pressure being exerted on them.[83]

B. Other documents improperly excluded

**Priv. Log 399** appears to concern how defendant "should respond to issues related to the mandatory inclusionary housing program," yet the so-called deliberative portion of the document is permitted to remain secret. *DPP Opinion*, at *16. But defendant's principal justification in response to the disparate impact claim is that the policy is necessary to overcoming community and politician opposition to land-use actions needed to facilitate the construction of affordable housing. In the course of the development of defendant's mandatory inclusionary housing program, significant opposition manifested itself. What defendant thought its options were in responding to opposition provides significant information: were the concerns of politicians, advocacy groups, and others race-based,[84] and, if so, what was defendant's response? Were the concerns raised *not* principally about the policy, thus tending to rebut the notion that community

[83] *See* discussion, *supra*, at 23-25.

[84] Some clearly was. *See* excerpt of a report by a coalition named Real Affordability for All, marked as Ex. 37 at the Been deposition, and annexed to Gurian Mar. 8 Decl. as Ex. 19, at 5 ("Race is an undeniable factor here and needs to be acknowledged: mandatory inclusionary zoning, as currently conceived by the de Blasio administration, will lead to the whitening of neighborhoods like East New York and the South Bronx that are scheduled to be rezoned.").

preference is "necessary"? What options existed for defusing opposition to affordable housing other than community preference? Did the mix of incomes contemplated by defendant reflect the necessary economics of affordable housing development, or was there a recognition that maintaining neighborhood *stasis* (in the sense of a neighborhood being economically homogeneous) perpetuates racial segregation?

None of these questions were considered by the DPP Opinion, which just announces it conclusion that the document "lacks information central to the claims in this action" and thus fails to meet the DPP Opinion's "heightened relevance standard." *DPP Opinion,* at *17.

**Priv. Log 885 and 1023** purport to deal with plans in two neighborhoods to rezone to facilitate more affordable housing, *id.* at *14, and are shielded from plaintiffs' view for the same reason as **Priv. Log 399**. *Id.* at *17. Here again, the DPP Opinion fails to recognize that how defendant understands opposition, and the tools it has to respond to it are relevant both to the question of its motivations (being influenced by race-based views) and to the legitimacy of its justification relating to the need to defuse opposition to its plans by utilizing outsider-restriction.

The DPP Opinion notes that there are "significant differences between the drafts and the final published documents," including the presence of "comment bubbles" and "track changes" *id*, at *14, and dismisses the relevance of drafts. *Id.* at *17.[85] But the significant differences in the versions does not *diminish* the importance of the drafts – it enhances the importance. Those differences help explain what options and concerns defendant was and was not responsive to, as well as defendant's sensitivities to certain issues. We know this from other contexts. For example, a draft [Redacted] document on opposition to a particular affordable housing project that was

[85] The case cited for the proposition, *Grossman*, 125 F.R.D. at 385, in fact deals not with a policy formation document, but with an entirely different type of document: an administrative decision. *DPP Decision*, at *17.

produced ( [Redacted] ) originally included the statement that [Redacted]

.

The last two documents that are the subject of objections, **Priv. Log 726 and 1556**, are similar. The DPP Opinion did not require production of those portions of Priv. Log 726 that reflect debate and discussion over policy issues related to the East New York Neighborhood Plan. For the reasons already stated, contention about affordable housing is highly relevant. We note in this connection that one of defendant's justifications is that its policy prevents or ameliorates displacement. It is undisputed that claims of potential displacement represent a large part of the discussion surrounding the affordable housing crisis. Thus, any documentation of: (a) defendant's actual view of the scope of displacement; and (b) how defendant believes that its housing plans can combat displacement independent of outsider-restriction, bears on the claims and justifications as to community preference. Priv. Log 1556, aside from improperly being withheld on the basis of DPP, is also withheld on the basis of attorney-client privilege. *DPP Opinion,* at *14. But the principal purpose of the document was to "communicate proposals to the Mayor regarding

[86] *See* email and attachment, identified as Ex. 39 at the Been deposition, annexed as Ex. 20 to the Gurian Mar. 8 Decl., at Bates 28777.

[87] *Id.*

mandatory inclusionary housing policy," and the DPP Opinion does not appear to have considered redaction of limited portions of the document. *Id.*

The DPP Opinion rulings, as objected to above, are clearly erroneous and contrary to law and should be reversed.

## CONCLUSION

The DPP Opinion failed to identify, analyze, or apply the relevant privileges and doctrines correctly, and, in these failures, was clearly erroneous and contrary to law. Plaintiffs respectfully request that this Court issue an order modifying the DPP Opinion by overruling the sustaining, in whole or in part, of one or more privileges or work-product protection (and the analyses underlying those rulings) as set forth in relation to the documents and depositions questions identified herein.

Dated: New York, New York
March 8, 2018

Craig Gurian

Craig Gurian
Anti-Discrimination Center,
Inc. 1745 Broadway, 17th Floor
New York, New York 10019
(212) 537-5824
*Attorney for Plaintiffs*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

JANELL WINFIELD, TRACEY STEWART and SHAUNA NOEL,

Plaintiffs,

-against-

Civil Action No.: 15-CV-5236 (LTS)(KHP)

CITY OF NEW YORK,

Defendant.

----------x

# DEPOSITION OF

# MARGARET BROWN

New York, New York

January 18, 2018

9:20 a.m.

Reported by:
JUDITH CASTORE, CLR
Job No. 53130

up enough on the list?

A Yeah. Unless your number is reached, yeah.

Q And the community preference policy makes it less likely for some number of outsiders to have their number reached, right?

A So there -- there is an assumption behind that question. Right now we're just talking about the mechanics of the lottery. But a fundamental assumption there is that the housing would have gotten built, that we would have a lottery at all. And --

Q That's all I'm asking you about. That's all that I'm asking you about here. I understand, and don't worry, other witnesses have taken the opportunity on this already. I'm just asking you to assume that the lottery is taking place.

A Okay. So in the lottery the community preference does mean that

there are ultimately fewer non-community preference applicants that will be processed.

Q I wanted to ask you about asset limits and the real property rule that changes.

A Yeah, our continuing need criteria.

Q Yes. That is the section that -- on Page 45, continuing need. And I was going to ask you to go to Pages 46 and 47.

So in broad terms the asset limits have been tightened, right, from what they were before. And I think one of the earlier exhibits, maybe Mr. Maldonado can point me to it. There was a -- on the second page of the changes list there was what the asset limits were, right?

MR. MALDONADO: Um-hum.

Q If we get to that, we will. But on the property, which I wanted to focus on more. For rental property no

STATE OF _____ )

) :ss

COUNTY OF _____)

I, MARGARET BROWN, the witness herein, having read the foregoing testimony of the pages of this deposition, do hereby certify it to be a true and correct transcript, subject to the corrections, if any, shown on the attached page.

_____

MARGARET BROWN

Sworn and subscribed to before me,

this _____ day of _____, 2018.

_____

Notary Public

C E R T I F I C A T I O N

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

I, JUDITH CASTORE, Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That MARGARET BROWN, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that this transcript of such examination is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 31st day of January, 2018.

Judith Castore

JUDITH CASTORE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

JANELL WINFIELD, TRACEY STEWART and SHAUNA NOEL,

Plaintiffs,

-against-

Civil Action No.: 15-CV-5236 (LTS)(KHP)

CITY OF NEW YORK,

Defendant.

----------x

VIDEOTAPED

DEPOSITION OF ALICIA GLEN

New York, New York

November 3, 2017

9:26 a.m.

Reported by:
JUDITH CASTORE, CLR
Job No. 52429

cross-subsidy from that market rate unit -- I am not suggesting that it's limitless, but the potential cross-subsidy from that market rate unit in the Upper East Side is going to be more than the market rate unit -- the cross-subsidy potentially available from the market rate unit in Morrisania. Right?

MS. SADOK: Objection.

A Theoretically, yes. Yes.

Q You listed a whole bunch of factors a few moments ago behind opposition.

In your experience, is it ever race or ethnicity based?

MS. SADOK: Objection.

A In my experience, the vast majority of the opposition has been about income levels, height, and how are we going to make sure that people who have lived in this neighborhood have an opportunity to live in these new buildings. And that's very much

why we spend, as I'm sure you have read this -- for example, in East New York, if the current average AMI is 32 percent, everybody goes if we're buildings that are 40 or 50 percent of AMI because they're worried that the people who live in the neighborhood will not be able to afford those units at 40 and 50 percent.

So this is a huge, huge issue, as to whether or not you build units at 30 percent of AMI, because that's a current AMI, or whether it's good housing policy, which I believe strongly it is, to build a variety of income levels within the affordable housing stock so that you have a lot of different income levels in a neighborhood.

MR. GURIAN: And I will note, for the record, that the witness didn't answer the question, and I'm to go ask for that question to be read again.

GLEN

(Whereupon, the record was read.)

Q Did you hear that read back?

A Yes.

Q Is it ever race or ethnicity based? Yes or no?

MS. SADOK: Excuse me. There is no reason for you to be pointing at her or being so aggressive in your tone. I would appreciate a little more decorum, Mr. Gurian.

A No.

Q You're sure? Never at all?

A No.

Q Never any pushback against the prospect of change in a neighborhood's racial or ethnic demographics?

MS. SADOK: Objection.

A I have never had a conversation where that's been articulated.

Q Have you ever had a

conversation where that's where you understood what the speaker was saying?

A It's always been about income levels and making sure folks in the neighborhood have a chance to get their units.

Q Are you familiar with a site that's referred to as the Pfizer site.

A If -- you are talking about the one in the Brooklyn or the Pfizer building on 42nd Street? There are two Pfizer sites in play. I'm guessing you are talking about Brooklyn.

Q Yes.

A Yes. I'm so smart.

Yes. Brooklyn. I'm familiar with the site.

Q Okay. And there was nothing race or ethnicity based about that opposition to that development?

A I believe, because I read in the paper, and I was in City Hall when there were a lot of protests about it, that there is a councilman who has been

GLEN

Q Actually, I was asking you -- it was a combo. It was as a human being and principally as the Deputy Mayor for housing and economic development, which is a very specific subset of human being.

So are you aware that New York City's housing patterns were shaped by forces of discrimination and segregation?

MS. SADOK: Objection.

A When I became Deputy Mayor for housing and economic development, which I think is what you are trying to get at, racial patterns was not -- or race discrimination issues were not front and center at all with what we were deeming to be the challenges facing the housing market.

And so that -- I actually -- I don't know -- again -- and I haven't seen data and maps on this, as to what you are describing as past practices, how those are correlated -- our focus,

GLEN

Q Let's stick with the general --

A Just the general thing. Right? The likelihood you are going to get a unit is higher with the community preference than if you were just in the citywide lottery. Right? So you can credibility say this building is a building where, if we didn't have a community preference, you would have less of a chance of getting it. Right? Just by definition.

Q So to say it in different way, and, again, I am talking about the general run of things, not quirkiness, but in a 50/50 scenario, okay, so there are the same number of apartments in both piles, there are a lot fewer people competing for the apartments from inside than there are competing for the other apartments from the outside, right?

MS. SADOK: Objection.

A I would say that would

generally be mathematically correct. There could be some weird quirk if, for some reason, people didn't apply for the lottery. Yes. Yes, generally speaking, you would -- there is a smaller pool of people. Yes.

Q And I apologize if this sounds too obvious, but, like, that's the point.

A No.

Q The point is to -- to increase the odds of insiders compared to what they would be if there were no community preference policy.

MS. SADOK: Objection.

A That, I guess -- is that the way -- yeah, that's the point.

Q That's the operational point.

A That's the -- point of the policy is that people who live in that community district have a better chance of getting a unit than if they were part of the citywide pool. And now, of course, it's even more complicated

time in that sense.

Q Okay. Well in -- let me try to distinguish two things. One is a circumstance where there may or may not be a negotiation going on with another person so that there is an ongoing possibility that policy might change.

And the other is the internal steps that are taken to determine whether, as a matter of public policy, you want to stick with what you have got or not.

So with respect to that second part, did there ever come a point where you said, Yes, we want to continue with what we've got?

MS. SADOK: Objection.

A I'm not sure there was any moment in time where we said we've reviewed this from every possible angle, and we want to stick with what we've got. I think it was more that we didn't see any reason why we should change the policy, and that we all felt

that the policy had very strong merit and was an important tool in the toolbox.

And so pending any external pressure to do anything, any legal reason to change it, that we were going to continue to do what we were doing.

Q Right. So --

A But I don't think that happened on, like, a date certain where there was "aha" moment. It was, you know, just part of what was in the sort of ether again.

Q Okay. So at the point in time of this letter, though, when the administration -- when you wrote that you were reviewing it, the HPD was reviewing it, was that a point before you said effectively, Yes, we think this is a -- this is a sensible policy, and we're going to keep on doing it unless somebody forces us to change it?

MS. SADOK: Objection.

A This is over three years ago.

A C K N O W L E D G E M E N T

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

I, ALICIA GLEN, certify, I have read the transcript of my testimony taken under oath in my deposition of November 3, 2017; that the transcript is a true, complete and correct record of what was asked, answered and said during this deposition, and that the answers on the record as given by me are true and correct.

- - - - - - - - - - - - - - - - - -
ALICIA GLEN

Sworn and subscribed to before me
this 11 day of December 2017.

Notary Public

KATHERINE P. COCKLIN
NOTARY PUBLIC-STATE OF NEW YORK
No. 02CO6328584
Qualified In New York County
My Commission Expires August 03, 201

C E R T I F I C A T I O N

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

I, JUDITH CASTORE, Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That ALICIA GLEN, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that this transcript of such examination is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of November, 2017.

Judith Castore

JUDITH CASTORE

INSTRUCTIONS TO WITNESS

Please read your deposition over carefully and make any necessary corrections. You should state the reason in the appropriate space on the errata sheet for any corrections that are made.

After doing so, please sign the errata sheet and date it.

You are signing same subject to the changes you have noted on the errata sheet, which will be attached to your deposition.

It is imperative that you return the original errata sheet to the deposing attorney within thirty(30) days of receipt of the deposition transcript by you. If you fail to do so, the deposition transcript may be deemed to be accurate and may be used in court.

# ERRATA

I wish to make the following changes, for the following reasons:

PAGE LINE

39 5 CHANGE: add "nuts" in between "everybody goes" and "if we're". Add "building" in between "if we're" and "buildings".

REASON: deponent or reporter inadvertently left out two words. The statement does not make sense without adding these words.

78 25 CHANGE: add "not" in between "I am" and "a demographer"

REASON: reporter inadvertently left out a word

94 17 CHANGE: "Latin suburbs" for "Latinos"

REASON: deponent said "Latinos" but reported transcribed "Latin suburbs"

101 23 CHANGE: add "who" in between "and" and "actually"

REASON: statement does not make sense without the word "who"

101 24 CHANGE: remove "s" from the word dynamics

REASON: deponent said "dynamic" but reporter transcribed "dynamics"

123 9 CHANGE: "downside" to "downsize"

REASON: deponent stated "downsize" but reporter transcribed incorrectly

251 16 CHANGE: "spent" to "spend"

REASON: deponent stated "spend" but reporter transcribed incorrectly

254 15 CHANGE: add "are in" in between "they" and "stable housing"

REASON: deponent or reporter inadvertently left out the words "are in". The statement does not make sense without these words

Redacted per

Protective Order (ECF 82)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

JANELL WINFIELD, TRACEY STEWART and SHAUNA NOEL,

Plaintiffs,

-against-

Civil Action No.: 15-CV-5236 (LTS)(KHP)

CITY OF NEW YORK,

Defendant.

----------x

# DEPOSITION OF

# VICKI BEEN

New York, New York

August 2, 2017

8:58 a.m.

Reported by:
JUDITH CASTORE, CLR
Job No.51317

BEEN

African American.Have you been in any such neighborhoods where there is real and raw fear of displacement?

A Yes.

Q And the concern in those neighborhoods about the people who were coming in may look different might be that they have green hair or white skin with equal likelihood as between them?

MS. SADOK: Objection.

A I don't know what people in a community are thinking. That's not -- I don't have that capacity.

Q Well, your whole presentation was trying to -- this portion of your presentation was trying to explain what people's concerns were about neighborhood change. And --

A -- about displacement.

Q Well, I think we've been over this. There is a worry that even if they stay -- my words now -- there is a problem -- your words -- the demographics, the look and feel of

BEEN

their neighborhood, the sense of the neighborhood may change.So you are trying to characterize what is driving the worries of people in a neighborhood. Aren't you doing that here?

MS. SADOK: Objection.

A I'm trying to explain why there -- why the fear of displacement is real and raw. That was the purpose of that slide.

Q But what you did was talked -- in part was talk about people who, even if they stay, the demographics, the look and feel of their neighborhood, sense of the neighborhood, may change.

A Yes.

Q And that's because, in part, the people who are coming in may look different.And so my question now is . When presenting that you considered the green or purple hair at an equivalent level of worry as someone being of a

BEEN

different racial or ethnic background?

MS. SADOK: Objection. Asked and answered.

Q Please answer.

A I do not know which is a greater fear. I do not know. I know that people fear displacement because they see differences.

Q Did you have a view during your time as HPD commissioner as to whether the green or purple hair on the one hand or a different race or ethnicity from a dominant race or ethnicity in the neighborhood was more of a worry or fear?

MS. SADOK: Objection.

A I don't know.

MS. SADOK: Asked and answered.

A As I have said, I don't know what is in the heads of the people in the neighborhood. I know what they say.

Q I understand that. But I'm asking you how you have thought about

BEEN

commencement of this lawsuit?

A I don't recall.

Q Did HPD compare the racial and ethnic breakdown of those applicants eligible at a particular AMI range to the applicants that would be eligible in any particular community district?

MS. SADOK: Objection.

A I'm sorry. Did we compare -- say it again?

Q Citywide eligible pool within a range of AMI -- let's step back for a second because you seem puzzled. So let's try to work that out.

Did HPD do anything in its consideration of whether and in what form to retain community preference to compare the citywide group of people who would be eligible to apply for a development with the community district group that would be eligible?

MS. SADOK: Objection. To the extent it calls for privileged

material, please don't answer that.

A I can't answer that.

Q On the basis of privilege?

A Yes.

MS. SADOK: For the work product, attorney-client privilege and deliberative privilege?

THE WITNESS: Yes.

MR. GURIAN: I really should note for the record that it's not proper for counsel to be suggesting to the witness what privileges are involved.

MS. SADOK: I stated what the privileges were on the record. My question tone was the attorney-client because I am not privy to every time Ms. Been may or may not have been engaged in attorney-client communications. So I was seeking to confirm that that was the privilege.

MR. GURIAN: Which did you

BEEN

assert?

MS. SADOK: I asserted work product deliberative. And then the question in my tone was for the attorney-client because I am not privy to all those conversations.

Q Outside the -- was it important to HPD during your tenure to find out whether community preference operated to cause either is a disparate impact or perpetuation of segregation?

A Yes.

MS. SADOK: Objection.

Q What were all of the things that you did to reach that determination?

MS. SADOK: Objection.

A I'm sorry. The determination of whether it was important or the -- what determination?

Q Of whether it caused a disparate impact or perpetuation of segregation.

BEEN

A We explored those questions through a variety of statistical techniques that were conducted that I discussed with my attorneys.

Q You said it was important for HPD to be doing it.Were you doing it as part of your work for HPD or were you having it done as part of your work for HPD or as part of the defense of this case?

MS. SADOK: Objection.

A Those are the same thing. My -- well, you mean after I left the city but was still working on this case?

Q No. Let's first talk about the period of time when you were still at HPD as commissioner.

A Um-hum. So you asked, Did I do it as part of my work at HPD or in this litigation? This litigation was part of my work at HPD, so I'm not sure what you are asking.

Q Well, let me ask you, absent

BEEN

the litigation, would you have done that analysis anyway?

MS. SADOK: Objection.

A Yes.

MR. GURIAN: Well, there is no basis for the privilege since it was the same thing that she would have done absent the litigation.

Q So I ask you to explain all of those things that you described that you did.

MS. SADOK: I direct her not to answer. That's a matter that we'll deal with in the motion practice as well as I see a distinction between what she might have done versus what she did.

MR. GURIAN: I don't know what privilege you are asserting at this point.

MS. SADOK: My understanding -- we can read back the question -- but my

BEEN

understanding where I asserted privilege was you asked about, Did you in considering whether to keep or get rid of the community preference, did you consider something. That's the question that I asserted privilege to. Work product, deliberative and attorney-client privilege. So the fact that --

MR. GURIAN: Then we went on to another question.

MS. SADOK: Right. So you're the one who raised reference to my privilege decision again. So I'm continuing as to that question to object based upon those grounds of privilege.I'm not sure I even necessarily followed your subsequent line of questioning all that clearly. But by no means do I think she said anything that would be evidence that there was a waiver of that privilege. And I'm

BEEN

going to continue to direct her not to answer.

MR. GURIAN: Could you read back my last question if you could find it.

(Whereupon, the record was read.)

MS. SADOK: So I'm not sure what privilege you are thinking that she waived. She indicated that some -- that she had conversations with her lawyers. So the fact that she may or may not have done the analysis, doesn't waive the attorney-client privilege that she invoked.

