UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JANELL WINFIELD, TRACEY STEWART, and SHAUNA NOEL,

Plaintiffs,

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

CITY OF NEW YORK,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S ORAL DECISION OF SEPTEMBER 14, 2017 DENYING DISCOVERY FROM NEW YORK CITY COUNCIL MEMBERS

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INTRODUCTION

This case challenges defendant's outsider-restriction policy ("ORP") in its affordable housing lotteries as intentionally discriminatory, as perpetuating segregation, and as causing a race-based disparate impact. It is undisputed that, in connection with potential affordable housing development and related land-use actions, there is a mutual process between the mayoral administration and the member of the City Council in whose district the affordable housing is slated to be developed: each side attempts to influence the other and is responsive to the other. According to defendant, the ORP is central to this process.

The City Council is comprised of 51 Council Members ("CMs"). Plaintiffs have pursued crucial discovery with respect to a limited subset of those CMs; specifically, document discovery from six CMs (Ritchie Torres; Rafael Espinal; Melissa Mark-Viverito, the Council Speaker; Antonio Reynoso; Robert Cornegy; and Laurie Cumbo), and depositions from two of the foregoing six (CMs Torres and Espinal). Defendant moved to quash the depositions and for a protective order to preclude any document discovery (ECF 113). Plaintiffs opposed.[1] The Magistrate Judge granted defendant's motion in full.[2] The decision did not speak to or rest on claims of qualified privilege that defendant had made.[3] Plaintiffs now seek reversal of the decision.

The decision failed to recognize that liability under an intentional discrimination theory can be based on decision makers in defendant's executive arm being influenced by or responsive

[1] Plaintiffs' opposition papers are found at ECF 124 (Declaration of Craig Gurian, dated Apr. 24, 2017 ("Gurian Apr. 24 Decl."), and ECF 125 (Plaintiffs' memorandum of law). Plaintiffs are not refiling those documents on ECF, but are submitting hard copies to the Court for ease of review. Many exhibits contained in the Gurian Apr. 24 Decl. are referenced in this brief.

[2] *See* excerpts of Transcript of Sept. 14, 2017 Court Conference ("Decision Trans."), at 7:16-12:19, annexed to the Sept. 28, 2017 Declaration of Craig Gurian ("Gurian Sept. 28 Decl.") as Ex. 1.

[3] Plaintiffs' brief to the Magistrate Judge, referred to in the footnote 1, *supra*, explains the inapplicability of privilege under the circumstances of this case.

to race-based considerations held or conveyed by officials of defendant's legislative arm. It also failed to recognize that defendant's justification for the ORP – that it is necessary to overcome opposition from CMs to land-use actions that facilitate affordable housing construction – is inextricably linked to discovery about what the CMs would do if outsider-restriction were no longer available. It failed to recognize that questions pertaining to a CM's motivations and positions regarding central issues – such as the desirability or undesirability of racial change at the council or community district level, or the relative importance of outsider-restriction as compared with other community benefits that the CM might pursue for his or her constituents – require information uniquely available to the CM in order to be answered. And it failed to recognize that, when it comes to discrimination, the overt expressions of which are today often disguised, official public records are no substitute for the information that can be acquired in discovery.

ARGUMENT

POINT I

THE DECISION FAILS TO RECOGNIZE THE CENTRAL ROLE OF COUNCIL MEMBERS IN PLAINTIFFS' CLAIMS OF INTENTIONAL DISCRIMINATION OR IN THEIR CLAIMS RELATING TO DISPARATE IMPACT AND PERPETUATION OF SEGREGATION.

The Magistrate Judge correctly determined that defendant's "outsider restriction policy [in its affordable housing lotteries] was not and is not a legislative enactment. It was and is a policy established and maintained by mayors administratively."[4] But the conclusion that the court then drew – that this fact "proves the lack of relevance of the city council members to this dispute,"[5] – does not logically or legally follow. That conclusion, *inter alia*, ignores well-established principles of law that liability for intentional discrimination can be established where decision makers are

[4] Decision Trans., at 9:3-6.