MR. GURIAN: The witness described it as being -- doing it as part of her work so that is -- so work product wouldn't be applicable. And we will continue this elsewhere so we don't continue to burn time here.So, separate and apart from any work

BEEN

that you did in connection with defending this lawsuit, did HPD do anything to assess why and how its community preference policy had a disparate impact or perpetuated segregation?

A Yes.

Q What?

MS. SADOK: I object to that on work product, attorney-client to the extent that attorneys were involved in these conversations, as well as deliberative, not related to this litigation but work product regarding anticipated litigation.

Q Outside of anything you did in connection with this litigation, any other litigation or any other -- or any anticipated litigation, is there anything that HPD did to assess whether and to what extent the community preference policy either had a disparate impact or perpetuated

BEEN

segregation?

A No.

MS. SADOK: Objection. You may answer.

A No.

Q In your entire tenure as commissioner?

A In -- that's correct.

Q Are you aware of anything that HPD did, prior to your tenure and outside the context of any litigation or anticipated litigation, to assess whether and to what extent the community preference policy either had disparate impact or perpetuated segregation?

MS. SADOK: Objection. You may answer.

A I'm not aware.

Q You are not aware of any such assessment or work?

A I'm not aware.

Q Now there was a development in Sunnyside, Queens that was rejected

BEEN

think that calls for work product and potentially attorney-client privilege in the context of the compliance review which is how you originally framed your question.

Q Did you come to advise anyone in the administration that an application of the community preference policy could lead to litigation?

MS. SADOK: Objection.

A I'm sorry. Could you define what you mean by "in the administration"?

Q In the De Blasio Administration.

A You mean the executive?

Q Yeah.

A I may have advised Deputy Mayor Glen that when calls were made as they frequently are for increases in the community preference, that increases in the community preference could lead to litigation.

Q Why would that be?

BEEN

A Because at some level we try to balance very carefully at some level. If you were giving 100 percent of the housing to people in the community that would potentially be a problem.

Q Any level less than a 100 percent?

A I don't know.

Q Anyway, the way we got off on do this was --

THE WITNESS: Sorry. I just have to stand up for a second because I'm having a leg cramp. You could continue. Sorry. I get bad cramps when I sit for long.

MR. GURIAN: You okay?

THE WITNESS: Yeah.

Q So I'm trying to figure out why this addendum doesn't talk about community preference.

And so, is a reason that it doesn't talk about community preference the fact that HUD was doing a

BEEN

compliance review that involved community preference?

A Certainly the existence of litigation or compliance review makes us more paranoid about what gets said.

Q Could we turn back to that other document, please, the sustainable communities. I will take that one. We're at Page 159.Do you see in that recommendation there is a 1 in the neighborhood typologies of white low poverty and white medium poverty.

A Right.

Q And there is a 3 not appropriate for all of the other neighborhood typologies.

MS. SADOK: Objection.

A I'm sorry. High and not appropriate? Right, okay.

Q I just want to make sure you see the same thing that I see.

So the first question is:

Did you, during your tenure at HPD, think it was a good idea to

BEEN

eliminate the use of the community preference in any low poverty area?

A I discussed --

THE WITNESS: I think this calls for attorney-client privilege.I discussed --

MS. SADOK: If it calls for attorney-client privilege, then we object on that grounds and direct you not to answer.

Q Well, whatever my view of that, it's not the question I asked. I didn't ask what was discussed. I asked do you think.

A Did I have that discussion?

Q No.

A I'm sorry.

Q Did you think that getting rid of the preference for any low poverty areas was a good idea?

MS. SADOK: Objection.

A I certainly considered -- I certainly considered those suggestions, yes.

BEEN

Q You're saying there were suggestions to do that?

A Well, I think they were my own questions. I certainly considered questions about whether that should be done.

Q And tell me what the positives of doing so would have been?

MS. SADOK: Objection. I think that if these considerations were in the context of litigation or anticipated litigation, then they would be privileged. So that's the case, then we would invoke --

THE WITNESS: They were.

MS. SADOK: -- the work product privilege. And deliberative privilege.

Q Have any advocate -- there should be a word that gets the whole bundle of types -- are there any advocates, community-based organizations --

BEEN

either on his Friday NPR, Brian Lehrer or in some other radio interview. According to what I read. I didn't hear it myself.

Q He has also said, hasn't he, that there is little the city can do about segregated housing patterns?

MS. SADOK: Objection.

A That was reported in that same conversation.

Q So you have mentioned a racial diversity index that --

A Um-hum.

Q -- that Furman uses.

And while you were -- sorry. While you were commissioner, you asked for that racial diversity index information to be provided to you, yes?

A That's correct.

Q For what purpose?

A I -- this is in the context of the HUD compliance review. I wanted to explore different approaches to the community preference.

BEEN

Q And could you tell me about those?

(Whereupon, the preceding question was marked for a ruling.)

MS. SADOK: Objection. I direct the witness not to answer as work product and deliberative privilege and attorney-client to the extent that those considerations were discussed with attorneys.

Q Is the diversity index intended to be a measure of segregation?

A It's intended to be a positive measure of a negative subject.

MR. GURIAN: I neglected just a moment to ago to ask you to mark for a ruling, and I may not have done that. But it's certainly our intention to ask for a ruling on all of those privilege claims.

So I apologize for not having done it throughout.And now I have

BEEN

to ask you to read back the witness' last answer because I diverted myself.

(Whereupon, the record was read.)

Q So it's really talking about segregation but not using the language of segregation?

A Correct.

Q Are there limitations on the utility of the racial diversity index?

A I would assume so.

Q Well, what limitations -- of what limitations are you aware?

A We have different measures of diversity and segregation that are useful in different contexts, right? So, dissimilarity index is useful in some contexts; the exposure index; the isolation index, et cetera. They're useful in different contexts.

So the racial diversity index is also useful in -- more useful in some circumstances than others.

BEEN

Q It's interesting. I'm afraid that's one of those where you didn't answer my question which is to please identify limitations of the racial diversity index.

A So one -- I am sorry. I'm trying to answer your question.

One limitation of the racial diversity index is that it focuses on neighborhoods, right? Each neighborhood, each community district has a racial diversity index, right?

We at The Furman Center can't compute that for every neighborhood in other cities. So it's not useful to compare, for example, New York City to Chicago.

Q I understand. Any other limitations?

A I think we identify in the Furman -- in the description that if you have races or ethnicities that are not captured in the four major groups that it can be less than accurate.

BEEN

MR. GURIAN: Could you mark this as 41.

(Document headed, State of New York City's Housing and Neighborhoods in 2016, was marked Plaintiff's Exhibit 41, for identification, as of this date.)

Q So I have shown you what's been marked as Exhibit 41, Furman State of New York City's Housing and Neighborhoods 2016. A document you are very familiar with because it was published in June of this year and you participated in its production, correct?

A I participated in its production.

Q Just so you see what we've reproduced here is the cover, all of Part 2 with the indicators at the -- at all levels, and then the only part of Part 3 that's included is the part that defines the -- or discusses the racial diversity index.

BEEN

value that connotes substantial diversity?

MS. SADOK: Objection.

A I'm sorry. In absolute terms, what do I consider?

Q An RDI value that connotes substantial diversity?

A I don't know that I would have any -- obviously a -- 80 is off the charts, a 73 is very diverse, extremely diverse.So are you saying at what level would I say there is a problem? I'm not sure what you are asking. I'm sorry.

Q No. I don't know. I think this one's a pretty straightforward question, which is: This is -- this Furman's measure, did you help develop this measure?

A I helped develop it, yes.

Q You helped develop this measure. And if somebody has a question just about whether a community district is diverse or not diverse or somewhat

BEEN

diverse or pretty diverse, you can't tell me the answer by looking at the racial diverse index?

MS. SADOK: Objection.

A No. When -- so, one of the major contributions that we think the annual report makes and that people ask us all the time are these relative comparisons, right?

And so we developed the racial diversity index to help us give relative comparisons between -- among the neighborhoods. That's what purpose -- that's the purpose. So it tells you relative -- what are the highest diversity and what are -- and where do things fall on the spectrum. That's what it tells you.

Q So something can be relatively diverse --

A Um-hum.

Q -- by the RDI --

A Um-hum.

Q -- but still be segregated?

BEEN

MS. SADOK: Objection.

A Yes. Something could be relative diverse compared -- relatively diverse compared to something that is less diverse and still be segregated, yes, absolutely.

Q So let me suggest to you a particular limitation of RDI in New York and you tell me what you think.

And this relates back to what you said earlier about if a -- there are many neighborhoods in or community districts in New York City that are homogenous. You remember that?

A Um-hum.

Q And if they're homogeneous, that represents segregation.

A Um-hum.

MS. SADOK: Objection.

Q But there are neighborhoods that are not homogenous which can still represent segregation for one particular group; isn't that right?

BEEN

MS. SADOK: Objection.

A I'm sorry. I'm not sure I'm following you. Maybe it's the time in the afternoon.

If a neighborhood is, let's say, 100 percent white --

Q We're not talking homogenous neighborhoods. We're talking about neighborhoods in which there are a mix of groups but one group is notably absent.

A I see. So you're saying a neighborhood that -- can we just -- I'm sorry but I think very concretely.

New York has four major racial ethnic groups, right? Let's -- I haven't looked at the numbers but we probably have them.

Q And one of the groups, let's say, African Americans are disproportionately not present in the community district?

A Right.

Q That community district can

BEEN

have a high ranking as far as racial diversity index, but in terms of, say, the absence of blacks in relation to whites, it might be very segregated?

MS. SADOK: Objection.

A So the RDI is trying to tell you, if you have the example they give, if you have four groups that each make up 25 percent of the population, it's trying to tell you how close to that distribution is this neighborhood, right?

Q Let's take a concrete example because you like those.So Queens 2 is ranked ninth.

A Queens 2 is ranked ninth.

Q Okay?

A Okay.

Q Queens 2 is ranked ninth and has an RDI of .69.

A Um-hum.

Q So --

A That's -- it has very few blacks.

BEEN

Q Yeah, right.

But you would say relatively, it was a diverse community district and what's the percent -- most recent percentage of African American?

A 1.5.

Q 1.5 percent?

A Percent, um-hum.

Q So, in that kind of circumstance, the RDI doesn't convey the stark absence of African Americans, correct?

A It does not. That's why we have the pictures also but, yes.

Q I'm not talking about the report. I'm just talking about the racial diversity index itself.

A Okay.

Q Or take Brooklyn 7. That's ranked tenth.

A Okay.

Q And the percentage of African Americans there?

A 1.7 percent.

BEEN

Q Brooklyn 5 is one which seems like it's just about in the middle. I guess, 27 or 28 would be right in the middle.And what's the percentage of whites in that?

A 3.1.

Q And just as one last example, Brooklyn 12, which I think is Borough Park; is that right?

A Yes.

Q Brooklyn 12 is Borough Park?

A Brooklyn 12 is Borough Park.

Q That actually has a low ranking on RDI and percentage of African Americans?

A 3.2.

Q May I have that back, please.

Now, in terms of meeting the affordable housing challenge.

A Um-hum.

Q I think your view is reflected in publication is that the city needs and has a multipronged strategy to meet the affordable housing

BEEN

challenge; is that right?

MS. SADOK: Objection.

A The city has a multipronged approach.

Q To meet the affordable housing challenge?

A To meet the affordable housing challenge. Sorry.

Q So it's not MIH or one subsidy in isolation, correct, that makes up the city's strategy?

A No. The city's strategy is multipronged.

Q So that's an integrated approach that includes -- I'm sure I'm leaving some things out -- MIH; variety of subsidies; mobility strategies; neighborhood investment that complements housing; density decisions; housing siting decisions. Is that fair to say that those are amongst the prongs of an integrated strategy?

MS. SADOK: Objection.

A I'm confused, I'm sorry, by

BEEN

your use of integrated strategy. What do you mean by that? I thought you --

Q They're all part of the multipronged strategy. Again, I am not saying that that's it, but those are all prongs?

A All of the things that you listed are prongs of the city's multipronged strategy for affordable housing.

Q And in connection with all of the prongs you've -- HPD considered the fair housing implications; is that correct?

MS. SADOK: Objection.

A Fair housing informed everything that we did. And the strategies were crafted certainly against the backdrop of fair housing.

Q So this may be why I used the term "integrated" before. It's not like there is some fair housing silo over there. You were thinking about fair housing when you think about the other

BEEN

things?

A That is correct.

MS. SADOK: Objection.

A I was thinking about fair housing throughout.

(Document, Bates stamped PLTF_0255 through 0259, was marked Plaintiff's Exhibit 42, for identification, as of this date.)

Q I'm showing you Exhibit 42 which is a letter to me from the then records access appeals officer Harold Weinberg rejecting Anti-Discrimination Center's appeal of a freedom of information ruling.

Have you seen this before?

A I don't recall seeing it.

Q If you turn to Page 2 of the letter, which here is marked PLTF_0256, in Request No. 2 on the fifth line it says, The Appeal assumes that the Agency tracks certain data, for example, outcomes by community district and outcomes by ethnic identification.

BEEN

Wasn't it frozen? You mean we didn't change anything about it?

Q That once the litigation began, you decided that during the pendency of the litigation you wouldn't change that 50 percent for community district residents approach.

MS. SADOK: Objection. To the extent that that calls for work product or attorney-client communications.

A It was discussed in the context of the litigation.

MS. SADOK: Then I direct you not to answer.

Q It wasn't discussed otherwise?

A Not that I recall.

Q Okay. Let's go back to the city law breakfast do you remember from this morning?

A Yes.

Q And this is near the end. Ross --

A Sandler.

Q Ross Sandler had said something like, Okay, we're going to have one or two more questions.

(Whereupon a video is shown to all parties in the conference room.)

Q So am I right that you said, As you may know, we are being sued over the community preference. And so while that litigation is pending, I won't be changing anything. That's the way litigation works, right?

A I think we could play it again but I think that's what I said.

Q Why did you say that?

A Because I believed it to be true. I didn't think that we would be changing the percentage except as part of the litigation. We weren't going to do it. We weren't going to do something independent of the litigation.

Q Why not?

MS. SADOK: Objection to the

extent that calls for privileged information.

A Something I discussed with my attorney.

Q Are you saying that what you described as your decision, I won't be changing anything, was made on the advice of counsel?

A Was the statement that I made under the advice of counsel or was -- I'm sorry.

Q Was the freezing of the policy? Was your decision, I won't be changing anything while the litigation is pending, made on advice of counsel?

MS. SADOK: Objection. That goes to what the advice of counsel was.

THE WITNESS: So are you directing me not to answer?

MS. SADOK: I'm directing you not to answer. Thanks.

Q There was supposed to be a revisiting of the community preference

BEEN

that compliance review.

Q Did that compliance review come to an end?

A There was no -- there was nothing that said, to my knowledge, that this compliance review is ended.

Q Has the city reviewed its community preference policy outside of the context of the compliance review or the investigation as you referred to in the e-mail or litigation?

A Has -- I'm sorry. Say it again.

Q Yeah.Has the city reviewed its community preference policy outside of the context of HUD's review or investigation or outside the context of litigation?

A Yes.

Q When?

A In the summer of -- fall of 2014, we reviewed the question of whether we should open the Atlantic Yards community preference to give a

BEEN

right of return.

Q Any other review that the city has done of its policy -- of its community preference policy?

A We have reviewed the implementation of the policy but not the policy itself.

Q Are council members aware that the city's community preference policy is being challenged?

A I can't speak for All council Members. I have had conversations with some council members telling them that we had been sued.

Q Do you have any ballpark of how many?

A I can recall probably five to seven. I would have to go through them to figure that out.

Q Another day.

Has the city done anything to make council members overall aware of the existence of this lawsuit to challenge community preference?

STATE OF NEW YORK )
) :ss
COUNTY OF NEW YORK )

I, VICKI BEEN, the witness herein, having read the foregoing testimony of the pages of this deposition, do hereby certify it to be a true and correct transcript, subject to the corrections, if any, shown on the attached page.

Vicki Been

VICKI BEEN

Sworn and subscribed to before me,
this 18th day of September, 2017.

Kristin E Silberman

Notary Public

KRISTIN E SILBERMAN
NOTARY PUBLIC STATE OF NEW YORK
NEW YORK COUNTY
LIC. #01SI6137116
COMM. EXP. Feb. 22, 2018

C E R T I F I C A T I O N

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

I, JUDITH CASTORE, Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That VICKI BEEN, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that this transcript of such examination is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of August, 2017.

Judith Castore

JUDITH CASTORE

Redacted per

Protective Order (ECF 82)

2018 WL 716013
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Janell WINFIELD, Tracey Stewart,
and Shauna Noel, Plaintiffs,
v.
CITY OF NEW YORK, Defendant.

15-cv-05236 (LTS) (KHP)
|
Signed 02/01/2018

**Attorneys and Law Firms**

Craig Gurian, Roger Daniel Maldonado, Anti-Discrimination Center, Eric J. Hecker, Mariann Meier Wang, Heather Clare Gregorio, Cuti Hecker Wang, LLP, New York, NY, for Plaintiffs.

Jasmine M. Georges, Melanie Vogel Sadok, Frances I. Polifione, William Henri Vidal, Sheryl Rebecca Neufeld, NYC Law Department, Office of the Corporation Counsel, New York, NY, for Defendant.

**Opinion**

## OPINION AND ORDER

KATHARINE H. PARKER, UNITED STATES MAGISTRATE JUDGE

***1** Plaintiffs commenced this action to challenge a New York City policy regarding affordable housing lotteries. The City's policy allocates 50% of units in affordable housing lotteries to individuals who already reside in the Community District where the new affordable housing units are located. This policy is referred to herein as the "Community Preference Policy." Plaintiffs allege that the Community Preference Policy violates the federal Fair Housing Act ("FHA"), 42 U.S.C. § 3604 *et seq.*, and the New York City Human Rights Law ("NYCHRL"), NYC Admin. Code § 8-107, *et seq.*, because it perpetuates racial segregation and disparately impacts racial minorities. They also claim that the City's decision to establish, expand, and maintain the policy constitutes intentional discrimination.

Currently pending before this Court is a series of related disputes over the City's claims of privilege. These disputes concern: (1) Plaintiffs' objections to the City's demand to claw back a document that the City produced but claims is protected by the deliberative process privilege; (2) Plaintiffs' objections to the City's claims of deliberative process privilege, legislative privilege, work product privilege, and/or attorney-client privilege over documents listed on its privilege log; and (3) the City's invocations of the deliberative process privilege, work product privilege, and/or attorney-client privilege during the depositions of former Commissioner of the City's Department of Housing Preservation and Development ("HPD") Vicki Been and former Chairman of the City Planning Commission and Director of the City's Department of City Planning ("DCP") Carl Weisbrod. For the reasons that follow, Plaintiffs' objections to the City's clawback demand are denied, Plaintiffs' objections to the City's Privilege Log are granted in part and denied in part, and the City's assertions of privilege during depositions are sustained in part and overruled in part.

## BACKGROUND

The facts pertaining to the underlying action have been set forth in the Court's prior decisions. *See Winfield v. City of New York*, No. 15-cv-5236 (LTS) (DCF), 2016 WL 6208564, at *1-3 (S.D.N.Y. Oct. 24, 2016); *Winfield v. City of New York*, No. 15-cv-5236 (LTS) (KHP), 2017 WL 5664852, at *1-6 (S.D.N.Y. Nov. 27, 2017); *see also Winfield v. City of New York*, No. 15-cv-5236 (LTS) (KHP), 2017 WL 2880556, at *1-2 (S.D.N.Y. July 5, 2017), *objections overruled by* 2017 WL 5054727, at *1-2 (S.D.N.Y. Nov. 2, 2017). Only the facts relevant to this motion are set forth below.

### *A. HUD Compliance Review*

In September 2013, the Office of Fair Housing and Equal Opportunity of the U.S. Department of Housing and Urban Development ("HUD") notified the City that it was commencing a compliance review of HPD and DCP. The purpose of the review was to ensure that HPD and DCP were in compliance with certain federal nondiscrimination statutes as well as to ensure that the City was meeting its obligation to affirmatively further fair housing. In particular, HUD was investigating the City's policies and practices regarding the development

of affordable housing. The City represents that this compliance review is ongoing.

***2** In connection with the review, HUD requested that the City submit an array of information and data about its housing policies and practices. Terri Feinstein Sasanow, then Assistant Corporation Counsel in the Legal Counsel Division of the New York City Law Department ("Law Department") and Chief of the Grants and Compliance Unit, who was closely involved in formulating the City's strategies, defenses, and settlement proposals for the review, stated in her declaration that she was concerned the compliance review could lead to litigation against the City by HUD or others. In an attempt to settle the investigation and avoid litigation, HPD and HUD engaged in more than one round of discussions regarding potential modifications to the Community Preference Policy.

Both Ms. Sasanow and Ms. Been state in their declarations that they understood that HUD considered the compliance review to be a non-public, confidential investigation and that all documents and communications exchanged in connection therewith would be kept confidential. They also point out that communications with HUD state the City's understanding that the compliance review process and related communications would be kept confidential. According to the City, HUD did not inform HPD that its understanding was incorrect or that discussions and documents exchanged in the review were not confidential. Ms. Sasanow also requested the complaint that triggered the compliance review under the Freedom of Information Act ("FOIA"), but her request was denied by HUD based on an assertion of the confidentiality of an ongoing law enforcement investigation.

***B. Clawback Demand***

During a conference on June 5, 2017, Plaintiffs' counsel handed up to the Court several documents that the City had produced in discovery in redacted form, including a presentation Bates-stamped 21052-21089 entitled "Affirmatively Furthering Fair Housing: A Preliminary Guide to NYC's Submission." As the title suggests, the presentation is a preliminary overview of the City's prospective submission in response to HUD's new Affirmatively Furthering Fair Housing ("AFFH") rule, which requires HUD program participants, such as New York City, to submit an Assessment of Fair Housing ("AFH") in 2019. Upon reviewing the presentation, counsel for the City indicated that she believed the document should have been withheld in its entirety on privilege grounds and that it had been inadvertently produced.

The City subsequently served Plaintiffs with a letter seeking to claw back the document Bates-stamped 21052-21089 as well as what appears to be an identical document that was produced and Bates-stamped 22822-22859 (collectively, the "AFFH Presentations"), pursuant to a Protective Order in place in this case. (*See* Doc. No. 76.) The City asserted that the AFFH Presentations were not responsive and, furthermore, were largely protected by the deliberative process privilege.

Plaintiffs objected to the City's clawback demand and sought a ruling on the issue. Plaintiffs argue that the AFFH Presentations are responsive to their discovery requests and relevant to the issues in this case because they reference, *inter alia*, community opposition to the development of affordable housing and levels of segregation within the City. With respect to privilege, Plaintiffs assert that: (i) since the City's decisionmaking process is at issue in this litigation, the deliberative process privilege cannot be invoked to preclude discovery; (ii) even if the privilege can be asserted in this case, it does not apply to the AFFH Presentations; and (iii) the City failed to properly present its privilege claim.

In its response, the City points out this Court previously limited discovery concerning AFFH to only those documents that "discuss or consider AFFH obligations in the context of the community preference policy." (*See* Doc. No. 87, Transcript from Feb. 16, 2017 conference at 38:14-21.) The City contends that, in light of this ruling, the AFFH Presentations are not responsive because they make only passing references to the Community Preference Policy and do not substantively address the Policy. It also claims that the deliberative process privilege may be invoked in this case and that the privilege applies to the AFFH Presentations. The City argues that the privilege must be upheld in order to ensure that policymakers can have open and honest deliberations in connection with making policy decisions.

***3** In opposition to Plaintiffs' objections to the City's clawback demand, the City also submitted a Declaration of David Quart, the Deputy Commissioner for Strategy,

Research and Communications of HPD. Quart averred that the AFFH Presentations were created by HPD's Division of Strategic Planning ("Strategic Planning"), with his input and oversight, to facilitate discussions about HPD's and the City's response to the new AFFH rule. Upon the Court's request, the City provided an unredacted copy of the AFFH Presentation for *in camera* review.

***C. City's Privilege Log***

In addition to challenging the City's claim of privilege over the AFFH Presentations, Plaintiffs also have repeatedly asserted that the City has over-designated other responsive documents as privileged, particularly with respect to the deliberative process privilege. During a conference on July 21, 2017, the Court directed Plaintiffs to identify a subset of 80 documents from the City's privilege log that the City had withheld on the basis of the deliberative process privilege. (Doc. No. 167 at 74:16-18.) The Court further ruled that the City would have an opportunity to re-review the 80-document subset identified by Plaintiffs and determine whether it intended to maintain its privilege claim as to each document.

Following the City's review of the sample set of 80 documents, the City advised that it maintained a claim of privilege(s) over only 27 documents. It also withdrew its privilege designation as to 51 documents and produced them. This Court subsequently ordered the City to submit all 80 documents to this Court for *in camera* review as well as a more detailed log for purposes of assessing the validity of the remaining privilege designations. The City submitted the documents and detailed privilege log, according to which the City maintains privilege assertions with respect to the following documents:

| Bates Number | Privilege(s) Claimed |
|---|---|
| NYCPRIV00017 | Deliberative Process; Work Product |
| NYC_0067301 | Legislative |
| NYCPRIV01218 | Legislative |
| NYCPRIV01728 | Legislative |
| NYCPRIV00090 | Deliberative Process |
| NYCPRIV00548 | Deliberative Process |
| NYCPRIV02127 | Legislative |
| NYCPRIV00242 | Deliberative Process; Work Product |
| NYCPRIV00845 | Work Product |
| NYCPRIV00885 | Deliberative Process |
| NYCPRIV01023 | Deliberative Process |
| NYCPRIV00726 | Deliberative Process |
| NYCPRIV00731 | Deliberative Process; Legislative |
| NYCPRIV00183 | Deliberative Process |
| NYCPRIV01556 | Deliberative Process; Attorney-Client; Work Product |
| NYCPRIV00218 | Deliberative Process; Work Product |

| | |
|---|---|
| NYCPRIV01648 | Deliberative Process; Work Product |
| NYC_0056994 | Deliberative Process; Work Product |
| NYCPRIV02154 | Work Product |
| NYCPRIV01387 | Work Product |
| NYCPRIV01399 | Deliberative Process; Work Product |
| NYCPRIV00281 | Deliberative Process; Work Product |
| NYCPRIV00393 | Deliberative Process; Work Product |
| NYCPRIV01840 | HUD Confidentiality |
| NYCPRIV00399 | Deliberative Process |
| NYC_0067432 | Work Product |
| NYCPRIV02361 | Deliberative Process |

***D. Privilege Assertions Raised During Depositions***

On July 27, 2017 and August 2, 2017, Plaintiffs conducted the depositions of Mr. Weisbrod and Ms. Been, respectively. During both depositions, counsel for the City directed the witnesses not to respond to certain questions on the basis of attorney-client, work product, and/or deliberative process privilege. Pursuant to the Court's directions, the parties did not seek immediate privilege rulings from the Court during the depositions and, instead, continued the depositions and raised disputes as to the claims of privilege after the depositions had concluded. On September 1, 2017, Plaintiffs submitted a letter to the Court seeking privilege rulings on 20 questions to which the City's witnesses were directed not to respond —specifically, four questions posed to Mr. Weisbrod and 16 questions directed to Ms. Been. Plaintiffs' submission also annexed copies of the deposition transcripts and relevant exhibits.

***4** The City subsequently withdrew its privilege objections as to the four questions directed at Mr. Weisbrod, as well as to Been Deposition Question Nos. 15 and 16, and provided Plaintiffs with responses to these questions in declarations. The City maintained its privilege objections to the following 14 questions posed to Ms. Been:

| ID No. | Transcript Citation | Privilege(s) Claimed |
|---|---|---|
| Been No. 1 | 39:25–41:11 | Work Product |
| Been No. 2 | 69:12–70:12 | Deliberative Process |
| Been No. 3 | 178:4–180:8 | Deliberative Process; Attorney-Client; Work Product |
| Been No. 4 | 180:9–184:3 | Deliberative Process; Attorney-Client; Work Product |
| Been No. 5 | 184:18–185:17 | Deliberative Process; Attorney-Client; Work Product |
| Been No. 6 | 223:18–224:17 | Attorney-Client; Work Product |
| Been No. 7 | 224:18–225:6 | Attorney-Client; Work Product |

| | | |
|---|---|---|
| Been No. 8 | 227:23–228:11 | Attorney-Client |
| Been No. 9 | 228:19–229:20 | Deliberative Process; Work Product |
| Been No. 10 | 236:12–237:23 | Deliberative Process; Attorney-Client; Work Product |
| Been No. 11 | 262:9–265:17 | Attorney-Client |
| Been No. 12 | 275:10–280:16 | Work Product |
| Been No. 13 | 280:20–282:15 | Attorney-Client; Work Product |
| Been No. 14 | 282:16–283:23 | Attorney-Client |

At the Court's direction, the City submitted a privilege log stating the basis for its objections. Ms. Been also explained some of the claims of privilege in her declaration, dated October 6, 2017.

## LEGAL STANDARDS

### A. *Federal Rule Of Civil Procedure 26*

Under Federal Rule of Civil Procedure 26(b) ("Rule 26"), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). The party seeking discovery bears the initial burden of proving the discovery is relevant, and then the party withholding discovery on the grounds of burden, expense, privilege, or work product bears the burden of proving the discovery is in fact privileged or work product, unduly burdensome and/or expensive. *See Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 284 F.R.D. 132, 135 (S.D.N.Y. 2012) ("Once relevance has been shown, it is up to the responding party to justify curtailing discovery.") (internal citation omitted); *Allison v. Closette Too, L.L.C.*, No. 14-cv-1618 (LAK) (JCF), 2015 WL 136102, at *8 (S.D.N.Y. Jan. 9, 2015).

### B. *Deliberative Process Privilege*

The City asserts that the documents and information at issue in this motion are protected from disclosure under the deliberative process privilege. The deliberative process privilege, also referred to as the executive privilege, protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation marks and citation omitted). It applies to both the ultimate decisionmaking executive and the executive's staff members. *See Hopkins v. H.U.D.*, 929 F.2d 81, 85 (2d Cir. 1991) (work product, opinions, and recommendations of staff are part of the deliberative process). It also applies to both inter- and intra-agency deliberative communications. *See In re Delphi Corp.*, 276 F.R.D. 81, 84 (S.D.N.Y. 2011) (citing *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 77 (2d Cir. 2002)).

***5** The privilege " 'protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions.' " *Marisol A. v. Giuliani*, No. 95-cv-10533 (RJW), 1998 WL 132810, at *6 (S.D.N.Y. Mar. 23, 1998) (quoting *Hopkins*, 929 F.2d at 84). It is motivated by "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news" and the desire to "enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *Fed. Hous. Fin. Agency v. HSBC N. Am. Holdings Inc.*, No. 11-cv-6189 (DLC), 2014 WL 1909446, at *1 (S.D.N.Y. May 13, 2014) (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001)); *see also Marisol A.*, 1998 WL 132810, at *6 (the

deliberative process privilege is premised upon the notion that "effective decisionmaking requires a free flow of information amongst government officials and that this free flow would be constrained if these communications had the potential to be revealed to outsiders") (internal citations omitted).

The privilege protects the documents and communications used in the decisionmaking process when such documents are both (1) predecisional and (2) deliberative. *Marisol A.*, 1998 WL 132810, at *6. A document is "predecisional" when it is prepared to aid the decisionmaker in arriving at a decision. *Hopkins*, 929 F.2d at 84; *Marisol A.*, 1998 WL 132810, at *6. In assessing whether a document is predecisional, courts also consider whether the government can: "(i) pinpoint the specific agency decision to which the document correlates, (ii) establish that its author prepared the document for the purpose of assisting the agency official charged with making the agency decision, and (iii) verify that the document precedes, in temporal sequence, the decision to which it relates." *Nat'l Congress for Puerto Rican Rights ex rel. Perez v. City of New York*, 194 F.R.D. 88, 92 (S.D.N.Y. 2000) (internal quotation marks and citation omitted). This analysis is designed to distinguish predecisional documents from those that are "merely part of a routine and ongoing process of agency self-evaluation," which are not covered by the privilege. *Tigue*, 312 F.3d at 80; *see also Charles v. City of New York*, No. 11-cv-0980 (KAM) (JO), 2011 WL 5838478, at *1 (E.D.N.Y. Nov. 18, 2011).

A document is "deliberative" when it relates to the process by which policies are formulated. *Hopkins*, 929 F.2d at 84. "[D]raft documents, by their very nature, are typically predecisional and deliberative. They reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors." *Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J.*, No. 11-cv-6749 (RKE), 2015 WL 3404111, at *3 (S.D.N.Y. May 27, 2015) (internal quotation marks and citation omitted).

Although some district courts within this Circuit have held that the deliberative process privilege is *per se* inapplicable in a case where the government's decisionmaking process itself is the subject of the litigation, *see, e.g., Children First Found., Inc. v. Martinez,* No. 04-cv-0927 (NPM/RFT), 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007), other courts in this Circuit have applied a five-factor balancing test to determine whether the deliberative process privilege should be upheld in such cases. *See Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 99-101 (S.D.N.Y. 2003) (observing that if the legislative or deliberative privileges were unavailable in any case where the government's decisionmaking process was at issue, "there would be few, if any, cases in which state legislators could shield their personal thought processes from view" and applying a five-factor balancing test to assess whether " 'reason and experience' suggest[s] that the claim of privilege should not be honored"); *In re Delphi Corp.*, 276 F.R.D. at 85 ("[t]his Court concludes that a claimed exception to the privilege, because the litigation 'involves a question concerning the intent of the governmental decisionmakers or the decisionmaking process itself' ... is subject to the five factor balancing test."); *Five Borough Bicycle Club v. City of New York*, No. 07-cv-2448 (LAK), 2008 WL 4302696, at *1 (S.D.N.Y. Sept. 16, 2008) (observing that "the difference between the parties as to whether the privilege is categorically inapplicable or dependent on a balancing of factors where the information sought is important to resolution of the dispute is more stylistic than substantive"). For the reasons articulated by other courts in this district, this Court agrees that a balancing approach that considers the competing interests of the party seeking disclosure and of the government—specifically, its need to engage in policy deliberations without the omnipresent threat of disclosure—is more appropriate than a *per se* rule requiring disclosure in every case where the decisionmaking process is at issue.

***6** In assessing whether and to what extent the privilege bars disclosure, courts "must balance the extent to which production of the information sought would chill the [government's] deliberations concerning such important matters ... against any other factors favoring disclosure." *Rodriguez*, 280 F. Supp. 2d at 100-01. Relevant factors for the Court to consider include:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

*Id.* (quoting *In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979)).

**C. *Legislative Privilege***

The City next asserts that some of the documents listed on its privilege log are protected under the legislative privilege. The concept of legislative privilege, and the parallel doctrine of legislative immunity, "developed in sixteenth- and seventeenth-century England as a means of curbing monarchical overreach, through judicial proceedings, in Parliamentary affairs." *Favors v. Cuomo*, 285 F.R.D. 187, 207 (E.D.N.Y. 2012) ("*Favors I*") (citing *United States v. Johnson*, 383 U.S. 169, 177-80 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)). For federal legislators, the privilege is enshrined in the Speech or Debate Clause of the federal Constitution, which provides that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The Clause has been construed as providing Members of Congress with two distinct, but related, absolute protections: (1) immunity from suit for their legislative acts and (2) protection from being compelled to testify in court and produce information about acts that fall within the "legitimate legislative sphere." *See, e.g., Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975); *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731-33 (1980); *Gravel v. United States*, 408 U.S. 606, 613-16 (1972); *United States. v. Brewster*, 408 U.S. 501, 525 (1972); *see also Sec. & Exch. Comm'n v. Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 242 (S.D.N.Y. 2015) (the "[t]estimonial privilege is thus at the heart of the Speech or Debate Clause protections.").

The Speech or Debate Clause, by its own terms, is limited to Members of Congress. Based on principles of comity, however, the Supreme Court has held that state and local legislators, like Members of Congress, are entitled to absolute "immunity from liability for their legislative acts" as a matter of federal common law. *Supreme Ct. of Va.,* 446 U.S. at 732-33 (citing *Tenney*, 341 U.S. at 379); *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1988); *see also Rodriguez*, 280 F. Supp. 2d at 94-95 (explaining that "[t]he doctrine of absolute immunity for state legislators is an outgrowth of the Speech or Debate Clause of the United States Constitution"). In *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977), the U.S. Supreme Court implicitly recognized in dicta that the common law legislative privilege also extends to protection from compelled testimony in civil cases. The Second Circuit likewise has recognized the shared origins of and justifications for the Speech or Debate Clause protections and common law protections afforded to state lawmakers. *See Star Distribs., Ltd. v. Marino*, 613 F.2d 4, 6-9 (2d Cir. 1980) (holding that because of the privileges' common roots, it is inappropriate to "differentiate the scope of the two without good reason"). District courts within the Second Circuit also have repeatedly held that state and local lawmakers are entitled to protection against discovery into their legislative acts in civil cases, explaining that such protection is needed to "shield legislators from civil proceedings which disrupt and question their performance of legislative duties to enable them to devote their best efforts and full attention to the public good." *See, e.g., Searingtown Corp. v. Inc. Vill. of N. Hills*, 575 F. Supp. 1295, 1299 (E.D.N.Y. 1981) (precluding discovery into motivation of local legislators for rezoning decision that plaintiffs claimed violated their constitutional rights) (internal quotation marks and citations omitted); *see also ACORN v. Cnty. of Nassau*, No. 05-cv-2301 (JFB) (WDW), 2007 WL 2815810, at *2 (E.D.N.Y. Sept. 25, 2007). The legislative privilege extends to both the legislator and legislative staff. *See Ways & Means*, 161 F. Supp. 3d at 233. However, the privilege is "a personal one," meaning that it can only be asserted, or alternatively, waived, by each individual lawmaker. *See Favors v. Cuomo*, No. 11-cv-5632 (DLI) (RR) (GEL), 2015 WL 7075960, at *8-9 (E.D.N.Y. Feb. 8, 2015) ("*Favors III*").

***7** Legislative acts that are protected under the privilege include any activity that is " 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.' " *Eastland,* 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625 and citing *McMillan*, 412 U.S. at 313); *see also Bogan*, 523 U.S. at 54-55 (actions are legislative in nature when they are "integral steps in the legislative process"). For example, legislative acts may include, but are not limited to: "delivering an opinion, uttering a speech, or haranguing in debate; proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and

issuing subpoenas; and holding hearings and introducing material at committee hearings." *Ways & Means*, 161 F. Supp. 3d at 236 (citing *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 10-11 (D.C. Cir. 2006)) (internal quotation marks omitted).

The legislative privilege also protects fact- and information-gathering activities about the subject of potential legislation, as well as documents regarding or reflecting the fruits of this research. *See id.* at 236-37, 245; *see also United States v. Biaggi*, 853 F.2d 89, 102-03 (2d Cir. 1988) (holding that legislative fact-finding activity is protected under the Speech or Debate Clause); *McSurely v. McClellan*, 553 F.2d 1277, 1286 (D.C. Cir. 1976) (*en banc*) ("information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation" and hence is protected legislative activity), *cert. dismissed*, 438 U.S. 189 (1978). The gathering of facts and other information—whether by formal means, such as a subpoena, or informal means, such as field work—is protected because "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *Eastland*, 421 U.S. at 504 (citation omitted); *see also Ways & Means*, 161 F. Supp. 3d at 236-37. To the extent there is a question as to whether particular research activities are privileged, the court must determine "whether 'the information is acquired in connection with or in aid of an activity that qualifies as 'legislative' in nature,' not what the source of the information is." *Ways & Means*, 161 F. Supp. 3d at 237 (quoting *Jewish War Veterans*, 506 F. Supp. 2d at 57). Thus, it is not just the motives of lawmakers that are protected by the privilege, but factual information as well (so long as it was collected and summarized in connection with a legislative activity).

Certain routine activities of legislators fall outside of the privilege. *See Gravel*, 408 U.S. at 624–25; *Biaggi*, 853 F.2d at 102. Activities concerning the administration of a law, speeches delivered outside of the legislative body and preparation for the same, the making of appointments with government agencies, newsletters and press releases to constituents and drafts thereof are among the activities that fall outside of the protection of the privilege. *Brewster,* 408 U.S. at 512; *Hutchinson v. Proxmire*, 443 U.S. 111, 130-33 (1979). Similarly, the privilege does not attach to documents or communications that are "merely administrative or personal in nature." *Ways & Means*, 161 F. Supp. 3d at 246 (citing *Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 522 (3d Cir. 1985) ("Private conversations—even between officials of governments—do not necessarily involve official business."); *Fields*, 459 F.3d at 11 (personnel decisions lacking a nexus to legislative acts are beyond the scope of the Clause's protections)).

Unlike the absolute privilege that is afforded under the Speech or Debate Clause, *see Ways & Means,* 161 F. Supp. 3d at 242, the common law legislative privilege is qualified and "must therefore depend on a balancing of the legitimate interests on both sides." *Rodriguez*, 280 F. Supp. 2d at 96; *see also Citizens Union of City of N. Y. v. Att'y Gen. of N. Y.*, No. 16-cv-9592 (RMB) (KHP), 2017 WL 3836057, at *18 (S.D.N.Y. Sept. 1, 2017) ("when there is a challenge to a claim of legislative privilege by state lawmakers, the court may consider whether the private parties' interest in exploring the motivations and fact-finding efforts of individual legislators (1) rises to a level of public need for full development of relevant facts that is sufficient to overcome the competing public interests in ensuring that legislators devote their full efforts and attention to legislative duties; (2) outweighs the threat of chilling legislative deliberations; and (3) warrants federal intrusion into the independence of state lawmakers."). Courts in this Circuit use the same balancing factors to weigh whether the legislative privilege should yield to the need for discovery as they do when weighing whether the deliberative process privilege should yield to the need for discovery. *See Rodriguez*, 280 F. Supp. 2d at 100-01.