[5] *Id.* at 9:6-7.

responsive to *others* who are motivated by race, and ignores the essence of defendant's own justification for its outsider-restriction policy.

A. Council Member discovery is directly relevant to the intentional discrimination case.

As to intentional discrimination, "[i]t is sufficient to sustain a racial discrimination claim if it has been found . . . that racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker is knowingly responsive." *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1226 (2d Cir. 1987). *See also Winfield v. City of New York*, 2016 WL 6208564, at *7 (S.D.N.Y. Oct. 24, 2016) (quoting *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016), for the continuing validity of the same proposition). Here, we do not have to guess whether or not defendant is being responsive to CMs when it insists on retaining its ORP: defendant openly admits that it is and has been. Indeed, responsiveness to CMs is at the heart of the key justification that defendant has interposed in response to plaintiffs' disparate impact and perpetuation of segregation claims. As Vicki Been, defendant's Commissioner of Housing Preservation and Development ("HPD") for the first three years of the de Blasio administration, explained in her declaration in support of defendant's motion to dismiss, "neighborhoods throughout the City *and their elected representatives* often resist approving land use actions" required to facilitate the construction of affordable housing; and, she claimed, the City's ORP "makes it possible for the City to overcome that resistance . . . ."[6] Ms. Been confirmed at her deposition that the administration was very concerned that there would be opposition to land use actions needed to allow for affordable housing creation, including opposition from local elected officials; that Ms. Been had to determine, as best she could, the motivations or concerns of those officials; and that the administration wanted to figure out ways to counter that opposition.

[6] Declaration of Commissioner Vicki Been, Oct. 2, 2015, ECF 18, at 4, ¶ 8 (emphasis added), the relevant excerpt of which is annexed to Gurian Sept. 28 Decl. as Ex. 2.

Been Depo., at 121:16-123:17.[7] In other words, the views of CMs were in no way irrelevant to defendant, and those views cannot be treated as irrelevant to this case.[8]

As such, there are a host of questions related to plaintiffs' proof of intentional discrimination that specifically arise for CMs. For example, *why* do they support outsider-restriction or oppose some affordable housing developments? What do they know about the reasons that residents and organizations within their districts oppose affordable housing or support outsider-restriction (if the residents or organizations do), and how have their own views of outsider-restriction been affected by their constituents (if at all)? Have they sought or received assurances from mayoral administrations that new housing development in their district will not alter the racial or ethnic or "cultural" makeup of their districts? These discovery issues naturally present themselves in light of defendant's responsiveness to CMs and in light of plaintiffs' allegation "that the 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 ([First Amended Complaint, at] ¶¶ 161-63)." *Winfield,* 2016 WL 6208564, at *7 (emphasis added).

Even if plaintiffs' allegations and the conceded fact that the administration is and has been responsive to CMs were all that existed, plaintiffs would be entitled to discovery on these and related questions. But there is significantly more. For example, we know already that one developer in East Harlem published a marketing flyer with an admission that the purpose of the

[7] Page and line numbers preceded by "Been Depo." refer to the transcript of the first day of the deposition of Vicki Been, Aug. 2, 2017, relevant excerpts of which are annexed to the Gurian Sept. 28 Decl. as Ex. 3.

[8] In an important respect, even this formulation understates the relevance of CMs. After all, CMs are not simply people to whom defendant is responsive, they *are* defendant (that is, defendant's legislative officers), and defendant is properly and directly responsible for their (its own) conduct.

ORP was to "help the area retain its traditional Latino identity . . . ."[9] Whether CMs (including Speaker Mark-Viverito, East Harlem's CM) acknowledge or have pursued that purpose merits discovery.

In terms of the concerns of residents living in a host of communities across New York City, we know from Ms. Been herself that: (a) there is fear of neighborhood change among those New Yorkers worried about displacement; and (b) this fear is, at least in part, race-based. In a speech at New York Law School during her tenure as HPD Commissioner, Ms. Been stated in part:

> And even if people aren't displaced, the people who are coming in *may look different*, may be wealthier, *may have different demographics*, may have different interests and desires. And so they worry that even if they stay, *the demographics*, the *look and feel of their neighborhood*, the sense of the neighborhood may change. And more broadly, they see that with stagnating wage growth, with stagnating job growth, that the American Dream, in some sense, is being threatened in many, many neighborhoods. So whatever the research shows, people fear displacement, and *they fear displacement for perfectly legitimate reasons*.[10]

She acknowledged at her deposition that she had intended to include race in her use of the term "demographics," Been Depo., at 135:7-12, 140:4-6, but she was highly resistant to specifying the role of race and ethnicity (as opposed to other factors) in stirring the fears of existing residents. She responded, for example, to a question as to whether race and ethnicity were a central part of what she was referencing as "demographics" that she "didn't parse it in that way," *id*., at 140:25-141:15, even though she did acknowledge that "certainly race or ethnicity may be easier" to identify than education levels. *Id*. at 141:16-142:3.

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[9] The flyer, for the Artspace PS109 development, is annexed to the Gurian Sept. 28 Decl. as Ex. 4.

[10] Excerpt of speech of Vicki Been at New York Law School, Nov. 13, 2013. A video of the full speech is available at http://www.citylandnyc.org/live-video-the-130th-citylaw-breakfast-with-hpd-commissioner-vicki-been/. The quoted material begins at approximately the 36:15 mark. Plaintiffs' transcription of this section was marked as Ex. 34 at Ms. Been's deposition and is annexed to the Gurian Sept. 28 Decl. as Ex. 5 (emphases added).

When Ms. Been was reminded that she had said that part of the worry was that people coming into the neighborhood "may look different," Ms. Been took the remarkable position that the worry about new residents "look[ing] different" could be just as much based on their having "more purple or green hair" as their being of "different races" – she claimed repeatedly not to know. *Id*. at 142:4-15, 144:22-145:7, 145:10-17, 147:13-23. She ultimately settled on the following position: "I don't think that it matters to them whether it's a person who looks different because of race or a person looks different because . . . their hair is different." *Id*. at 149:12-16.

Plaintiffs suggest that this account – including the statement that these fears of displacement generated by the change in the "look" of a neighborhood are for "perfectly legitimate reasons" – runs counter to a very long and ugly history that is plainly race-based. *Cf. MHANY*, 819 F.3d at 610-11 (citations omitted) (noting need to go beyond rote recitation that officials "did not understand the citizen opposition to be race-based"; observing that "discrimination is rarely admitted," thus requiring reliance on circumstantial evidence; and pointing out that incredible testimony is entitled to be discredited by the factfinder).

The fears described by Ms. Been occur against a backdrop of a city where, as Carl Weisbrod, the Director of the Department of City Planning and Chair of the City Planning Commission during the first three years of the de Blasio administration, admits, "racial politics" – meaning "just the reality of politics" that interest groups, including racial and ethnic groups, "have perspectives on what should happen in the City and how" – have been "a fact of life in the City" for 50 years, continue to be at play, and do not exempt housing policy from their reach. Weisbrod Depo., at 99:22-101:20.[11]

Plaintiffs are entitled to determine whether CMs, who have extensive contacts with their

[11] Page and line numbers preceded by "Weisbrod Depo." refer to the transcript of the deposition of Carl Weisbrod, July 27, 2017, relevant excerpts of which are annexed to the Gurian Sept. 28 Decl. as Ex. 6.

local communities, are attuned to and influenced by the fears and racial politics alluded to by Ms. Been and Mr. Weisbrod – both to gauge whether CMs in turn exert influence on the executive branch based on such considerations, and to rebut attempts like those of Ms. Been to minimize the racial aspect of neighborhood opposition to demographic change.