**D. *Work Product Privilege***

***8** The work product privilege protects documents and other tangible things "that are prepared in anticipation of litigation or for trial by or for another party or its representative," Fed. R. Civ. P. 26(b)(3)(A), as well as deposition testimony concerning the substance of such work product. *See Bowne of N. Y. C., Inc. v. AmBase Corp.*, 150 F.R.D. 465, 471 (S.D.N.Y. 1993). Documents "should be deemed prepared 'in anticipation of litigation' ... if, 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.' " *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (emphasis in original) (internal citation omitted). "Where a document was created because of anticipated litigation, and would

not have been prepared in substantially similar form but for the prospect of that litigation," it is protected as work product. *Id.* at 1195. "Conversely, protection will be withheld from 'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of litigation.' " *Schaeffler v. United States*, 806 F.3d 34, 43 (2d Cir. 2015) (quoting *Adlman*, 134 F.3d at 1202).

Like the deliberative and legislative process privileges, the protection afforded by the work product doctrine is not absolute. A party seeking discovery may overcome work product protection and obtain disclosure of material otherwise discoverable under Fed. R. Civ. P. 26(b)(1) by showing (1) substantial need for the material; and (2) an inability to obtain its substantial equivalent from another source without undue hardship. Fed. R. Civ. P. 26(b)(3)(A); *Obeid v. Mack,* No. 14-cv-6498 (LTS) (HBP), 2016 WL 7176653, at *5 (S.D.N.Y. Dec. 9, 2016). Although factual materials "may generally be discovered upon a showing of substantial need," *Obeid*, 2016 WL 7176653, at *5 (internal quotation marks and citations omitted), courts "*must* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B) (emphasis added). Thus, "[d]ocuments or portions of documents that qualify as 'opinion work product' are 'entitled to virtually absolute protection.' " *United States v. Mount Sinai Hosp.*, 185 F. Supp. 3d 383, 390 (S.D.N.Y. 2016) (quoting *United States v. Ghavami*, 882 F. Supp. 2d 532, 540 (S.D.N.Y. 2012)).

**E. *Attorney-Client Privilege***

Finally, the City has invoked the attorney-client privilege in response to certain deposition questions and as to one document on its privilege log. The attorney-client privilege is one of the "oldest recognized privileges for confidential communications." *Swindler & Berlin v. United States*, 524 U.S. 399, 403 (1998). The attorney-client privilege "exists for the purpose of encouraging full and truthful communications between an attorney and his client and 'recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.' " *In re von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). At the same time, courts should construe assertions of privilege narrowly, sustaining the privilege "only where necessary to achieve its purpose." *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)); *see also In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000). The party seeking to invoke the privilege bears the burden of establishing its applicability. *In re Cnty. of Erie*, 473 F.3d at 418.

When the government asserts a claim of attorney-client privilege, it must establish: (1) a communication between government counsel and their clients that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice. *See id.* at 419 (internal citation omitted). "[I]n civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or a corporate entity." *Id.*

***9** The question of whether a communication is protected under attorney-client privilege often turns on whether the communication was made for the purpose of obtaining or providing legal advice, rather than policy advice. "Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct," and requires an attorney to rely upon "legal education and experience to inform judgment." *Id.* Accordingly, the key inquiry is whether the "predominant purpose" of the communication is to solicit or provide legal advice. *Id.* at 419-20 (collecting cases). When legal advice is the predominant purpose, "other 'considerations and caveats' are not severable and the entire communication is privileged." *Fox News I*, 739 F. Supp. 2d at 560 (citing *In re Cnty. of Erie*, 473 F.3d at 420). On the other hand, if the legal advice is merely "incidental to the nonlegal advice that is the predominant purpose of the communication," then the legal portions of the document may be redacted. *In re Cnty. of Erie*, 473 F.3d at 420 n.8.

## DISCUSSION

***A. The City's Clawback Demand***

The City contends that it should be permitted to clawback the AFFH Presentations because they are not responsive and, even if they are deemed to be responsive, they are protected by the deliberative process privilege.

*1. Responsiveness*

The Court need not spend much time addressing the City's first argument concerning responsiveness. While portions of the AFFH Presentations are not relevant to the claims and defenses in this case, they do contain at least some information that is responsive to Plaintiffs' discovery requests. By way of one example only, the presentations mention community opposition to affordable housing, which is one of the City's primary defenses. The City, in its responses and objections to Plaintiffs' discovery requests, agreed to produce documents regarding opposition by community members to affordable housing. (*See* Doc. No. 62-2 p. 18). Other portions of the AFFH Presentations implicate issues that are similarly pertinent to the claims and defenses in this litigation.

*2. Application Of The Deliberative Process Privilege*

The City's assertion that the AFFH Presentations are protected by the deliberative process privilege is meritorious, however. The presentations are indisputably predecisional, as they were prepared to aid City decisionmakers in their early policy decisionmaking that will eventually be reflected in the City's AFFH submission to HUD, which is not due until 2019. *See Hopkins*, 929 F.2d at 84.

The presentations also reflect deliberative content. In particular, the City has represented that the AFFH Presentations were prepared by Strategic Planning and reflect the preliminary thoughts of that agency alone, not HPD or the City as a whole. (Quart Decl. ¶¶ 7-13.) It points out, as an example, that the AFFH Presentations reflect Strategic Planning's selection of certain "contributing factors" to fair housing issues from a HUD-published list, as well as Strategic Planning's early efforts to address issues related to the contributing factors it selected, but that the presentations do not contain the City's final decisions or positions on these matters. (Quart Decl. ¶ 8); *see Grand Cent. P'ship*, 166 F.3d at 482 (deliberative process privilege protects "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency").

Additionally, the AFFH Presentations include limited, preliminary analyses of HUD-provided data, identified in the presentations themselves as "Data Issues" and "Preliminary Findings." (Quart Decl. ¶ 9.) These "findings" are not the City's findings on the relevant issues, nor are they final. (*Id.*) Rather, the City intends to supplement HUD's data and to undertake the comprehensive analyses required by HUD as part of the AFH process. (*Id.*) The preliminary analyses "reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors," and thus are deliberative in nature. *See Auto. Club of N. Y., Inc.*, 2015 WL 3404111, at *3.

***10** Plaintiffs contend that portions of the presentations, including the slides addressing Strategic Planning's selection of "contributing factors," cannot be protected under the deliberative process privilege because such material is factual, not policy-oriented. This position oversimplifies the City's obligations under the AFH, however. The AFH requires participants, like the City, to prioritize the contributing factors that it identifies and to establish goals for overcoming the effects of the selected contributing factors, including identifying milestones and metrics for determining what fair housing results will be achieved. *See* 22 C.F.R. § 5.154(d)(4). This means that the City's selection and prioritization of the contributing factors from HUD's list are inextricably intertwined with the City's deliberations over its future fair housing policies. Thus, Strategic Planning's selection and discussion of contributing factors is more akin to an advisory opinion or recommendation, which is privileged, than purely factual material, which is not. *See Grand Cent. P'Ship*, 166 F.3d at 482. It is also not clear from the presentation that the contributing factors selected will ultimately be deemed to be contributing factors by the City in its submission to HUD in 2019 after it further analyzes the items identified in the preliminary presentation.

This Court does agree with Plaintiffs, however, that other portions of the AFFH Presentations reflect nonprivileged factual material. For example, the City concedes that Table 3 on page 8, Table 12 on page 9, Table 6 on page 34, Table 7 on page 35, and pages 36 and 37 "are 'pure' facts, data or information provided from HUD[ ] that do not reflect the City's deliberations, and could be disclosed." (Defendant's Supplemental Memorandum of

Law, dated Oct. 6, 2017, p. 23.) Since pages 31-33 also appear to reflect HUD-provided data, these pages can also be produced.

### *3. Application Of The* Rodriguez *Balancing Test*

Having concluded that the AFFH Presentations are protected in part by the deliberative process privilege does not end the inquiry, as this Court next must consider whether the privilege should be upheld in light of the competing interests of the parties. *See Rodriguez*, 280 F. Supp. 2d at 99-101. As set forth above, relevant factors for the Court to consider include:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

*Id.* (quoting *In re Franklin Nat'l Bank Secs. Litig.,* 478 F. Supp. 577, 583 (E.D.N.Y. 1979)). "If consideration of the first four factors leads to the conclusion that they outweigh the risk addressed by the fifth—possible future timidity—then the demanded document ought to be disclosed," despite the claim of privilege. *Favors II*, 2013 WL 11319831, at *11; *see also Rodriguez*, 280 F. Supp. 2d at 101.

Relevance for purposes of invading a privilege is a narrower concept than relevance for purposes of establishing the scope of discovery. Information that is presumptively privileged will be deemed relevant only if it is central "to the proper resolution of the controversy." *See Five Borough Bicycle Club*, 2008 WL 4302696, at *1; *cf. Torres v. City Univ. of New York*, No. 90-cv-2278 (LAP), 1994 WL 502621, at *4 (S.D.N.Y. Sept. 14, 1994) (holding that balancing test weighed against disclosure of confidential information where such information was "not necessary to [the plaintiff's] case" and did not "have any significant probative value in proving discriminatory intent"). The Court also notes that "[d]rafts, by their very nature, rarely satisfy the test of relevance." *Grossman v. Schwarz*, 125 F.R.D. 376, 385 (S.D.N.Y. 1989).

The AFFH Presentations amount to a preliminary overview of the City's prospective AFH submission—due in 2019—pursuant to HUD's new AFFH rule. In that regard, the presentations have even less relevance than a draft of the City's submission, which itself would be subject to "repeated revisions, including changes in language and style, correction of typographical errors, editing by superiors of subordinates' work, incorporation of new legal research or a more detailed review of the facts, or simply a more focused view of the issues with each reading," diminishing any prior draft's probative value. *See id.* Moreover, the AFHH Presentations were created after this litigation was commenced and provide no insight into the City's decisions to implement, expand, or maintain the Community Preference Policy, which, significantly, are the only City decisions at issue in this case.

***11** Although Plaintiffs are correct that circumstantial evidence may be considered in an intentional discrimination analysis, the scope of evidence relevant to that analysis has been circumscribed by the courts. *See Vill. of Arlington Heights*, 429 U.S. at 267; *United States v. Yonkers*, 837 F.2d 1181, 1221 (2d Cir. 1987). Factors to be considered in establishing discriminatory intent include: whether the official action bears more heavily on one race than another, the decision's historical background, the specific sequence of events leading up to the decision, departures from normal procedure, substantive departures, and contemporary statements by members of the decisionmaking body). *Id.* Notably, the privileged information contained in the AFFH Presentations does not assist Plaintiffs in establishing any of the aforementioned *Arlington Heights* factors with respect to the policy at issue in this case. The presentations are not tailored to New York City community districts and do not otherwise reveal information central to the City's decisions concerning the Community Preference Policy.

Certainly, the *Arlington Heights* factors are not exhaustive. However, Plaintiffs' arguments as to the relevance of the document are unpersuasive. Nothing in the document reflects any analysis of the racial impact of the Community Preference Policy on affordable housing applicants, let alone the Policy's impact on the demographics of community districts. Nothing in the document bears on the reasons for the implementation,

expansion, or maintenance of the Community Preference Policy. Rather, the document reflects that HUD listed a number of factors that can contribute to segregated housing and that the City identified certain of these factors for further discussion in connection with planning how to comply with a new federal rule. The document does not reflect a disregard of federal fair housing requirements; rather, it reflects the opposite—that the City takes its obligations seriously and created a preliminary presentation to fully analyze and discuss how to comply with the new rule. Further, the City's alleged knowledge that segregation exists—according to HUD's data and suggested initial methodology—does not indicate any acceptance of the data or methodology or bear on knowledge about the impact, if any, of the Community Preference Policy on the racial demographics of community districts. There is nothing in the presentations that indicates the Community Preference Policy is designed to placate race-based community opposition to affordable housing. In short, there are no admissions or analyses in the draft presentations that are specific to the Community Preference Policy and, accordingly, consideration of the "relevance" factor (pursuant to the narrower definition discussed above) weighs against disclosure here.

The second *Rodriguez* factor—availability of other evidence—also weighs against disclosure in this instance. Significantly, Plaintiffs have been provided data by the City that can be analyzed by their own expert and, accordingly, have no need for the City's preliminary analyses of HUD-provided data. The HUD data itself, reflected in the AFFH Presentations' tables and maps, also will be produced to Plaintiffs pursuant to this Court's order, as it is not subject to the protections of the deliberative process privilege. Plaintiffs' expert can analyze this data as well. Any remaining privileged material in the AFFH Presentations that cannot be gathered from the data is nonetheless, as discussed, not central to this litigation. On the whole, this factor tips the balance against permitting an invasion of the City's privilege.

The third factor—the seriousness of the case and issues involved—goes to the nature of the claims themselves. *Citizens Union of City of N.Y.*, 2017 WL 3836057, at *28. Because "every federal case is serious," the outcome of this factor "hinges on the interest of the public." *Id.* In other words, this Court must ask whether the public interest weighs in favor of disclosure or in favor of protecting the ability of City officials to function properly in their roles without the distraction of civil litigation. *Id.* It is indisputable that claims of racial discrimination raise serious issue of public concern and that, in such cases, the public has a significant interest in a plaintiff's ability to obtain all the information needed to prosecute her claims. But, nothing in the presentations provides information establishing the core issues in this case—whether the Community Preference Policy was adopted or maintained for discriminatory motives and/or has a racially disparate impact. Rather, the presentations concern the City's preliminary assessment of new HUD requirements pertaining to affordable housing. If all preliminary internal assessments of federal requirements were subject to disclosure, internal communications on these topics would be chilled. Accordingly, this factor too weighs against disclosure.

***12** The fourth *Rodriguez* factor looks to the role of government in the litigation. *Id.* This refers, specifically, to the government's role in the allegedly unlawful conduct. *See Favors II*, 2013 WL 11319831, at *12. In this litigation, the City's decisionmaking clearly is the central issue challenged by Plaintiffs. Although the fourth factor favors disclosure here, the Court notes that this factor will not always favor disclosure under the *Rodriguez* analysis—for example, in instances where privileged government documents are sought pursuant to a third-party subpoena and the government did not serve a central role in the allegedly unlawful conduct.

When these first four *Rodriguez* factors are balanced against the fifth factor—the potential chilling effect that disclosure will have on government employees—this Court concludes that disclosure of the AFFH Presentations, with the exception of the factual portions mentioned above, is not warranted. A key rationale for the deliberative process privilege is the need to ensure that government officials are able to engage in robust deliberations about, and analysis of, proposed policies that are essential to the effective functioning of our government. *See Citizens Union of City of N.Y.*, 2017 WL 3836057, at *29. City officials cannot engage in open, productive deliberations about how to best address the City's fair and affordable housing needs if all communications are subject to disclosure. It is in all parties' interests—including the interests of Plaintiffs and all other individuals who seek affordable housing in New

York City—to allow the City to engage in the candid exchange of ideas and opinions concerning the future of its fair and affordable housing policies.

***B. The City's Privilege Log***

Out of the 80-document sample for which the City reassessed its privilege claims, the City continues to assert that 27 documents are protected from disclosure by at least one privilege. Having reviewed these 27 documents *in camera*, this Court will first address whether each document is privileged and, if so, then will address whether the competing interests of the parties weigh in favor of upholding, or circumventing, the deliberative process privilege.

***1. Application Of The Asserted Privileges***

- **NYCPRIV00017**: This draft, internal memorandum is protected under the work product and deliberative process privileges. It was prepared in anticipation of this litigation and reflects potential alternatives to the Community Preference Policy as part of the City's formulation of its settlement position in this case. With respect to the deliberative process privilege, the document is predecisional because the City's deliberations have not resulted in a final policy decision. It is also deliberative, as it reflects non-final thoughts and assessments for the purpose of reaching a final policy decision as to possible changes to the Community Preference Policy. Given that disclosure of this document also would reveal the City's settlement strategies in connection with this litigation, this Court finds that the privileges must be upheld.

- **NYC_0067301, NYCPRIV01218, and NYCPRIV01728:** These email chains are not protected under the legislative privilege. These documents primarily reflect internal HPD conversations about what to say in response to Council Member Rafael Espinal's inquiries about various topics concerning East New York. Because HPD is an executive agency, not part of the City's legislative branch, its internal communications do not constitute acts that are an "integral step[ ] in the legislative process." *Bogan*, 523 U.S. at 54-55. To the extent the City asserts that the Council Member's questions should be protected under the legislative privilege, this argument also is unavailing. Although gathering information from persons outside of the legislature in connection with potential legislative activity may be privileged in some circumstances, *see Almonte v. City of Long Beach,* 478 F.3d 100, 107 (2d Cir. 2007), it is not clear here that the Council Member was seeking information in aid of an activity that qualifies as "legislative in nature." *See Ways &* Means, 161 F. Supp. 3d at 237. Rather, many of the questions/topics reflected in the emails seek updates on already-existing City policies and programs, the administration of which falls outside of the legislative sphere of responsibility. *See id.* at 246. Other topics appear to be more along the lines of "cajoling" or attempting to influence the executive branch, rather than gathering information in aid of legislating. *See Gravel*, 408 U.S. at 625 (observing that legislators are "constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity"). Moreover, no information is being conveyed directly to the Council Member in these communications. Nor is it clear from these emails what information was ever relayed to him. Thus, the City must produce these documents.

***13** • **NYCPRIV00090**: This email chain is not protected under the deliberative process privilege. Although the City attempts to characterize this minimally relevant communication as pertaining to its deliberations regarding MIH and East New York rezoning policies, nothing in this email chain reveals the City's decisionmaking process as it relates to those policies. Rather, the communication simply reflects discussion about how to interpret data regarding the effects of *prior* rezonings and what, if anything, should be communicated about that data. Accordingly, the City must produce this document.

- **NYCPRIV00548**: This spreadsheet is protected in part under the deliberative process privilege. Column A, entitled "[p]roblem raised or inferred by developers," reflects purely factual information that falls outside of the scope of the privilege and can be easily segregated from the privileged portions of the documents. *See Grand Cent. P'ship, Inc.,* 166 F.3d at 482; *Local 3, Int'l Bhd. of Elec. Workers v. Nat'l Labor*

*Relations Bd.*, 845 F.2d 1177, 1180 (2d Cir. 1988) ("Purely factual material not reflecting the agency's deliberative process is not protected."). Information in Column F, labeled "[f]ix [a]lready [p]lanned for HC 2.0," also is not privileged because the heading indicates that a final policy decision had already been reached about how to correct an identified problem. Thus, this information can be neither predecisional nor deliberative. However, the information reflected in Columns B, C, and D does reflect preliminary ideas and thoughts regarding how best to respond to the identified problems (*i.e.*, the issues raised by developers regarding Housing Connect and the marketing process for affordable housing units) and would reveal the manner in which the City reached a final policy decision. Thus, the information in these three columns may be redacted on the basis of privilege.

- **NYCPRIV02127**: The legislative privilege does not apply to this email chain regarding questions from Council Member Margaret Chin about community preference and affordable housing. As the document itself makes clear, a member of the Council Member's staff was seeking information for the purpose of preparing for a public meeting with members of the community. It is well established that the legislative privilege does not extend to preparing for comments to be made outside of the legislative body. *See Brewster*, 408 U.S. at 512; *Hutchinson*, 443 U.S. at 130-33. Accordingly, the City must produce this document.

- **NYCPRIV00242 and NYCPRIV00845**: These documents are protected under the work product privilege. Both of these documents were prepared in anticipation of the HUD compliance review and a potential enforcement action from that review. The law is clear that the work product doctrine protects documents prepared in anticipation of adversarial proceedings, including governmental investigations that could lead to litigation, to the same extent as materials prepared for litigation. *See, e.g., Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-cv-7126 (JMF), 2016 WL 6779901, at *4 (S.D.N.Y. Nov. 16, 2016). The closer question, however, is whether the City has waived its claim of privilege as to these two documents because the documents were provided to HUD. In *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993), the Second Circuit held that a party had waived its work product protection as to documents that were voluntarily provided to a government adversary in a different proceeding. *Id.* at 235-36. However, the Court suggested, albeit in dicta, that the privilege might not be waived in situations where the disclosing party entered into an agreement with the government agency to maintain the confidentiality of the disclosed documents. *Id.* at 236. Following *Steinhardt*, other courts in this Circuit have upheld claims of work product privilege where the documents had previously been produced to a government agency pursuant to a confidentiality agreement. *See, e.g., In re Symbol Techs., Inc. Secs. Litig.*, No. 05-cv-3923 (DRH) (AKT), 2016 WL 8377036, at *14 (E.D.N.Y. Sept. 30, 2016) (holding that privileges were not waived as a result of disclosures made to SEC where documents were produced with understanding of confidentiality); *Maruzen Co., Ltd. v. HSBC USA, Inc.*, No. 00-cv-1079 (RO), 00-cv-1512 (RO), 2002 WL 1628782, at *1-2 (S.D.N.Y. July 23, 2002) (finding no waiver of privilege where defendant entered into oral confidentiality agreement with U.S. Attorney's Office). Here, the City has presented evidence that its submissions to HUD were made with the express understanding that such documents would be kept confidential. For example, Ms. Been testified that HUD personnel advised the City that communications and documents related to the compliance review would be kept confidential and not shared publicly. (Been Decl., dated Oct. 6, 2017, ¶ 14.) Ms. Sasanow similarly avers that she understood HUD would treat all documents and communications related to its review as confidential. (Sasanow Decl. ¶ 9.) This confidentiality understanding was also explicitly stated in the City's letter to HUD in the document Bates-stamped NYCPRIV00242. In addition to the presence of a confidentiality agreement, it is also relevant that Plaintiffs already possess, or have access to, all of the data that underlies the City's analysis in NYCPRIV00242, as well as many of the documents referenced in NYCPRIV00845. *See In re Natural Gas Commodity Litig.*, 03-cv-6186 (VM) (AJP), 2005 WL 1457666, at *8-9 (S.D.N.Y. June 21, 2005) (holding that work product privilege was not waived where there was a confidentiality agreement in place with the government and where the factual documents underlying the privileged analysis had been produced

in the litigation); *Alaska Elec. Pension* Fund, 2016 WL 6779901, at *5 (following *In re Natural Gas Commodity Litigation*). Moreover, with respect to NYCPRIV00242, this document also explicitly states that it was provided for settlement purposes only and, accordingly, would not be admissible in this litigation in any event. *See* Fed. R. Evid. 408. This document—NYCPRIV00242—additionally is protected under the deliberative process privilege because it reflects the City's non-final thoughts and assessments concerning potential alternatives to the Community Preference Policy. The document is predecisional because the City's deliberations have not resulted in a final policy decision. For all of the foregoing reasons, the Court finds that the City has not waived its claim of work product privilege and that these documents may be withheld.

***14** • **NYCPRIV00885 and NYCPRIV01023:** The deliberative process privilege protects these draft portions of the Inwood Action Plan and East New York Affordable Housing Strategy from disclosure. It is clear from the face of these documents that they are non-final and predecisional, as they reflect placeholder text, track changes, and/or comment bubbles. Production of these draft documents also would reveal the manner in which the City reached its final policy decisions regarding housing issues in these two neighborhoods. In particular, this Court notes that there are significant differences between the drafts and the final published documents.[1] Given that the final versions of these documents are available to Plaintiffs on the City's website, the City will not be required to produce its preliminary, non-final drafts of these plans. The Court accordingly finds that the City is entitled to assert privilege claims over the entirety of these drafts.

• **NYCPRIV00726**: This email chain regarding the East New York Neighborhood Plan is protected under the deliberative process privilege. This communication occurred prior to the implementation of the Neighborhood Plan and, as such, is predecisional. It is also deliberative, as it reflects debate and discussion over policy issues.

• **NYCPRIV00731:** This draft presentation is protected under the deliberative process privilege. The City represents that the presentation was created to brief the New York State Legislature on proposals that HPD wanted to implement regarding tax and rent regulation issues, but that this particular document reflects HPD's non-final proposals on the topics. Disclosure of this preliminary draft would reveal the process by which the City reached its final decision on these policy issues. Although the City additionally asserts that this document is protected under the legislative privilege, it has not made a showing sufficient to support that assertion. The legislative privilege is "a personal one," meaning that it can only be asserted by each individual lawmaker. *See Favors III*, 2015 WL 7075960, at *8-9. The City has not demonstrated that this document was prepared at the behest of a lawmaker, nor is the same apparent from the document's face. Nonetheless, because the deliberative process privilege applies—as explained further in the balancing analysis below—this document is protected against disclosure.

• **NYCPRIV00183:** This draft memorandum regarding HPD's homelessness unit commitment is protected under the deliberative process privilege. This document is still in draft form, as it reflects placeholder text, questions, comment bubbles, and edits made using track changes. The tracked changes also show how various underlying policy decisions were being substantively modified as a result of the City's deliberative process. It is true that the portion of the document concerning the City's announcement of the commitment does not bear on policy-oriented deliberations. Nevertheless, this portion of the document is not at all relevant to the claims or defenses in this case and, accordingly, does not need to be produced.

• **NYCPRIV01556:** This draft memorandum regarding the creation of a mandatory inclusionary housing program is protected under the attorney-client and deliberative process privileges. With respect to attorney-client privilege, the document reflects questions directed to counsel in which the City sought legal advice. It also recites the substance of legal advice rendered by counsel. The deliberative process privilege also applies because the memorandum is a draft, non-final policy proposal that was created for the purpose of assisting the Mayor, and other City decisionmakers, in deciding whether to create a mandatory inclusionary housing program. Although the City additionally claims that this document is protected under the work product doctrine, it

has failed to demonstrate that the memorandum was prepared because of prospective litigation. *See Adlman*, 134 F.3d at 1202. To the contrary, the City acknowledges that this document was intended to communicate proposals to the Mayor regarding a mandatory inclusionary housing program.

*15 • **NYCPRIV00218 and NYCPRIV01648:** These emails are protected under the work product and deliberative process privileges. Both communications relate to the statistical analyses the City conducted as part of its consideration of alternatives to the Community Preference Policy. Ms. Been represents that the analyses discussed in the emails were performed for the purpose of formulating potential settlement proposals for the HUD compliance review. As such, they are protected as work product. They are also protected under the deliberative process privilege because they concern analysis that was done to help guide the City's decisionmaking process on potential Policy alternatives. Moreover, while these documents do mention the Community Preference Policy in passing, they are not particularly relevant to the issues in this litigation because they do not contain any substantive discussion about the Policy or its rationales.

- **NYC_0056994:** This email is protected in part by both the deliberative process privilege and the work product privilege. Specifically, emails from Ms. Been and Matthew Murphy dated September 26, 2016 at 5:23 a.m. and 7:04 a.m., respectively, are privileged. These portions of the document reflect preliminary thoughts and deliberations about potential alternatives to the Community Preference Policy. Additionally, to the extent Ms. Been and Mr. Murphy were weighing and considering Community Preference Policy alternatives at the direction of counsel in connection with this litigation or the HUD review—and they would not have otherwise done so in carrying out general responsibilities within HPD—their thoughts and mental impressions regarding the alternatives they considered would be protected under the work product privilege, particularly since Ms. Been has represented that she has engaged in significant deliberations over Policy alternatives in connection with settlement efforts. With respect to the rest of the email chain, however, the City has improperly redacted content that does not reflect deliberations over policy or the exercise of policy-oriented judgment and does not constitute work product prepared in anticipation of litigation. At best, the communications concern issues that are "merely peripheral to actual policy formation" and to which the deliberative process privilege does not apply. *Grand Cent. P'ship, Inc.*, 166 F.3d at 482. Thus, the City will be permitted to redact the two emails from Ms. Been and Mr. Murphy but must produce the remainder of the document in unredacted form.

- **NYCPRIV02154:** This document, which reflects factual information that was compiled in anticipation of this litigation, is protected under the work product privilege. Although factual work product may be discoverable in some instances, Plaintiffs here will not be able to establish a "substantial need" for this document because the underlying facts all appear to have been gathered from publicly available sources. *See Obeid,* 2016 WL 7176653, at *3. The City accordingly may withhold this document as privileged.

- **NYCPRIV01387**: The City has failed to meet its burden of establishing that this document is protected under the work product privilege. Neither the document itself, nor the City's privilege log or other submissions present any basis for this Court to conclude that the document was created in anticipation of litigation. *See Davis*, 2012 WL 612794, at *5 (finding that "[a]s the parties asserting privilege, defendants have the burden of establishing through its privilege log, affidavits, or other evidentiary material that the elements of the privilege exist" and ordering production where the revised privilege log was insufficient to substantiate the claimed privileges). Therefore, the City must produce this document.

- **NYCPRIV01399:** This email is protected under the work product privilege because it concerns how the City wanted to present its position as part of its strategy in this litigation and was prepared in anticipation of litigation. The email is not, as the City contends, protected under the deliberative process privilege because the claimed "deliberations" contained therein (concerning the Community Preference Policy) reflect only the City's litigation strategy and not any predecisional assessment of potential modifications to the Community Preference Policy. Nonetheless, because the work product

doctrine applies, this document is protected against disclosure.

*16 • **NYCPRIV00281 and NYCPRIV00393:** These documents are protected under the work product and deliberative process privileges. These documents reflect analyses that were conducted as part of the City's consideration of alternatives to the Community Preference Policy. The City represents that they were prepared in connection with either the HUD compliance review or this litigation. Disclosure of these documents would reveal the City's decisionmaking processes concerning potential modifications to the Policy in connection with an adversarial proceeding or in anticipation of litigation.

- **NYCPRIV01840:** This document is a letter from HUD regarding the commencement of its compliance review. While the City concedes that this document is not protected as privileged, it contends that it is entitled to withhold the document on confidentiality grounds. This Court is not persuaded by this argument. Under Rule 26, Plaintiffs are entitled to discovery of all nonprivileged and responsive documents, including documents that may be subject to a third-party confidentiality agreement or understanding. *See In Re Subpoena Duces Tecum Served on Bell Commn'cns Res., Inc.*, No. MA-85, 1997 WL 10919, at *3 (S.D.N.Y. Jan. 13, 1997) (collecting cases that hold confidentiality agreements cannot serve as protection from discovery requests and observing that a contrary holding would "clearly impede 'the truth-seeking function of discovery in federal litigation,' as all individuals and corporations could use confidentiality agreements to avoid discovery.") (citations omitted). Notably, the question of whether a confidentiality agreement alone can prevent disclosure is distinguishable from the question, addressed above, of whether a confidentiality agreement may help to preserve a document's privilege. Moreover, the parties in this case have entered into a Protective Order that restricts the use of material designated as confidential or for attorneys' eyes only. This Order is sufficient to protect the City's interests in maintaining the confidentiality of this document.

- **NYCPRIV00399:** This memorandum is protected in part under the deliberative process privilege. The memorandum itself reflects predecisional recommendations and thoughts regarding how the City administration should respond to issues related to the mandatory inclusionary housing program. Thus, the City may withhold the memorandum (pages 1-6) as privileged. The Appendices, however, reflect purely factual material that is not protected under the deliberative process privilege. *See Grand Cent. P'ship, Inc.*, 166 F.3d at 482. Since the Appendices can be easily segregated from the underlying privileged memorandum, the City must produce them.

- **NYC_0067432:** This draft presentation is protected under the work product privilege. The document, which was prepared in anticipation of litigation, reflects the City's litigation strategy, legal assessments, and potential alternatives for settlement.

- **NYCPRIV02361:** The City produced this email chain in redacted form and redacted portions of the document on the basis of the deliberative process privilege. This document is not privileged and should be produced in full without redactions. Communications regarding how to "message" an already-made policy decision to the public, like those reflected in this document, are not protected by the deliberative process privilege. *See Fox News II*, 911 F. Supp. 2d at 276 ("communications concerning how to present agency policies to the press or public, although deliberative, typically do not qualify as substantive policy decisions protected by the deliberative process privilege."); *Nat'l Day Laborer Org. Network v. United States Immigration and Customs Enforcement Agency*, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011) (agency deliberations about the "messaging" to be delivered to the public about an existing policy is not protected under the privilege). Although the City contends that the details surrounding the homeless referral policy had not yet been fully finalized at the time of this communication, this document does not reflect or reveal the substantive deliberations about any open policy issues.

***2. Application Of The* Rodriguez *Balancing Test To Documents Protected By The Deliberative Process Privilege***

***a. Relevance Of The Evidence***

***17** A majority of the documents listed on the City's privilege log are drafts of various documents, including drafts of Disclosure Provisions themselves, public statements, summaries, and analyses, among other examples of preliminary work product. As discussed above, "[d]rafts, by their very nature, rarely satisfy the test of relevance." *Grossman*, 125 F.R.D. at 385. As the court in *Grossman* explained, "administrative decisions ... are often subjected to repeated revisions, including changes in language and style, correction of typographical errors, editing by superiors of subordinates' work, incorporation of new legal research or a more detailed review of the facts, or simply a more focused view of the issues with each reading." *Id.* It further stated that "[t]he relevance of such revisions to defendants' state of mind is pure speculation. Absent extrinsic evidence tending to show the relevance of a particular draft, production of these documents is likely to lead only to wasteful fishing expeditions concerning the identification and deciphering of handwriting and the reasons for immaterial revisions." *Id.*

Additionally, as discussed above, "relevance" for purposes of invading a privilege is defined narrowly and must be weighed against the potential chilling effect of disclosure on government employees. Information that is presumptively privileged will be deemed relevant only if it is central "to the proper resolution of the controversy." *See Five Borough Bicycle Club*, 2008 WL 4302696, at *1; *cf. Torres*, 1994 WL 502621, at *4.

The City's Excel spreadsheet Bates-stamped NYCPRIV00548, while related to the Community Preference Policy, addresses the policy solely in the context of potential modifications to the marketing process for affordable housing units. (Defendant's Supplemental Memorandum of Law, p. 9 n.4.) This document does not concern the City's decisions to implement, expand, or maintain the Community Preference Policy, which are the only City decisions at issue in this case. The contents of the spreadsheet, therefore, are not central to the resolution of this litigation, and application of the "relevance" factor weighs against disclosure of the privileged portions of this document under *Rodriguez*.

The documents Bates-stamped NYCPRIV00885, NYCPRIV01023, and NYCPRIV00399 similarly fail to satisfy the heightened relevance standard under *Rodriguez* such that disclosure should be favored. As the City previously indicated, these documents include only "limited discussions of issues responsive to plaintiffs' demands (typically anti-displacement strategies and or [sic] community opposition)." (Defendant's Supplemental Memorandum of Law, p. 9.) The first two documents are draft portions of the Inwood NYC Action Plan and East New York Affordable Housing Strategy, respectively. As such, their relevance would be diminished even if they did contain information central to this litigation, which they do not. The third document is a memorandum concerning the City administration's potential response to issues related to the mandatory inclusionary housing program. This document too, while not a draft, lacks information central to the claims in this action and thus is not "relevant" so as to warrant an invasion of the deliberative process privilege.

The document Bates-stamped NYCPRIV00731 is a draft of a presentation created to brief the New York State Legislature on proposals that HPD wanted to implement regarding tax and rent regulation issues. The document Bates-stamped NYCPRIV00183 is a draft memorandum concerning HPD's homelessness unit commitment. Neither document contains information central to this litigation; thus, neither document is relevant for purposes of the *Rodriguez* analysis.

The document Bates-stamped NYCPRIV00726 is an email chain concerning the East New York Neighborhood Plan. Although portions of this document are not relevant, other portions reference the Community Preference Policy and its underlying justifications, which are central to this litigation. Accordingly, the Court finds that certain information contained in this document meets the relevance threshold under *Rodriguez*.

***b. Availability Of Other Evidence***

***18** With respect to the availability of other evidence, the Court notes that this factor carries minimal, if any, weight when the evidence sought is not central to the litigation. If a privileged document is not relevant under *Rodriguez*, it matters not whether the irrelevant information contained therein is accessible to the requesting party

by alternative means. Consideration of this factor thus results in a neutral outcome with respect to the following documents, which do not contain information central to the litigation: NYCPRIV00548, NYCPRIV00885, NYCPRIV01023, NYCPRIV00399, NYCPRIV00731, and NYCPRIV00183. Notwithstanding that these privileged documents fail to satisfy the heightened standard for relevance under the balancing test, should Plaintiffs wish to review the contents of the Inwood NYC Action Plan (NYCPRIV00885) or the East New York Affordable Housing Strategy (NYCPRIV01023), the final versions of these documents are available on the City's website.

Concerning the relevant information contained in NYCPRIV00726, such information might be publicly available, as this email chain addresses revisions to documents that were intended for eventual public release. Nevertheless, the email chain's particular characterization of the Community Preference Policy and its underlying justifications is unlikely to be found elsewhere. Accordingly, this factor weighs in favor of disclosure of the relevant portion of NYCPRIV00726.

#### *c. Seriousness Of The Litigation*

While "relevance" and "availability of other evidence" vary among documents, the third *Rodriguez* factor—the seriousness of the case and issues involved—remains constant across discovery categories. *See Favors II*, 2013 WL 11319831, at *11. As this Court previously found in its analysis regarding the City's clawback demand, the public has a significant interest in a plaintiff's ability to obtain all the information needed to prosecute her discrimination claims but also has an overriding interest in fostering a productive government deliberation process—particularly with respect to deliberations addressing the City's fair housing needs. For all documents at issue here, this factor thus weighs against disclosure of information protected by the deliberative process privilege.

#### *d. Government's Role In The Litigation*

As with the third *Rodriguez* factor, the fourth factor—the role of the government in the litigation—remains constant across discovery categories. *See id.* In this litigation, the City's decisionmaking is the central issue challenged by Plaintiffs, and the government clearly plays a direct role in the allegedly unlawful conduct. Accordingly, this factor weighs in favor of disclosure for all documents at issue.

#### *e. Potential Chilling Effect On Government Employees*

When weighed against the potential chilling effect of court-ordered disclosure of privileged information, the first four factors justify disclosure only of the relevant portion of NYCPRIV00726. This Court reiterates that it is in all parties' interests—including the interests of Plaintiffs and all other individuals who seek affordable housing in New York City—to allow the City to engage in robust deliberations and analysis concerning the future of its fair housing policies. The City is ordered to produce NYCPRIV00726 in redacted form, disclosing the portion that discusses the Community Preference Policy and its underlying justifications.

### *C. The City's Claims Of Privilege During Depositions*

The parties have also marked 14 questions posed to Ms. Been during her deposition for a ruling on the City's invocation of privilege. Under the legal standards set forth above governing the deliberative process, attorney-client, and work product privileges, the Court rules as follows:

- **Been No. 1** (39:25–41:11): Plaintiffs asked Ms. Been whether it was her decision to use certain language in a declaration. The City objected on the basis of work product. The City's privilege objection is **sustained**. Been's declaration was prepared with the assistance of counsel in the course of this litigation, and strategic communications and decisions about what content to include in the declaration are protected as work product. This question also does not seek information that is relevant to the claims or defenses in this litigation.

***19** - **Been No. 2** (69:12–70:12): Plaintiffs asked Ms. Been to describe a conversation she had with Mayor DeBlasio in which they were discussing the City's position on pending rent regulation proposals. The City objected on the basis of deliberative process privilege. The City's objection is **sustained.** To respond to Plaintiffs' question, Ms. Been would need to disclose the substance of deliberations she had with Mayor DeBlasio regarding the City's non-final positions on the proposals. The communication

Plaintiffs ask Ms. Been to describe is predecisional because it occurred before the City formulated its final position regarding rent regulation modifications in 2015. It is also deliberative because, as Ms. Been testified, its purpose was to consider and deliberate pending regulatory proposals for the purpose of reaching a final decision. Because the contents of Ms. Been's conversation with Mayor DeBlasio are protected only by the deliberative process privilege, the Court must next consider whether a balancing under *Rodriguez* would nonetheless favor disclosure. With respect to the first factor, the Court notes that the privileged information is, at least to some degree, relevant to this litigation—particularly to the extent Plaintiffs wish to show that increased rent regulation would serve the government's interest in preventing displacement effectively and with "less discriminatory effect" than the Community Preference Policy. *See Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 617 (2d Cir. 2016). However, with respect to the second factor—availability of other evidence—it is apparent that Plaintiffs could simply ask HPD's representatives about the effects of rent regulation on displacement without requesting the specific contents of Ms. Been's conversation with Mayor DeBlasio. The third and fourth *Rodriguez* factors, as discussed previously, weigh against and in favor of disclosure, respectively. Ultimately, the ease with which Plaintiffs could access this information by alternative means, when considered in light of the potential chilling effect of disclosure on government deliberations, tips the balance against disclosure.

- **Been No. 3** (178:4–180:8): In response to a question inquiring whether HPD compared the eligibility for affordable housing on both a city-wide and community-district basis in its consideration of whether to retain the Community Preference Policy, the City objected on the basis of deliberative process, attorney-client, and work product privileges. The City's objections are **overruled.** The question posed requires a simple yes-or-no answer, and Ms. Been's response will not reveal any privileged communications, impressions, or deliberations. Accordingly, Ms. Been is directed to respond to this question.

- **Been No. 4 and 5** (180:9–184:3 and 184:18–185:17): As a follow-up to the question addressed in the prior bullet point, Plaintiffs asked Ms. Been to describe what disparate impact analyses HPD conducted regarding the Community Preference Policy. The City objected on the basis of deliberative process, attorney-client, and work product privilege. The City's objections are **sustained**. The details of the City's analyses are protected under attorney-client privilege and the deliberative process privilege. The City sought the advice of counsel regarding whether the Community Preference Policy is compliant with federal and local laws, and part of that legal advice concerned how HPD should conduct its disparate impact analysis, as Ms. Been testified. (*See* Tr. 181:2-5.) Describing what specific statistical analyses were done would reveal privileged communications, as well as the City's preliminary deliberative process with respect to whether to maintain or modify the Policy. Significantly, the City has already identified and produced the data sets relevant to any disparate impact analysis. In the course of expert discovery, both parties will have the opportunity to present their statistical approaches and findings in formal expert reports, as well as to cross-examine the opposing party's statistical expert. Moreover, the manner in which HPD conducted its preliminary data analyses during Ms. Been's tenure has no bearing on whether the Policy is intentionally discriminatory or whether it, in fact, causes (or does not cause) a disparate impact. Thus, the details of HPD's preliminary statistical approaches are not relevant to the claims and defenses in this action. Rather, what is relevant is whether the City conducted an analysis, what data set was used for the analysis, and whether the City concluded that the Policy had a disparate impact on the basis of race. Plaintiffs may ask these questions but cannot probe further into the specifics of HPD's early data analyses.