We also now know that defendant *intentionally* downplays – or avoids outright – the language of fair housing or race. Ms. Been and Mr. Weisbrod had written in a letter to HUD that it was difficult to have "thoughtful discussions" about the determinants of fair housing issues against the "backdrop of local politics."[12] Ms. Been explained at her deposition that disagreements about racism and racial biases are different from other public policy issues because "when you are talking about racism and racial biases, it's a hard conversation. People don't tend [to] do all that well in those conversations in my experience." Been Depo., at 205:2-206:25. According to Ms. Been, "I think fair housing . . . shuts people down . . . in my experience, it doesn't lead to the best of conversations. *When you invoke fair housing, it shuts people down.*" *Id.* at 207:24-208:6 (emphasis added). Defendant's approach of not speaking in the language of fair housing or race as opposed to "diverse communities" was not random; on the contrary, Ms. Been acknowledged that the chosen path was "a tactic, a question of tactics." *Id.* 210:17-211:12.

In other words, the limited discovery that has occurred to date confirms that defendant knows that race-based considerations continue to be active in the City, including in connection with neighborhood change and housing policy. As alleged, the City has a policy of downplaying discussions of fair housing as fair housing (or race as race), preferring instead to speak in the vague language of "diversity." The scope of resistance to change in the residential racial status quo, and the range of people pushing that resistance, is a clearly relevant area to pursue in discovery.

[12] A copy of the Nov. 24, 2014 letter, marked Exhibit 24 at the Weisbrod deposition, is annexed to the Gurian Sept. 28 Decl. as Ex. 7; the quoted material appears at page 9.

In seeking discovery from the limited number of CMs, it is reasonable for plaintiffs to seek to learn, for example, whether the CMs share the fear of change – newcomers who may look different, have different demographics – that Ms. Been described. For example, CM Cornegy, one of the CMs from whom plaintiffs seek only document discovery, participated in a televised "townhall" about gentrification during which he discussed the "flood of people" who had come into Brooklyn; said that he was "trying to make sure we can slow some of it down"; and, responding to a question that had earlier been posed about the definition of gentrification, spoke in race-based terms, emphasizing that "for some of us long-term residents," it is "when we see white people with a baby in a stroller."[13]

CM Cumbo, another CM from whom plaintiffs seek only document discovery, has said she wanted to know why "blocs" of Asians were living in certain projects, "and suggested it would be 'beneficial' to assign housing by ethnic group"; she went on to say that "[t]here could be some benefit to housing people by culture" and that she "think[s] it needs to be discussed."[14]

It is likewise reasonable to ask CMs about what their own constituents have told them about the desirability or undesirability of racial change in the neighborhood and what, if anything, they have done to support a residential racial status quo, including support for outsider-restriction.

There are many other areas of appropriate CM inquiry as well. For example, at a Brooklyn Law Center event, CM Reynoso, another CM from whom plaintiffs have sought document discovery, publicly branded the land-use process as a "sham" and "racist," and then, responding to a question from a fellow CM about whether the Council should ever "overrule the will of the

[13] *See* video of Apr. 20, 2016 BRIC and WNYC "Brooklyn for Sale: The Price of Gentrification", available at https://www.bricartsmedia.org/brooklyn-sale-price-gentrification, and referenced in the Gurian Apr. 24 Decl. at 9, ¶19 (citing statements made at approximately the 30- and 58-minute marks).

[14] *See* Michael Gartland, *NYC councilwoman: It might be 'beneficial' to assign public housing by ethnic group*, N.Y. Post, Mar. 27, 2015, annexed to the Gurian Apr. 24 Decl. as Ex. 16, at 1-2.

local council member" who opposed a rezoning, CM Reynoso said "[y]es, in some cases," and argued that "[w]e're building housing in poor neighborhoods for poor people and [continuing] that trend of segregation in our city" while in "the white affluent area, we're doing the [bare] minimum."[15] *Cf.* First Amended Complaint, at ¶¶ 135-36;[16] *see also Winfield*, 2016 WL 6208564, at *7 (reciting among the allegations that make the claim of disparate treatment plausible the allegation that, during the Bloomberg administration, "white and black neighborhoods were treated differently when it came to zoning: increases in density occurred most frequently in neighborhoods with disproportionately high African-American or Latino populations and decreases in density occurred most frequently in white neighborhoods [First Amended Complaint, at] ¶¶ 143-44"). Plaintiffs need information from CM Reynoso that, *inter alia,* fully documents: (a) the bases for his view of City policy and practice on the siting of housing; and (b) the responses to that view he has received.