- **Been Nos. 6 and 7** (223:18–224:17 and 224:18–225:6): Plaintiffs asked whether Ms. Been ever expressed concerns about the legality of the Community Preference Policy. The City objected on the basis of attorney-client and work product privilege. The City's privilege objections are **sustained in part**. If Ms. Been's response would require her to reveal statements made during conversations soliciting or receiving legal advice from counsel, then the attorney-client privilege protects such conversations. Similarly, any communications in which Ms. Been discussed the legality of the Community Preference Policy in the context of the HUD compliance

review or this litigation at the direction of counsel are protected under the work product privilege. However, if Ms. Been ever expressed concerns about the Policy's legality outside of a discussion with counsel and not in anticipation of litigation or the HUD review, then the privileges would not apply and such communications would be discoverable.

*20 • **Been No. 8** (227:23–228:11): Plaintiffs asked Ms. Been whether she ever thought that it was a good idea to eliminate community preference in any low-poverty area during her tenure at HPD. The City objected on the basis of attorney-client privilege. The City's objection is **overruled**. Ms. Been's response to this question would require her to disclose only her own thoughts, not the substance of any privileged communications with counsel that may have occurred on this topic. Accordingly, Ms. Been shall respond to this question. However, to the extent that Plaintiffs ask follow-up questions that would require Ms. Been to divulge the substance of her conversations with counsel, the City may invoke attorney-client privilege as applicable.

- **Been No. 9** (228:19–229:20): Plaintiffs asked Ms. Been to explain what considerations weighed in favor of eliminating the Community Preference Policy in certain low-poverty areas. The City objected on the basis of deliberative process and work product privilege. The City's objections are **sustained.** To the extent that Ms. Been was weighing and considering Community Preference Policy alternatives at the direction of counsel in connection with this litigation or the HUD review —and she would not have otherwise done so in carrying out general responsibilities within HPD —her thoughts and mental impressions regarding the alternatives she considered would be protected under the work product privilege, particularly since Ms. Been has represented that she has engaged in significant deliberations over Policy alternatives in connection with settlement efforts. The deliberative process privilege also applies because Plaintiffs are seeking testimony about how the City reached a final policy determination—that is, its decision not to modify the Policy to eliminate the community preference in certain low poverty areas. However, to the extent the City's decisionmaking process regarding potential modifications to the Community Preference Policy outside the context of settlement-related discussions considered race, or otherwise implicated race-based concerns, the City will not be permitted to assert the deliberative process privilege to preclude discovery into whether, and how, race was considered. Moreover, the City also must be prepared to articulate its final reasons for why it maintained the Policy in its current form, as the deliberative process privilege does not protect the justifications underlying a final policy determination.

- **Been No. 10** (236:12–237:23): After Ms. Been testified that she requested racial diversity index data during her tenure at HPD for the purpose of exploring different approaches to community preference in the context of the HUD compliance review, Plaintiffs asked her to describe the different approaches she explored. The City objected on the basis of deliberative process, attorney-client, and work product privilege. The City's objections are **sustained in part.** Ms. Been's testimony makes it clear that she was using the data indexes and considering different approaches to community preference because of the HUD compliance review. Thus, under the work product doctrine, she will not be required to describe the specifics of her analyses to the extent they were conducted at the direction of counsel, as she represents they were. The attorney-client privilege would also apply insofar as Ms. Been's response would disclose communications with counsel regarding legal advice, such as conversations between Ms. Been and her attorneys concerning the legal merits or risks of different alternatives to the Policy. Moreover, testimony regarding what alternatives Ms. Been considered, but did not ultimately adopt, also would be protected under the deliberative process privilege because her analysis was predecisional and would reflect her decisionmaking process.

*21 • **Been No. 11** (262:9–265:17): Plaintiffs asked Ms. Been to explain a statement she made in an email about the potential for litigation against the City. The City objected on the basis of attorney-client privilege. The City's objection is **sustained.** As Ms. Been stated during her deposition, her response to Plaintiffs' question would require her to divulge the content of discussions she had with HPD's General Counsel about the potential legal consequences of adopting certain policy positions.

- **Been No. 12** (275:10–280:16): In response to Plaintiffs' questions about whether Ms. Been considered a particular document in connection with possible changes to the Community Preference Policy, the City objected on the basis of work product. The City's objection is **overruled.** Responding to this yes-or-no question will not require Ms. Been to disclose legal strategy or the substance of any privileged work product. Moreover, discovery regarding the City's consideration of alternatives to the Community Preference Policy is relevant given the nature of Plaintiffs' claims in this case. Ms. Been is not required to disclose the substance of any discussions she had about this document in connection with this litigation or settlement. At the same time, to the extent HPD has already rejected any of the community preference strategies reflected in the document at issue, Plaintiffs are entitled to learn why such strategies were deemed insufficient to serve the City's "substantial, legitimate, nondiscriminatory interests" with "a less discriminatory effect" than the Community Preference Policy. *See Mhany Mgmt., Inc.*, 819 F.3d at 617. Questioning must be carefully tailored to the above-described findings.

- **Been No. 13** (280:20–282:15): Plaintiffs asked Ms. Been about whether the community preference percentage amount was "frozen" once this litigation began. The City objected on the basis of attorney-client and work product privilege. The City's objections are **sustained**. As Ms. Been testified and as the City represents in its privilege log, decisions regarding whether to modify the 50% preference for community district residents were discussed in the context of this litigation with counsel. Testimony regarding these communications and the related decisionmaking process would reveal legal strategy and advice rendered in connection with this litigation.

- **Been No. 14** (282:16–283:23): Plaintiffs asked Ms. Been to explain a statement she made about not changing the Community Preference Policy during the pendency of this litigation. The City objected on the basis of attorney-client privilege. The City's objection is **sustained**. In order to respond to Plaintiffs' question, Ms. Been has stated that she would need to disclose communications with counsel concerning whether or not to modify the Community Preference Policy during the pendency of the litigation. Such discussions regarding legal strategy in the context of an ongoing litigation are protected by the attorney-client privilege.

## CONCLUSION

For the foregoing reasons, Plaintiffs' objections to the City's clawback demand are DENIED; Plaintiffs' objections to the City's privilege log are GRANTED in part and DENIED in part; and the City's assertions of privilege during depositions are SUSTAINED in part and OVERRULED in part. The City is directed to produce the documents Bates-stamped NYC_0067301, NYCPRIV01218, NYCPRIV01728, NYCPRIV00090, NYCPRIV02127, NYCPRIV01387, NYCPRIV01840, and NYCPRIV02361, as well as redacted copies of the documents Bates-stamped NYCPRIV00548, NYC_0056994, NYCPRIV00399, and NYCPRIV00726 in accordance with this opinion.

***22 SO ORDERED.**

**All Citations**

Slip Copy, 2018 WL 716013

Footnotes

1 While these drafts do reflect some factual material, the nature of the documents precludes the City from segregating the factual portions from the otherwise privileged portions of the documents. *Stinson v. City of New York*, 304 F.R.D. 432, 437 (S.D.N.Y. 2015) (recognizing that it may be impractical to sever the factual portions of a document when "the context in which the facts were written and the fact that they were carefully chosen, worded, and included discloses opinions and thought processes" about the policy decision).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| WINFIELD, et al., | : | |
| | : | 15-CV-05236 (LTS) |
| Plaintiffs, | : | |
| | : | |
| v. | : | 500 Pearl Street |
| | : | New York, New York |
| CITY OF NEW YORK, | : | |
| | : | July 21, 2017 |
| Defendant. | : | |

TRANSCRIPT OF CIVIL CAUSE FOR
TELEPHONIC STATUS CONFERENCE
BEFORE THE HONORABLE KATHARINE H. PARKER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:
CRAIG GURIAN, ESQ.
ROGER DANIEL MALDONADO, ESQ.
Anti-Discrimination Center
1745 Broadway, 17th Floor
New York, New York 10019

MARIANN MEIER WANG, ESQ.
Curti Hecker Wang, LLP
305 Broadway
Suite #607
New York, New York 10007

For the City:
MELANIE VOGEL SADOK, ESQ.
WILLIAM VIDAL, ESQ.
FRANCES I. POLIFIONE, ESQ.
New York City Law Department
100 Church Street
New York, New York 10007

Court Transcriber:
RUTH ANN HAGER, C.E.T.**D-641
TypeWrite Word Processing Service
211 North Milton Road
Saratoga Springs, New York 12866

Proceedings recorded by electronic sound recording, transcript produced by transcription service

considerable time going through this log what could be duplicates or not. So what I -- I'm going to have to look at some of these documents in camera, I believe. But what I would like some further briefing on are a few questions. So, one, does the privilege analysis change. And this is specific to the claw-back argument. So is the City's privilege analyses change because the City is required to develop new policies and submit certain information to HUD as part of its new affirmative furthering fair housing rule.

So as -- by way of explanation I understand the deliberative process privilege or the executive privilege related to the City's policies, but does that same thing apply when the City is doing something or engaging in an activity per a reporting requirement of the federal government? In other words, does that recording requirement remove the discussion from a policy discussion into simply an obligation and take it out of the deliberative privilege or is it mixed or is it still policy decisions. So I would like that issue addressed.

Does the fact that the discussions concern a federal reporting obligation change the analysis of the deliberative process privilege; two is, how do you draw the line as to what is the decision-making process at issue and does the -- does the -- to the extent that the -- how is an issue tangential to such an extent that it would mean that there would not be a

waiver of the deliberative process privilege pursuant to the Rodriguez balancing factors versus when it might be waived. So how are you drawing that, what decisions or what policies do you believe are at issue in the litigation for purposes of looking at a potential waiver of the privilege.

And third and specifically as to this -- these -- the documents at issue in the claw-back, but I imagine that this issue also is going to impact some of the documents listed on the log, what are the parties' positions regarding the factual portion in the presentation or the documents? There are certainly factual information in general is not privileged as a general matter. It's typically not privileged. So I don't believe that issue has been fully vetted and when do you believe that the document is more factual than policy oriented because there certainly are factual things in that document that's the subject of a claw-back motion.

And then with respect to the privilege log I would like for the City to take a closer look at that log to see which ones are duplicates because if there's -- if there's ones that are -- they should be indicated as such so that everybody can be clear what we're talking about, you know, in terms of volume. And then I can look at a subset of documents that are not dupli -- that don't contain duplicates for purposes of evaluating whether those documents are subject to

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

Ruth Ann Hager, C.E.T.**D-641

Dated: July 27, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

JANELL WINFIELD, TRACEY STEWART, and SHAUNA NOEL,

Plaintiffs,

-against-

CITY OF NEW YORK,

Defendant.

----------x

**FIRST AMENDED COMPLAINT**

INTRODUCTION

1. Defendant City of New York ("the City") has been and continues to be characterized by extensive residential segregation on the basis of race, ethnicity, and national origin.

2. The development of these segregated patterns was not a "natural" process; on the contrary, the patterns were developed in large measure as a function of intentional discrimination by all the categories of actor in the housing market: governmental entities, developers, landlords, and others.

3. A central feature of the City's historic discrimination in the period from the beginning of the 20th century into the 1980s was the restriction of most or all African-Americans from large parts of the City and their being funneled into a relatively small number of neighborhoods.

4. These neighborhoods were and are characterized by high concentrations of African-Americans and high concentrations of poverty.

5. A similar process, most apparent in the period after World War II, occurred with respect to Latino New Yorkers.

128. The City operates under a mandatory obligation to affirmatively further fair housing.

129. Specifically, the City has been and continues to be a recipient of Community Development Block Grants and other federal funds. As such, it was required to comply with the provisions of the Fair Housing Act, 42 U.S.C. §3601 *et seq.,* including the requirement of 42 U.S.C. §3608(e)(5) that it affirmatively further fair housing to the maximum extent possible.

130. The City was and is also obligated to comply with the requirements of the Community Development Act, including the affirmatively furthering fair housing requirements of Section 104(b)(2) thereof [42 U.S.C. § 5304(b)(2)].

131. The City knew and knows of these obligations, and operated its outsider-restriction policy in derogation of those obligations.

132. The City's Department of Housing Preservation and Development (HPD) is responsible for implementing and overseeing the outsider-restriction policy.

133. The only explanation for the outsider-restriction policy stated on HPD's website is that "[t]he community preference was established to provide greater housing opportunities for long-time residents of New York City neighborhoods where HPD has made a significant investment in housing."

134. This explanation is pretextual and reflects consciousness of guilt about the operation of a policy that illegally perpetuates segregation.

135. The City knows that, as a matter of policy, it causes housing to be developed in a way that results in the housing being built "generally in areas of relatively higher racial/ethnic concentrations and lower-income households than can be found in areas of 'higher opportunity.'"

segregation or on the advancement or impairment of the goal of affirmatively furthering fair housing.

156. The City has implemented and operated the outsider-restriction policy even though HPD claims never to have issued instructions to staff, affecting the public, concerning the question of the impact of the use of the outsider-restriction policy on the perpetuation of segregation or on the advancement or impairment of the goal of affirmatively furthering fair housing.

157. The City has implemented and operated the outsider-restriction policy even though it claims not to track lottery outcomes by community district or by ethnic identification.

158. The outsider-restriction policy is popular among many community boards, local politicians, and advocacy groups.

159. Rather than try to educate these community boards, local politicians, and advocacy groups to the fact that the outsider-restriction policy perpetuates segregation and harms the City as a whole (most especially African-American and Latino New Yorkers), the City has curried favor with those supporting or thought to be supporting the outsider-restriction policy.

160. Some of the support for the outsider-restriction policy from community boards, local politicians, and advocacy groups was based on a desire to preserve existing racial or ethnic demographics or culture of a neighborhood or community district.

161. Nevertheless, the City allowed itself to be influenced by such race- or ethnicity-based positions or by fear that an abandonment of the outsider-restriction policy would generate race- or ethnicity-based opposition from these community boards, local politicians, and advocacy groups.

162. The City considered it politically expedient to accede to the wishes of these community boards, local politicians, and advocacy groups.

163. Indeed, the City has admitted that, in its view, a requirement that it identify "determinants" of "fair housing issues" could be counterproductive because it is difficult to have a "thoughtful discussion" of issues of racial and ethnic housing segregation "against the backdrop of local politics."

164. That the outsider-restriction policy accedes to the race- and ethnicity-based backdrop of local politics is illustrated by the fact that a developer-participant in the City's affordable housing program has explicitly explained the purpose of the outsider-restriction policy as being to "help the area retain its traditional Latino identity."

165. That the City has considered the matter in stark racial terms is made clear by the fact that it has explicitly purported to know what African-American and Latino New Yorkers "want" (as if the wants of four million New Yorkers could be treated as a single, unitary position), saying, for example, that "Community districts throughout the City with large black and Hispanic populations want this community district preference."

166. In responding to an affirmatively further fair housing rule that HUD proposed in 2013 and about an affirmatively further fair housing assessment tool as to which HUD asked for comment in 2014, the City has complained that a fair housing analysis should always "account" for and "allow" for local "nuance, culture, and character," and has emphasized "choice" and preference" among residents as important reasons for a neighborhood to be characterized by ethnic segregation (what the City calls ethnic "concentration").

167. In the face of a Freedom of Information Law request, the City is unlawfully withholding information -- information that it can produce in a form that does not identify

individuals -- that would allow an analysis, by race and ethnicity, of more than 700,000 participants in "NYC Housing Connect," the City's electronic program by which individuals can sign up and register to learn about City affordable housing opportunities and to apply for those opportunities.

168. Specifically, the information being withheld includes the participant's race or ethnicity; any information about a participant's address (even zip code); the length of time that a participant has lived at his or her address; the participant's household size; the participant's annual household income; and the participant's reason or reasons for wanting to move.

169. By withholding the information, the City is able to hide, among other things, the extent to which residents of predominantly African-American or Latino neighborhoods are interested in residential mobility, and the reasons for that desire.

170. The withholding of this information reflects the City's consciousness of guilt about the operation of a policy that illegally perpetuates segregation and ignores the desires of substantial numbers of its citizens.

171. Taken together, several factors -- the City's knowledge of, or deliberate indifference to, the impact of its outsider-restriction policy and its predecessors; the City's history and practice of racial discrimination and segregation; the City's responsiveness, for reasons of political expediency and otherwise, to racially- and ethnically-influenced community and political opposition to permitting neighborhood demographics to change and to allow all New Yorkers equal opportunity for affordable housing opportunities in a neighborhood regardless of race or ethnicity; the City's own consideration of what it considered to be the policy desires of particular racial and ethnic groups; and the City's rejection of pro-integrative alternatives to its policy, in part because such alternatives posed political challenges --

demonstrate that the City's outsider-restriction policy constituted intentional discrimination for the purposes of the Fair Housing Act and the New York City Human Rights Law.

**VI. Ongoing Violation and Continuing Injury**

172. Over the next several years, the City expects that the outsider-restriction policy will be applied to tens of thousands of housing units, perhaps even more than 100,000 housing units.

173. Households with income between 40 and 100 percent of AMI will continue to be eligible to participate in lotteries for some or all of those units.

174. Plaintiffs are now and can reasonably be expected in the future to be income-eligible for such housing units, including housing units located in neighborhoods of opportunity outside of the community district in which they live.

175. Manhattan Community Districts 5, 6, and 7 are neighborhoods of opportunity as compared with many other community districts in the City.

176. The above-average opportunity is reflected in many indicators including income, employment, educational attainment, school quality, and access to cultural and recreational facilities.

177. The outsider-restriction policy has restricted plaintiffs' ability to compete for housing on an equal basis with persons who already live in these high opportunity areas, and plaintiffs have been injured thereby.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

JANELL WINFIELD, TRACEY STEWART, and SHAUNA NOEL,

Plaintiffs,

- against -

CITY OF NEW YORK,

Defendant.

**AMENDED ANSWER TO FIRST AMENDED COMPLAINT**

15 CV 5236 (LTS)

----------x

Defendant the CITY OF NEW YORK, by its attorney, ZACHARY W. CARTER, Corporation Counsel of the City of New York, for its answer to the first amended complaint, respectfully alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1 of the first amended complaint ("complaint"), except denies the allegations insofar as they allege or purport to allege that Defendant has acted or is acting contrary to the law or in violation of Plaintiffs' rights.[1]

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the complaint, except denies the allegations insofar as they allege or purport to allege that Defendant has acted or is acting contrary to the law or in violation of Plaintiffs' rights.

3. Denies the allegations set forth in paragraph 3 of the complaint.

---

[1] Defendant is denying knowledge or information sufficient to form a belief here, and in other paragraphs, at least in part, because Plaintiff fails to define segregation. Although Plaintiff provides some definition of segregation in paragraph 101, this definition is vague in itself, and it is further unclear whether Plaintiff intended to use such "definition" for the term segregation throughout the complaint, or just for that paragraph.

41. Neither admits nor denies the allegations set forth in paragraphs 128 through 130 of the complaint as they constitute legal conclusions for which no response is required, however, in the event that a response is required, Defendant denies the allegations.

42. Denies the allegations set forth in paragraphs 131 of the complaint.

43. Denies the allegations set forth in paragraph 132 of the complaint, except admits that HPD is responsible for implementing and overseeing the City's community preference policy.

44. Denies the allegations set forth in paragraph 133 of the complaint, except admits that the City's community preference policy is designed, in part, to "provide greater housing opportunities for long-time residents of New York City neighborhoods where HPD has made a significant investment in housing."

45. Denies the allegations set forth in paragraphs 134 through 142 of the complaint.

46. Denies the allegations set forth in paragraphs 143 through 145 of the complaint, except admits that during the Bloomberg administration several neighborhoods or portions of neighborhoods were rezoned.

47. Denies the allegations set forth in paragraph 146 of the complaint.

48. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 147 of the complaint.

49. Denies the allegations set forth in paragraphs 148 and 149 of the complaint, and respectfully refers the Court to the Housing New York plan for its complete and accurate content and meaning.

Redacted per

Protective Order (ECF 82)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

JANELL WINFIELD, TRACEY STEWART and SHAUNA NOEL,

Plaintiffs,

-against-

Civil Action No.: 15-CV-5236 (LTS)(KHP)

CITY OF NEW YORK,

Defendant.

----------x

# DEPOSITION OF JERILYN PERINE

New York, New York

October 26, 2017

9:15 a.m.

Reported by:
JUDITH CASTORE, CLR
Job No. 52427

A No.

Q -- how much before?

A No.