As another illustration of an important area of inquiry, the moderator of an American Planning Association panel on affordable housing that Ms. Been participated in pointed out, in a pre-conference outline containing, *inter alia*, prospective questions for panelists, that the "threats to the ethnic identity of neighborhoods is one of the key issues that comes up in debates around gentrification including around Chinatown and East Harlem."[17] Ms. Been was aware that some

[15] *See* Khorri Atkinson, *Reynoso: City's land-use process needs to be modified*, Politico N.Y., Dec. 2, 2016, annexed to the Gurian Apr. 24 Decl. as Ex. 12, at 1, 2-3.

[16] "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."' 136. The City, instead of taking the opportunity to counteract the effect of its housing siting policies by eliminating the outsider-restriction policy, instead continues the outsider-restriction policy and thereby amplifies the restrictions on entry to high opportunity areas by African-Americans and Latinos, and limits opportunities for interracial association."

[17] *See* Been Depo., at 154:7-17, where Ms. Been reads this material from the document marked Ex. 35 at her deposition.

people think that threats to ethnic identity are among the key issues in gentrification debates, Been Depo., at 154:22-156:9, and that there were "several" other discussions of gentrification where questions of changes in the ethnic identity of the community had been raised. *Id*. at 158:9:159:3.

[Redacted]

plaintiffs' counsel asked, "Doesn't reinforcing cultural identity often have something to do with reinforcing the presence of people who share the culture?" *Id*. at 162:16-20. Ms. Been said, "No." *Id*. at 162:23.

Of course, "ethnic identity" is explicit; the term "cultural identity" is coded. *Cf. MHANY*, 819 F.3d at 608-10 (citations omitted) (noting that discrimination "continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms," including the use of "code words" like the "flavor" and "character" of Garden City, and accepting the District Court's finding that residents urging the Board of Trustees to "keep Garden City what it is" and to "think of the people who live here" was, in context, a use of code to communicate race-based animus). Council Speaker Mark-Viverito, for example, another CM from whom document discovery is sought, needs have her records searched about the extent to which she has been concerned about "threats" to the ethnic identity or "cultural identity" of East Harlem (her district), and about the extent to which constituents and others have communicated those concerns to her. The need is enhanced further by an East Harlem neighborhood plan, co-sponsored by the Speaker's Office, that recommended that the City "[m]ake community preference in affordable housing a requirement of development in East Harlem," and further recommended that the

environmental review process' definition of "Neighborhood Character . . . be informed by community input and expanded to include *cultural and demographic identities* . . . ."[18] Plaintiffs need, *inter alia*, discovery of any of the Speaker's records that reflect the impetus for these recommendations, and need discovery from the other CMs about whether and to what extent they and their constituents fear "threats" to the ethnic or cultural identity of their districts.

Finally, CM Reynoso has noted that so long as "we look at [development] neighborhood by neighborhood and councilmember by councilmember it's going to be poor neighborhoods fighting to get more affordable housing and rich neighborhoods fighting to get less."[19] He has proposed that CMs confronting a "NIMBY" approach "go against member deference and vote *for* a project despite community opposition, in the interest of citywide equity and affordable housing development."[20] The proposal raises the possibility of a less discriminatory alternative for defendant: finding ways, formal or informal, to get land-use actions approved by a process that takes away the local CM's effective veto, thereby reducing the need to overcome that CM's opposition. Discovery from CM Reynoso will help illuminate the feasibility of this less discriminatory alternative, including any communications he has had with his colleagues regarding changing Council customs, or any documentation of other methods of achieving citywide equity.

B. Defendant's Council Members-based justification inescapably raises the question of whether they would approve such actions if there were no outsider-restriction policy.

It is remarkable and patently unfair for a party to use an assertion of fact (here, about what

[18] *See* excerpt of East Harlem Neighborhood Plan, Feb. 2016, annexed to the Gurian Apr. 24 Decl. as Ex. 9 (emphasis added); the excerpt does not list page numbers, but the quoted material is on the third and fifth pages of the exhibit.

[19] *See* Jarrett Murphy, *Report: Leaders Must Gauge Displacement Risk Before Making Policy*, City Limits, Mar. 1, 2017, annexed to the Gurian Apr. 24 Decl. as Ex. 13, at 2.

[20] *See* excerpt of CM Reynoso's Nov. 2016 report entitled "Proposal to Increase Community Engagement in Private Development Plans," annexed to the Gurian Apr. 24 Decl. as Ex. 14, at 7.

needs to be done to bring CMs into line on affordable housing development proposals) and then deny the other party access to discovery from the very people in question that could rebut the assertion. *See* discussion at Point II, *infra.* Here, plaintiffs focus on a closely-related error in the Magistrate Judge's decision. Contrary to that decision, the question of "what would happen" in the absence of the ORP is inseparable from defendant's assertion that the ORP is necessary, and CM discovery is essential, *inter alia,* to answer that "what would happen" question.

In asserting that "[council] members' speculation about what might happen if the community preference policy were eliminated is not probative [of] the issues in this case," Decision Trans., at 10:24-11:2, the decision conflates two very separate issues. As to speculation, it is absolutely true that a "legally sufficient justification" – defendant's burden of proving that the ORP is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" of defendant – "must be supported by evidence and may not be hypothetical or speculative." 24 C.F.R. §§ 100.500 (b)(1)(i), (b)(2), and (c)(2) (2013). *See also MHANY*, 819 F.3d at 617 (citations omitted) (describing the Second Circuit's longstanding rule for the second-stage of a disparate impact analysis – "the burden shifts to the defendant to 'prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest'" – as "substantially the same" as the HUD regulation); *R.I. Comm'n for Human Rights v. Graul*, 120 F. Supp. 3d 110, 126-29 (D.R.I. 2015) (explaining that, in the disparate impact context, a mistaken view of necessity, even one held in good faith, cannot serve as evidence of a legitimate business purpose).

But *evidence* of what would happen if the ORP were eliminated (or made applicable to a smaller percentage of units) is not just probative of defendant' justification – it *is* the justification.[21]

[21] Plaintiffs do not accept the proposition that a defendant having to convince itself to do what is in its own interest (agree to necessary land-use decisions) is a legally sufficient justification for Fair Housing Act or City Human Rights Law purposes, but that legal issue is not yet before the Court.

To say that the ORP is *necessary* to overcome CM opposition is to say that, *without* the ORP, CM opposition would *not* be overcome and that the CM or CMs in question would ultimately vote against the land-use measure needed to facilitate the construction of affordable housing.

One cannot simply rely on past events to determine the answer to that question. CM statements in support of outsider-restriction in the current or past environment do not necessarily test what would happen in the absence of outsider-restriction: those statements are just consistent with administration policy of continuing to implement the ORP. *See* Been Depo., at 288:24-289:16 (neither Ms. Been nor, to her knowledge, any other member of the administration has suggested to any CM that the ORP should be eliminated or reduced). To put it another way, supporting outsider-restriction today is a position that a CM can take without risking the loss of either the affordable housing itself or other "carrots" for his or her constituents (what Mr. Weisbrod characterized as "public investments that communities need").[22]

If the ORP were to be eliminated, however – either by a decision of a mayoral administration or by court order – the facts on the ground would be very different. A CM might want there to be outsider-restriction, but that option would not be on the table. Instead, the CM (if defendant's theory of the necessity of outsider-restriction were correct) would have to decide that offering affordable housing on an equal access basis to all income-eligible New Yorkers, including his or her own constituents – the alternative plaintiffs seek – was such an unacceptable prospect as compared with the outsider-restriction regime that it would be better to thwart affordable housing construction in that CM's district altogether (*i.e.,* deprive all New Yorkers of affordable housing that could have been constructed) than to allow the equal-access housing to be built. And the CM would have to do that in the face of the knowledge that affordable housing is needed all throughout

[22] Weisbrod Depo., at 226:22-227:11.

the City.[23] The CM would have to decide to block affordable housing even though the affordable housing crisis in this City is such that, despite the extensive efforts of the current administration, it is likely that "there is going to remain a big gap between the need for affordable housing and what is available . . . ." Been Depo., at 29:24-30:14. The CM would have to reject the steps needed to construct the housing even though doing so, as Ms. Been acknowledges, would not be in the interest of the City. *See id*. at 294:18-295:4.