Q But would it have been more than a week between thinking of the idea and doing it?

A I honestly have no memory of the timeline.

Q It could have been as short as a week?

A I have no memory of it.

Q So I'm just going to make the assumption, I think this is a fair assumption, that the two things weren't simultaneous.

That is, starting to think about it had occurred some period before making the decision, right?

A Well, sure.

Q Once you started thinking about it but before you made the decision, did you look at the city's reasons for having chosen 30 percent in the first place?

A Look at it beyond what I already knew it to be?

Q Well, look at it in any way?

A Well, I already knew what the thinking was so --

Q Just so we can clarify, you knew why the percentage was 30 percent and not 50 percent and not 70 percent?

A No. Sorry. I thought you just meant Community Preference.

No, I don't know why it was 30 and not some other number.

Q So you didn't investigate that --

A No.

Q -- question at the time?

A Not that I remember. I don't remember the details of this so you have to forgive me a little but --

Q For whatever it's worth, I will forgive you a little.

What, if anything, did you try to do to determine what the impacts of going from 30 to 50 percent would

be?

A You know, I had reasons for wanting to do it and, you know, lots of discussions and people thought it was a good idea and that was -- we moved forward and it became -- I mean, I don't -- we just moved it ahead. I mean, we hoped that the --

Q I didn't want to make the assumption that you moved ahead without trying to determine what the impacts would be. So I asked you the question:

What, if anything, did you do to try to determine what the impacts would be before making the change?

A Other than reaching out to a broad cross section of people, we certainly hoped that the impact was going to be, you know, provide better access to people and prevent some displacement in these communities. Other than that, we moved forward.

Q Why was 50 percent picked as opposed to 60 percent or 75 percent?

A Because I thought it was fair.

Q So you thought that 60 percent would not be fair?

A I didn't think they should -- yeah, I thought 50 percent was fair.

Q Why would 60 percent not have been fair?

A Because then it tipped over to a majority of one way or the other. I just thought 50 percent was fair.

Q Why would it be unfair to tip it into a majority when you have explained that the concern was to help residents of improving neighborhoods get access, that is, be awarded a greater percentage of apartments?

A Because that's what I thought was fair. I mean -- I mean, you want an answer in the negative but I can only give it to you in the way I can give you it to you which is to say I thought that that was fair, it was a fair accommodation. There was still

going to be the same number of units that were available for eligible people citywide and I thought it was fair.

Q Was --

A -- because it was half.

Q Right.

Was part of your thinking on this that going higher had the risk of perpetuating segregation?

MR. VIDAL: Objection.

A No.

Q So did it occur to you that going from 30 to 50 percent could increase the risk of perpetuating segregation?

A No, never.

Q What, if anything, did you do or cause to be done to explore whether that risk existed, the risk of perpetuating segregation more from going from 30 to 50 percent?

A Well, other than just my experience in working in these communities and working with people who

were directly on the ground, this issue was never raised. And it never dawned on me that this would be -- have anything to do with Community Preference.

MR. GURIAN: Let's take a lunch break.

VIDEOGRAPHER: The time is 1:15 p.m. and we're off the record.

(Whereupon, a lunch recess was taken at 1:15 p.m.)

STATE OF New York )
) :ss
COUNTY OF New York )

I, JERILYN PERINE, the witness herein, having read the foregoing testimony of the pages of this deposition, do hereby certify it to be a true and correct transcript, subject to the corrections, if any, shown on the attached page.

JERILYN PERINE

Sworn and subscribed to before me, this 13th day of December, 2017.

Notary Public

LOUISE LIPPIN
Notary Public, State of New York
Registration #02LI4992429
Qualified in Kings County
Commission Expires 2/24/18

C E R T I F I C A T I O N

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

I, JUDITH CASTORE, Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That JERILYN PERINE, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that this transcript of such examination is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of November, 2017.

Judith Castore

JUDITH CASTORE

# Transcript: Mayor de Blasio Delivers Speech on Vision and Plan to Combat Homelessness

February 28, 2017

**Mayor Bill de Blasio** Pastor, thank you so much. I want to really thank you for putting this into powerful perspective. And before I acknowledge some of the dignitaries in room, I want thank everyone here. People in this room have devoted your lives to helping people in need. And you know it's been a long fight, and you know it will continue to be a long fight, but I don't see anyone shirking from the fight. I see this as a lifetime commitment.

And we're blessed in this city that we could fill a room with so many people who feel that.

[Applause]

And there are thousands more like you. So, as I describe this vision, I want to affirm from the beginning, the vision can work, the vision will work, because there an army of people who already believes in uplifting others and have proven it can happen. Even in most complex, most diverse city in the world, we can lift up each other.

I also want to tell you, I had a real pleasure before we started today – six wonderful individuals that I got to spend sometime with, and some of them are here now. All of them were people who were purposeful, energetic, and enthusiastic, focused on bettering themselves and their families, had been working hard, ready work hard. Many working right now, other pursuing work or education – exemplary people. Did I mention they were homeless? And that's part of what today is all about – recognizing people who are New Yorkers, who are our neighbors, often also grapple with homelessness. That makes them no less New Yorkers, no less our neighbors, no less our fellow human beings.

So, I want to say to Freddy, and Lucy, and Eric, and Pedro, and Ruth, and Oscar, it was my profound pleasure to know you, and I admire the good route and the good path you're on, and we're here to support you.

[Applause]

To our wonderful host, Jennifer Jones Austin, who has been my partner in so much work – co-chair of my transition, did extraordinary work helping us build the administration, doing extraordinary work here at the federation. And wherever you go, not just in New York City, but around the country, you

focus on the human. We're going to think about people and their pathway to something better. We're going to reach out to every part of our society, but we're going to start with families. We're going to start with families, because family members, first and foremost, want to see something good for their own. Doesn't mean every family unified, doesn't mean there aren't problems, doesn't mean other members of families don't have their own struggles. But, typically, in families all over the city, there's a sense of solidarity, and, if they can help, they want to help.

But, guess what? Government hasn't set up to connect with families. Government has not thought about how can family members be part of the solution, how can they be allies and partners. How can we help the family at the same time as we are helping the homeless individuals? Communities have ended up feeling – and I understand why – that a shelter or any other facility is a problem, because they haven't, of course, gotten to know people being served, they don't feel connection to them, they don't feel it could be they, themselves, in that same situation. If everyone in New York City thought, that could be me – there but for the grace of God go I – we'd be having a different discussion.

But one thing that the government has done that's made it harder is we've sent people all over and there's not a sense of the people who are being served are from my very own community – they are just like me – and that's something we need to change.

We think that will create a better and fairer system. We think that will create more human solidarity. We think it'll create more chance success in helping people back on their feet.

So, we are going to deepen our response to homelessness. And now, we are going respond to homelessness borough by borough, neighborhood by neighborhood, family by family, person by person.

[Applause]

En Español –

[Mayor de Blasio speaks in Spanish]

What does this mean in terms of the big picture? It means we plan on reducing number of people in shelter, again, incrementally, steadily. But this is the honest number we believe we can commit to.

We will reduce the number people in shelter by 2,500 people by the end of the 2021. Is it gloryful goal? Is it everything we want it to be? No. It's the honest goal. We want to surpass it, and, with your help, we aim to surpass it. But this is what we can tell of people New York City can be done and can be sustained.

A borough-by-borough, neighborhood-by-neighborhood approach that will ensure that people are in shelter to begin with in the borough they come from, and, ultimately, as close to the neighborhood they come from as possible – that, that will be the governing philosophy of the homeless shelter

as homeless. We're going to go the extra mile to support that family. We're going to help them their rent. We're going to help them make ends meet. We're going to make it a good equation for that family – and it makes so much sense. Because especially if we're talking about children – lord knows we'd rather have children in a family setting than in a shelter. We'd rather family members with their loved ones feeling warmth and support as they get back on their feet. Why should we provide financial support to make that happen? It makes all of the sense in world by the way, there any at that?

By the way, if there's any taxpayers in the room –

[Laughter]

It's a hell of a lot less expensive than a family being in shelter. So, it's humane. It's much more intelligent strategically in terms of actually helping someone get their life better, and it costs lot less too. That's the family part of the equation.

I've mentioned the community part of the equation. We're going to have a different kind of conversation. It won't alway be an easy conversation, but we're going to have a different conversation with community boards, with community civic organizations. And, I want to be clear, we've looked at the exact numbers – every community board has people in our shelter system who come from it. Some have a very small number. Some very large number. We're going to change our shelter system to reflect the needs of each community board. We're going to ask each community board to do their fair share. For some, it may mean very small facility. If community board has 50 people in shelter system, we want home have some kind of capacity like that. If they have thousands, we want them to have capacity for the people from their neighborhood, even if it means enough capacity for thousands of people. We want people to be close to home. But we want everyone to do their fair share – every community board needs to be part of the solution.

[Applause]

And we will – whenever we site a shelter, we will set up a community advisory board, and the idea will be to work in common for a better outcome. We know a lot of people are going to say, wait, we don't want anything like that in our neighborhood. Well, guess what? Everyone needs to take on their fair share, but we can make it work better if we work together. We can figure out what will make it succeed and what will make it not a negative for the community, but, in some times, even a positive for the community, especially because people will know the folks inside those doors come from right around their own streets, their own neighborhood, their own block.

When we create a new shelter facility, we will provide 30 days notice, or more. That is going to be a strict rule. We've actually already been applying that rule in recent months. That will be a consistent rule. And we understand why that's been a point of contention – communities deserve to know they will get notification. That does not mean, if there's protest we will change our minds. It means we want people to come to the table with us, offer their concerns, if they have an alternative location, we'll look at that too. If they have better ways we can do the work, we're listening. but they deserve

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

JANELL WINFIELD, TRACEY STEWART, and SHAUNA NOEL,

Plaintiffs,

-against-

15 CV 5236 (LTS)(DCF)

CITY OF NEW YORK,

Defendant.

---

**DECLARATION OF COMMISSIONER VICKI BEEN IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

**VICKI BEEN**, declares pursuant to 28 U.S.C. §1746, under penalty of perjury, as follows:

1. I am the Commissioner of the City of New York Department of Housing Preservation and Development ("HPD"), a position that I have held since February 2014. As Commissioner of HPD, I am responsible for leading the nation's largest municipal housing agency. This declaration is based upon my personal knowledge, conversations with employees of the City of New York, and my review of records maintained by the City of New York.

2. I submit this declaration in support of defendant's motion to dismiss the claims asserted in the plaintiffs' First Amended Complaint, and to provide an overview of HPD-sponsored affordable housing programs, tax incentive programs administered by HPD, and the New York State Real Property Tax Law ("RPTL") § 421-a Tax Exemption Program. I also submit this declaration to provide facts regarding the affordable housing lotteries at the developments located at 160 Madison Avenue, New York, New York; 200 East 39th Street, New York, New York; and 40 Riverside Boulevard, New York, New York (the "subject developments"), and plaintiffs' application status at said developments.

3. Affordable housing, in safe, high-opportunity neighborhoods, is a basic human need. Every New Yorker deserves a safe and affordable place to live, in a neighborhood that provides opportunities for residents to thrive. Recognizing this essential need, HPD's mission is to promote the construction and preservation of affordable, high quality housing for low and moderate-income families in thriving and diverse neighborhoods in every borough, by enforcing housing quality standards, financing affordable housing development and preservation, and ensuring sound management of the City's affordable housing stock.

4. The City is deeply committed to fair housing. Indeed, the City's five-borough Housing Plan was developed to "address the City's affordable housing crisis" by "fostering diverse, livable neighborhoods."[1] The five-borough Housing Plan aims to create and preserve 200,000 units of affordable housing throughout the City. The most comprehensive affordable housing plan in the City's history and largest municipal housing plan in the nation, its goal is to help address the City's affordability crisis by providing new, or preserving existing, affordable housing for more than half a million New Yorkers ranging from those with very low incomes to those in the middle class, all of whom face ever-rising rents. The plan incorporates dozens of initiatives "to ensure balanced growth, fair housing opportunity, and diverse neighborhoods."[2]

**HPD-Sponsored Affordable Housing Programs**

5. HPD works with a variety of public and private partners to achieve the City's goals of providing affordable housing for New Yorkers with a range of incomes, from the very lowest to those in the middle class. HPD accomplishes these goals through a combination

[1] See Mayor Bill de Blasio's Housing New York: A Five-Borough, 10-Year Housing Plan.

[2] Id. at 7.

of loan programs, tax incentives, disposition of City-owned property, tax credits, and other subsidies and incentives. For example, the City's Voluntary Inclusionary Housing program is designed to preserve and promote affordable housing within neighborhoods where zoning has been modified to encourage new development. In applicable areas, a development may receive a density bonus (allowing the construction of additional market-rate floor area) in return for the new construction, substantial rehabilitation, or preservation of permanently affordable housing.

6. In addition, HPD finances programs such as the Supportive Housing Loan Program, which provides financing to not-for-profit organizations to develop supportive housing for homeless single adults, including people suffering from disabilities such as mental illness and AIDS. Supportive housing is affordable housing with on-site services to serve the needs of the most vulnerable New Yorkers. HPD's Senior Affordable Rental Apartments (SARA) Program supports the construction and renovation of affordable housing for low-income seniors, including a 30% set-aside for homeless seniors.

7. Both for-profit and not-for-profit developers can explore a wide range of opportunities to build or preserve affordable rental and homeownership units on publicly-owned or private sites throughout the City. Developers creating new City-subsidized affordable housing are required to follow HPD marketing and tenant selection procedures. The objectives of these procedures are to create housing opportunities for qualified applicants in a way that is fair, open, and accessible to all; to comply with fair housing and equal opportunity requirements; and to ensure that accessible units are made available to those with mobility, visual or hearing impairments.

8. In some buildings financed through subsidies or density bonuses from New York City, HPD gives eligible current residents of the community district in which a new

affordable housing development is located priority for 50% of the available affordable units (the "City Community Preference Policy"). The City Community Preference Policy is intended to ensure that local residents, many of whom have deep roots in the community and have persevered through years of unfavorable living conditions, are able to remain in their neighborhoods as those neighborhoods are revitalized. As City investment enables a neighborhood to stabilize and become a more desirable location, housing costs may increase to the point where long-term residents are displaced. This is a harsh and inequitable outcome for people who have endured years of unfavorable conditions, and who deserve a chance to participate in the renaissance of their neighborhoods. The City Community Preference Policy ensures that new affordable units will be offered to these residents. In addition, neighborhoods throughout the City and their elected representatives often resist approving land use actions required to allow greater density or site affordable housing because of concern about the other types of burdens that development may impose. They have legitimate concerns about potential negative effects of development both during construction (such as noise and danger) and afterward (as additional residents strain existing infrastructure, potentially leading to things like traffic congestion and school crowding). The City Community Preference Policy ensures that neighborhoods see that new growth and investments in affordable housing provide some benefits to local residents to offset those burdens. This makes it possible for the City to overcome that resistance and achieve its ambitious affordable housing goals despite neighborhoods' understandable concerns about the difficulties that new construction and growth may pose.

9. If after thorough outreach, the developer is unable to reach the required percentage, it may seek a waiver from HPD with respect to the remaining units. Once the community preference goal is reached or waived, the remaining units are offered to all other

applicants on a random ranking list. Since every development is also marketed throughout the City, this process ensures that all residents have an opportunity to become part of a revitalized community.

**Tax Incentive Programs Administered by HPD**

10. Tax incentives can either be granted as-of-right or by resolution of the City Council. Projects that meet the eligibility requirement of an as-of-right tax program administered by HPD are granted benefits pursuant to the statutes and regulations governing the particular program.

11. As-of-right tax incentive programs administered by HPD may reduce or eliminate the amount of municipal real property taxes a property owner must pay. Incentives are typically awarded in exchange for investment that benefits the public, such as the creation or preservation of affordable housing, and are used by developers and property owners to offset the cost of investment in the property.

**421-a Tax Exemption Program**

12. In 1971, the New York State Legislature enacted Section 421-a of the RPTL to spur housing development in New York City at a time when housing market conditions were dire. To incentivize development of permanent housing, the 421-a tax exemption program provided tax exemptions for housing development throughout the City. In 1985, after major amendments and the creation by local law of a specified Geographic Exclusion Area ("GEA"), 421-a evolved into a tax exemption program that incentivized the development of affordable housing. Developments within the GEA were required to provide some affordability — either on-site or by purchasing negotiable certificates generated by off-site affordable housing units —

in order to be eligible for RPTL § 421-a benefits. Outside of the GEA, RPTL § 421-a tax exemption benefits were, and currently are, available without providing affordable housing.

13. Local Law 58 of 2006 and subsequent enactments by the New York State Legislature in 2007 greatly expanded the GEA, requiring developers in areas that were not previously included in the GEA to provide affordable housing units in order to receive RPTL § 421-a benefits.

14. In 2007 and 2008, the New York State Legislature enacted further amendments to RPTL § 421-a, making several major programmatic changes to strengthen the GEA affordability requirement. Relevant to this action, Chapter 618 of the Laws of 2007 added a community preference requirement for 421-a affordable units in the GEA. Within the GEA, residents of the community board in which the building receiving benefits is located have priority for the purchase or rental of 50% of the affordable units upon initial occupancy ("421-a Statutory Community Preference Requirement"). See RPTL § 421-a(7)(d)(ii) (2007).[3] Section 63-l of the Laws of 2015 renumbered RPTL § 421-a(7)(d)(ii) to RPTL § 421-a(7)(d)(iii).

15. Pursuant to RPTL § 421-a(3)(a) and Section 1802(6)(b) of the New York City Charter ("City Charter"), HPD is the local housing agency charged with administering the New York State RPTL § 421-a tax exemption program in the City of New York. RPTL § 421-a developments are usually privately financed, without any HPD involvement. HPD processes the

[3] Chapter 110 of the Laws of 2005, which created special requirements for receipt of 421-a benefits in the Greenpoint-Williamsburg Waterfront Exclusion Area and which took effect on June 21, 2005, also had a community preference requirement for affordable units. See RPTL Section 421-a(6)(d).

421-a applications and markets the affordable units. The City has no discretion with regard to applying the statutorily mandated requirements of the 421-a Program.[4]

**Affordable Housing Lotteries at the Subject Developments and Plaintiffs' Application Status**

16. I understand that the Complaint alleges that the City Community Preference Policy violates the Fair Housing Act ("FHA"), 42 U.S.C. § 3604, et seq., and the New York City Human Rights Law ("NYCHRL"), Administrative Code of the City of New York ("Administrative Code") § 8-107, et seq. Am. Compl. ¶¶ 183-90.

17. However, the City Community Preference Policy was not and will not be applied at the subject developments. All three subject developments have applied for and received preliminary certificates of eligibility ("PCE") for 421-a tax benefits, and all affordable units in those developments were required to be provided as a condition of receiving those 421-a benefits. Therefore, all affordable units marketed at the subject developments are subject to a the 421-a Statutory Community Preference Requirement mandated by State law, which has nothing to do with the City Community Preference Policy. Put simply, the City had no choice about implementing a community preference with regard to these affordable units because State law specifically required the implementation of such a preference.[5]

---

[4] The State legislature recently enacted Chapter 20 of the Laws of 2015, which amends RPTL § 421-a, and becomes effective January 2016 if representatives of residential real estate developers and construction labor unions sign a memorandum of understanding regarding wages of construction workers performing work on 421-a projects that contain more than 15 units. Under the 2015 amendments, HPD is defined as the agency charged with administering the 421-a tax exemption program. See RPTL § 421-a(16)(a)(xii) (2015).

[5] While some of these 421-a affordable units also qualified the subject developments to receive zoning density bonuses under the City's Voluntary Inclusionary Housing Program, the application of the mandatory 421-a Statutory Community Preference Requirement meant that the City Community Preference Policy never came into play. HPD had no discretion to apply the City Community Preference Policy given the requirements of 421-a.

18. When marketing subsidized affordable units in 421-a developments, such as the subject developments, HPD and the relevant developer solicit applications for a lottery. An applicant's race or ethnicity is not a factor in the lottery process. Each application is randomly assigned a number and then placed in order on a "lottery log." The numbers on the logs are not influenced by community preference. Once the log order is randomly established, the developer then considers preference categories when going down the list. The developer moves through the list in search of applicants who qualify for an apartment based on household size, income, and, if applicable, current residence.

19. The status of the lottery logs and plaintiffs' positions on the logs for the three subject developments are as follows:

**200 East 39th Street (Block 919, Lot 59)**

- Approved for Preliminary Certificate of Eligibility ("PCE") for 421-a tax benefits on 5/27/2015
- 19 affordable units
- Ad posted 1/15/15; deadline 3/16/15; Agent received log 4/20/15; interviewing in progress
- *Plaintiff Shauna Noel-Robinson is log number 6,745 and Janell Winfield is log number 12,489*

**40 Riverside Boulevard (Block 1171, Lot 150)**

- Approved for PCE for 421-a tax benefits on 5/20/2015
- 55 affordable units
- Ad posted 2/18/15; deadline 4/20/15; Agent received log 6/25/15; interviewing in progress
- *Plaintiff Shauna Noel-Robinson is log number 55,908 and plaintiff Janell Winfield is log number 16,926*

**160 Madison (Block 862, Lot 20 – condo lot 7504)**

- Approved for PCE for 421-a tax benefits on 5/7/2014
- 64 affordable units
- Ad posted 3/15/15 – deadline 6/1/15 – Agent received log 7/16/15; interviewing in progress
- *Plaintiff Janell Winfield is log number 47,107 and plaintiff Tracey Stewart is log number22,796*

20. Given plaintiffs' positions on the logs at the subject developments, and the small number of available apartments, it is extremely unlikely that the State law regarding community preference for community district residents will influence whether or not they receive an apartment.

21. In any event, the City Community Preference Policy in no way affected the plaintiffs' applications at the subject developments. HPD is simply administering a State program in accordance with the specific requirements of State law. It is not applying the City Community Preference Policy to the subject developments.

Dated: New York, New York
October 2, 2015

VICKI BEEN

Sworn to before me this
2nd day of October, 2015.

NOTARY PUBLIC

MATTHEW ELLIOTT SHAFIT
Notary Public, State of New York
No. 02SH6243313
Qualified in New York County
Commission Expires June 12, 2018

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

JANELL WINFIELD, TRACEY STEWART and SHAUNA NOEL,

Plaintiffs,

-against-

Civil Action No.: 15-CV-5236 (LTS)(KHP)

CITY OF NEW YORK,

Defendant.

----------x

# DEPOSITION OF

## RAFAEL E. CESTERO

New York, New York

November 14, 2017

9:15 a.m.

Reported by:
JUDITH CASTORE, CLR
Job No. 52672

Q It's never been voiced to you or you never understood what you've been told as an argument that this market rate housing is going to change the racial or ethnic demographics of the neighborhood?

A No.

Q You've never heard yourself or heard anyone else discuss fear of racial or ethnic change to a neighborhood?

A No.

Q Now I should make sure I understand. It's -- it's correct that you've never heard anyone say that to you or tell you about that fear?

A I have never heard anybody say they don't want that development because it's going to change the racial or ethnic composition of their neighborhood.

Q Okay. Have you heard anyone express any concern -- any person or organization express any concern that

the racial or ethnic composition of a neighborhood was going to change?

MR. VIDAL: Objection.

A No.

Q Never?

A No.

Q In the context of the city that we live in and rent pressures that you've talked about, do you think that a fear of racial or ethnic change in a neighborhood would be understandable?

MR. VIDAL: Objection.

A Yes.

Q Why?

A Because racial discrimination and the fears we talked about earlier related to development and neighborhoods from the urban renewal area are real, people feel them.

Q And so from your point of view it's a legitimate response to say -- it would be a legitimate response to say and we don't want the racial or ethnic composition of this

STATE OF New York )
) :ss
COUNTY OF New York )

I, RAFAEL E. CESTERO, the witness herein, having read the foregoing testimony of the pages of this deposition, do hereby certify it to be a true and correct transcript, subject to the corrections, if any, shown on the attached page.

RAFAEL E. CESTERO

Sworn and subscribed to before me,
this 25 day of January, 2018.

Notary Public

JACLYN R KEANE
Notary Public, State of New York
No. 01KE6199572
Qualified in Nassau County
Commission Expires January 20, 2021

C E R T I F I C A T I O N

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

I, JUDITH CASTORE, Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That RAFAEL E. CESTERO, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that this transcript of such examination is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 29th day of November, 2017.

Judith Castore

JUDITH CASTORE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

JANELL WINFIELD, TRACEY STEWART and SHAUNA NOEL,

Plaintiffs,

-against-

Civil Action No.: 15-CV-5236 (LTS)(KHP)

CITY OF NEW YORK,

Defendant.

----------x

# DEPOSITION OF

# STEVEN BANKS

New York, New York

November 29, 2017

9:18 a.m.

Reported by:
JUDITH CASTORE, CLR
Job No. 52807

have worked with who -- and because you have worked with them, you know that they are homeless, but otherwise you wouldn't know, right?

A That's correct. Similarly, there is some neighborhoods where there have been shelters for years and people don't know that there is a shelter in the neighborhood.

Q But the mayor is talking about something in particular, people knowing that the folks inside those doors come from right around their own streets, their own neighborhood, their own block.

Why is that important to know that?

A For the same reason that I am describing, that the -- what I have observed and experienced is the demonization of our clients, in part, comes from a belief that they're not just like you and me and, in part, that's working/not working, my

neighborhood/not my neighborhood, those kinds of things.

Q My race/not my race?

A That -- that's part of it. I mean, the demonization may be based on that too in terms of my experience, yes.

Q I just want to make sure I understand the word --

A Sure.

Q -- that you are using.

You're saying, as far as you understand, there are some times when demonization is based on race --

MS. SADOK: Objection.

Q -- not simply that there is a theoretical possibility?

A Again, I think you are -- in experiences that I have had, both in government and out of government, people demonize people who they don't know. And sometimes that can be based upon stereotypical presumptions they have about people and sometimes that

falls into race too.

Q This is something -- the race-linked fear or demonization, that's something that you know has occurred and continues to occur over time. It's not like one incident, right?

MS. SADOK: Objection.

A I mean, the reason why I'm hesitating, and I think -- and tell me if I am on the wrong track, and then I actually will not -- I will stop this answer. If you are asking about shelter sitings, they're all different. And I can give you some examples of differences.

So there is not a monolithic response to a shelter siting, even just in the first eight shelters that we got up and operating since April right after the plan. There have been different experiences. Some places there's been opposition; some places no opposition. So that's why I'm

hesitating to answer.

Q Right. I was not suggesting or are pushing you to do anything about saying that the same thing happens all the time. I just wanted to be clear about your answer in terms of the role of race in demonizing clients.

It's not something that just, like, happened once in the last 40 years. It's like one of the phenomena that exists.

MS. SADOK: Objection.

A So the only way I can answer that is by giving an example.

So the shelters siting in Maspeth. I conducted two large community meetings there. Thousand people in one of them, close to a thousand in the other one. And there were some very offensive things that were said, and I reacted to them, as you saw --

(Clarification by the reporter.)

A If you saw on internet what was said, you probably saw how I reacted to things that were said.

Q And you interpreted some of those things as being race-based. Yes?

A Well, the comment that was yelled out to me, that that was denied about, you know, Go back to East New York, I responded to that directly. But in those meetings and in addressing the shelter that we're operating in Maspeth now, we said -- I said that people had come -- we're in the shelter system from that community, and they disputed that, rather loudly. And I think that's really what the mayor and I have both been trying to get at, which is that community could not believe that people from that community would be in our shelter system. But they were.

And trying to engage them, that's the kind of language that the mayor is using and I was using, and,

you know, ultimately there is 50, 60, 70 people that have are sheltered in that neighborhood despite what occurred. But nonetheless that was what I could give you as an example of that kind of opposition.

On the other hand -- you know, it's not monolithic is all I'm trying to say.

Q Yeah, you said it's not monolithic.

But "Go back to East New York" does not have any explicit race words, but you understood that to be race linked or race coded?

A Yes. I understood those words and other words to be race coded, and I said so from the podium.

Q There was a sign, Maspeth Lives Matter --

A Yes.

Q -- that you understood to be race coded?

A Right. I think they had

those in front of my house on the three or so occasions that had come to protest opening that shelter.

Q So there's a lot of opposition. I'm not saying it's monolithic, but there is a lot of opposition to the placement of homeless shelters for a variety of reasons. Yes?

A Right. But that's why -- I can't say yes with the word "a lot" in that sentence. And the only way I can -- you are not going to want me to do this, but I got to say it anyway, of the first five that we opened, one of them in Prospect Heights, totally supported by the community. Block association totally for the opening of the shelter. A shelter in Richie Torres' district for LGBTQIA youth, even though there is a lots of shelters in his district supported by him, welcomed by the community.

We got sued by two different

lawsuits about fair share that ultimately failed in communities with differing racial makeup in the Crown Heights area. Meetings about opening shelters are a lot like union meetings.

Q Now we're really going far afield, Mr. Banks.

A I'm just saying -- I object to the word "a lot," but I'm going to acknowledge that there are particular sitings that have created a significant amount of opposition. But it's not monolithic. We have other sitings where there have been no opposition for opening shelters --

(Clarification by the reporter.)

A -- other sitings in which have opened the shelters without opposition.

Q And in your experience in terms of the demonization of homeless New Yorkers in general are not some of the common themes that are -- common

theme and fears that are raised:
Crime, danger, drugs?

MS. SADOK: Objection.

Q I mean, what's said explicitly, crime and danger and drugs.

A Safety is the -- I'm just -- I'm not disputing. I just think the better word that I feel more comfortable -- if you are asking me are people raising issues about safety, I would answer that question yes.

Q And in your own belief, are some of those fears -- I'm not asking you if it's monolithic -- are some of those fears linked to racial stereotyping?

MS. SADOK: Objection.

A That was certainly my experience in Maspeth, but I have had similar concerns raised in neighborhoods which -- in which the people raising the concerns were residents of color.

Q So over the course of the

last 35 or 40 years you have been working with or for homeless New Yorkers, Maspeth the only occasion where you thought that concerns ostensibly were about safety but they actually were a function of racial stereotyping?

MS. SADOK: Objection.

A I mean, I will give you another example.

Q No, that's not my question. My question is: Is that the only time?

A No.

Q Were there several other occasions or more?

MS. SADOK: Objection.

A Your question really can't be answered yes or no.

Q Okay. Have you communicated with the mayor, either orally or via e-mail or text, about the role, if any, that race plays in terms of the difficulties the city encounters either in siting shelters or in placing

homeless New Yorkers in housing?

A We certainly discussed the Maspeth situation, and he supported me fully in moving forward with placing people in that hotel, where they are to this day, despite the opposition.

Q Any communications outside of the Maspeth situation?

MS. SADOK: Objection.

A That's the one that comes to my mind today.

Q That it is the only one that comes to your mind?

A That's correct.

Q As far as you can recall today, you haven't discussed with him the role race plays in difficulty of shelter siting or placing homeless New Yorkers in shelters on any other occasions?

MS. SADOK: Objection.

A I mean, to the best of my recollection, that's the Maspeth situation.

Q Other members of the administration who testified so far in this case have testified about the ongoing presence of racial politics in the city, including as it relates to advocacy on housing policy.

So let me first ask you what, if anything, you understand the term "racial politics" to encompass?

MS. SADOK: Objection.

A I don't know what they meant. I don't know what you mean. For me, that phrase means the kinds of things we discussed before the first break. The challenge of the race issue in our city. You asked me about racism. We've been talking about Maspeth in connection to that.

That's what would come to my mind if you ask me, like, what do you think of when you think of racial politics. I think of all the things that we were talking about the before the break and things I have been

discussing about Maspeth.

Q While you have been in city government, regardless of whether it formally comes under your role as Commissioner of Homeless Services or not, have you heard anyone or any groups making an appeal to maintain the racial status quo of a neighborhood?

MS. SADOK: Objection.

A I have not heard that.

Q And you include in that, as we were discussing before, language that -- any language that you interpreted as effectively asking to maintain?

A Any language that I would have interpreted hadn't been used.

Q Very good.

Have you heard anyone complaining that gentrifying neighborhoods are becoming whiter?

MS. SADOK: Objection.

A I have been at lots of town halls, and the term -- it's always

C E R T I F I C A T I O N

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

I, JUDITH CASTORE, Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That STEVEN BANKS, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that this transcript of such examination is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 29th day of November, 2017.

Judith Castore

JUDITH CASTORE

INSTRUCTIONS TO WITNESS

Please read your deposition over carefully and make any necessary corrections. You should state the reason in the appropriate space on the errata sheet for any corrections that are made.

After doing so, please sign the errata sheet and date it.

You are signing same subject to the changes you have noted on the errata sheet, which will be attached to your deposition.

It is imperative that you return the original errata sheet to the deposing attorney within thirty(30) days of receipt of the deposition transcript by you. If you fail to do so, the deposition transcript may be deemed to be accurate and may be used in court.

The following excerpts of the errata sheet are inclusive of the pages of the transcript that are part of this exhibit.

148 9 CHANGE: "in some part of the city" to "in some parts of the city"
REASON: Incorrect transcription.

151 25 CHANGE: "Brooklyn and through" to "Brooklyn schools and through"
REASON: Clarify intent of sentence.

152 15-16 CHANGE: "that's what brought" to "that's what was brought"
REASON: Clarify intent of sentence.

157 5 CHANGE: "the promise of a plan" to "the promise of the plan"
REASON: Clarify intent of sentence.

158 12 CHANGE: "what we develop as a plan" to "what we developed as a plan"
REASON: Clarify intent of sentence.

158 24-25 CHANGE: "Is the residential segregation" to "Is there residential segregation"
REASON: Incorrect transcription.

170 7 CHANGE: "there is some neighborhoods" to "there are some neighborhoods"
REASON: Incorrect transcription.

173 16-17 CHANGE: "So the shelters siting in" to "So for the shelter siting in"
REASON: Incorrect transcription.

174 14 CHANGE: "we're in the shelter" to "were in the shelter"
REASON: Incorrect transcription.

175 2-3 CHANGE: "ultimately there is 50, 60, 70 people that have are sheltered" to "ultimately there are 50, 60, 70 people that are sheltered"
REASON: Incorrect transcription.

176 3 CHANGE: "occasions that had come" to "occasions they had come"
REASON: Incorrect transcription.

181 24 CHANGE: "talking about the before" to "talking about before"
REASON: Incorrect transcription.

182 18 CHANGE: "hadn't" to "hasn't"
REASON: Incorrect transcription.

183 17 CHANGE: "people of multiple of all races" to "people of multiple -- all races"
REASON: Clarify intent of sentence.

184 25 CHANGE: "given the opportunity refer clients" to "given the opportunity to refer clients"
REASON: Incorrect transcription.

186 13 CHANGE: "homeless, particularly supportive" to "homeless, particularly when supportive"
REASON: Clarify intent of sentence.

188 8 CHANGE: "applied to all of the building" to "applied to all of the buildings"
REASON: Incorrect transcription.

190 12 CHANGE: "we're not eligible" to "were not eligible"
REASON: Incorrect transcription.

195 18 CHANGE: "how to best of connect them" to "how to best connect them"
REASON: Incorrect transcription.

198 2 CHANGE: "There is a lot of units" to "There are a lot of units"
REASON: Incorrect transcription.

224 12 CHANGE: "was made able to them" to "was made available to them"

REASON: Incorrect transcription.

WITNESS' SIGNATURE

1-29-18

DATE

STATE OF New York )
) :ss
COUNTY OF New York )

I, STEVEN BANKS, the witness herein, having read the foregoing testimony of the pages of this deposition, do hereby certify it to be a true and correct transcript, subject to the corrections, if any, shown on the attached page.

STEVEN BANKS

Sworn and subscribed to before me, this 29 day of January, 2018.

Notary Public

AARON FRIEDMAN
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02FR6348028
Qualified in Kings County
Commission Expires 09/19/2020

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

JANELL WINFIELD, TRACEY STEWART and SHAUNA NOEL,

Plaintiffs,

-against-

Civil Action No.: 15-CV-5236 (LTS)(KHP)

CITY OF NEW YORK,

Defendant.

----------x

# VIDEOTAPED DEPOSITION OF

## CARL WEISBROD

New York, New York

July 27, 2017

9:06 a.m.

Reported by:
THERESA TRAMONDO, AOS, CLR
JOB NO. 51315

experience in my three years personally resistance to change based on race.

Q. In your three years in the de Blasio administration, you are not aware of arguments that have been made by people outside the administration in favor of trying to maintain the racial composition of a neighborhood or, to put it another way, to resist change in the racial composition of the neighborhood?

MR. VIDAL: Objection.

A. Those are two totally different things. To say advocacy on racial grounds or, to put it in another way, change, those are two different things. I heard many, many, from -- almost every community has at the very least a concern about change and what it means. But I didn't hear explicitly or I don't even think implicitly that expressed in racial terms.

MR. GURIAN: Mark this as Plaintiffs' 24.

(Plaintiffs' Exhibit 24,

A. Thank you.

THE VIDEOGRAPHER: Here ends video recording number 2. This concludes the video recorded deposition of Carl Weisbrod taken by the plaintiffs on Thursday, July 27, 2017. The time is 1722. We are going off the record.

(Time noted: 5:23 p.m.)

CARL WEISBROD

Subscribed and sworn to before me this 15 day of September, 2017.

Notary Public

JULIA NUSSENBAUM
NOTARY PUBLIC
New York County
COMMISSION EXPIRES
01NU6352412
DECEMBER 27, 2020
STATE OF NEW YORK

C E R T I F I C A T E

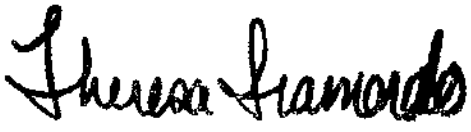
STATE OF NEW YORK )
: ss.
COUNTY OF NEW YORK )

I, THERESA TRAMONDO, a Notary Public within and for the State of New York, do hereby certify:

That Carl Weisbrod, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 31st day of July, 2017.



Redacted per

Protective Order (ECF 82)

Redacted per

Protective Order (ECF 82)


## CONTEXT: THE AFFORDABILITY CRISIS IN DE BLASIO'S NEW YORK CITY AND THOSE BLOOMBERG LEFT BEHIND

Across the five boroughs, the affordability crisis is growing every day. Today, low- and moderate-income New Yorkers continue to be priced out of their neighborhoods. The incomes of countless New Yorkers are not increasing while rents keep rising. The growing gap between lower incomes and higher rents is making New York City increasingly unaffordable.

Indeed, a recent study released by *StreetEasy, The High Burden of Low Wages: How Renting Affordably in NYC is Impossible on Minimum Wage*, found that a New Yorker earning $15 an hour could afford just one neighborhood: Throgs Neck in the Bronx.[i]

"The extent to which rent growth has outpaced income growth in New York City means low-wage workers face three options: find several roommates to lower their personal rent burden, take on more than one job, or move out of New York City," the study finds.

According to a close analysis of the most recent Census data[ii], Bloomberg's housing efforts generated a shortage of more than 400,000 affordable units for low-income New Yorkers. Low-income here is defined as a household earning less than 50% of Area Median Income (AMI). For a household of four, that means an approximate annual income of less than $42,000. (In 2012 New York City area median income was $83,600 for a family of four; the 2015 New York City area median income for a family of four is $86,300).

Exhibit 37
8/2/17 92

To create an average of 60% of AMI, for example, a developer could build units at 40% and 80% or 30% and 90%. But the problem is that the city's Department of Housing, Preservation and Development (HPD) does not incentivize either the higher income units (80% and 90% of AMI) or the lower-income units in a real way that would allow for a financially feasible project with a mix of units for tenants at 40% or 30% of AMI.

Unfortunately, the most common funding source for building low-income units, The Federal Low Income Housing Tax Credit program (LIHTC), incentivizes apartments to be built at 60% of AMI. The city's Department of Housing, Preservation and Development (HPD) also requires developers to build a bulk of affordable apartments at 60% of AMI in an effort to maximize the use of limited subsidy dollars. Given these priorities and funding streams, it is very difficult to achieve deeper affordability without some additional direct city capital subsidy.

As new apartments at higher income levels are introduced into low-income areas, economic integration will only be created and maintained if current residents are able to stay in the neighborhoods that will be rezoned. But none of the three options for mandatory inclusionary zoning proposed by de Blasio will achieve this goal.

Bottom line: current residents in low-income communities of color will not be the beneficiaries of new housing required under mandatory inclusionary zoning. The same low-income people whose affordable housing needs were ignored by Bloomberg will continue to be ignored.

Bottom line: current residents in low-income communities of color will not be the beneficiaries of new housing required under mandatory inclusionary zoning. The same low-income people whose affordable housing needs were ignored by Bloomberg will continue to be ignored.

New so-called affordable housing will overwhelmingly go to wealthier, whiter outsiders – people who come from other neighborhoods. Instead of limiting gentrification and displacement, de Blasio's mandatory inclusionary zoning plan will likely accelerate them.

Race is an undeniable factor here and needs to be acknowledged: mandatory inclusionary zoning, as currently conceived by the de Blasio administration, will lead to the whitening of neighborhoods like East New York and the South Bronx that are scheduled to be rezoned.

Based on existing income levels, residents of color in East New York and the South Bronx will not gain access to new housing. It will be too expensive for them, unless their wages are increased substantially.

The local media is increasingly running stories about gentrification, land speculation, and higher real-estate prices coming to East New York[iii]. The concern among longtime residents is that de Blasio's mandatory inclusionary zoning will exacerbate, rather than halt, these trends.

That brings us to another major deficiency of de Blasio's approach to tackling the affordability crisis: in his plan, there is no vision for job quality, even though the rezoning of neighborhoods will impact thousands of new jobs, and present opportunities to increase economic opportunity for the most vulnerable low-income residents and communities.

The lack of attention to job quality is even more disconcerting when you consider the recent evidence showing that even $15 per hour isn't enough to make low-income neighborhoods affordable. Low-wage

Redacted per

Protective Order (ECF 82)