There would, of course, be other choices for the CM. For example, the CM could focus on trying to achieve for his or her constituents those carrots that *did* remain possible. There is a "wide range" of public investments that communities need; these may include a "school, youth center, enhanced parks, street scape [*sic.*] improvements"; improvement to an "industrial park and the like"; and adding transportation infrastructure. *See* Weisbrod Depo., at 227:12-228:5, 230:14-231:5. Or the CM might recognize that an equal access system might solve other problems – like segregation in schools – that have housing segregation at their root.[24]

As it happens, defendant appears not to have evidence that the ORP is necessary to overcome CM opposition and to ensure that the CM or CMs in question would ultimately vote for the land-use measure needed to facilitate the construction of affordable housing. First, Ms. Been acknowledged that she has not even *asked* CMs "what they would do about future affordable housing proposals in their districts if the administration decided to cut back on the percent of units subject to community preference . . . ." Been Depo., at 299:22-300:6. Second, Ms. Been

[23] *See* Defendant's stipulated fact in response to plaintiffs' Document Request No. 31, as stated in Defendant's Mar. 2, 2017 Letter to Magistrate Judge Parker, annexed to the Gurian Sept. 28 Decl. as Ex. 8 ("There is a need for more affordable housing throughout the entire City.").

[24] See highlighted portion of excerpt of transcript of Mayor de Blasio's appearance on WNYC's "Brian Lehrer Show", June 16, 2016, at 3, annexed to the Gurian Sept. 28 Decl. as Ex. 9 (housing segregation is "really, obviously" the "root" of the school segregation problem).

acknowledged that she does not know, in circumstances where the ORP were eliminated either by court order or by defendant's own policy decision, whether "any council members would reject the necessary actions to permit any affordable housing in their districts[.]" *Id*. at 290:6-291:7. Third, Ms. Been admitted, when asked whether the beneficial effects she ascribed to the ORP (like facilitating land use actions that result in more affordable housing supply) would not have occurred "but for" the ORP, that "I don't have an alternate . . . universe where I have tested out the community preference versus . . . not having a community preference on actual disputes," *id*. at 74:4-17, and further conceded that "I don't have any way of assessing 'but for.'" *Id*. at 75:3-10.

Nevertheless, defendant has not abandoned the justification, and plaintiffs are entitled to seek evidence to rebut it. Quite obviously, there are a range of inquiries that could be made of CMs that are relevant to the justification – the first being "what would you do?" and the second being "why?" CM Espinal, one of the CMs from whom document discovery and a deposition is sought, for example, represents East New York, where a large rezoning has been effected. He is on record as being a staunch supporter of outsider-restriction.[25] In the course of negotiations with the de Blasio administration, it was reported that Espinal had "managed to extract significant concessions from the city to get a framework that he said he could be proud of, taking back to his community a robust plan for new housing and infrastructure" among "other community amenities," and that CM Espinal had said, "[f]rom the start, I told my community I would fight for a better plan," a rezoning plan that "wasn't just about housing, but about developing a neighborhood that had been neglected for decades."[26]

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[25] *See* Eric Adams & Rafael Espinal, *De Blasio's bellwether Brooklyn rezoning must be revised*, Crain's N.Y. Business, Jan. 6, 2016, annexed to the Gurian Apr. 24 Decl. as Ex. 1, at 2 (supporting a strong City commitment to outsider-restriction in East New York).

[26] *See* excerpt of Samar Khurshid, *East New York Deal Sets Precedent for Wave of Rezonings*, Gotham Gazette, Apr. 19, 2016, annexed to the Gurian Apr. 24 Decl. as Ex. 3, at 2-3.

If outsider-restriction were not a possible outcome, would CM Espinal have just voted against the zoning changes needed for housing, and thus would he have given up on the development of his district that he sought? If so, what would be so important to him about preferring existing residents in the neighborhood who were income-eligible instead of other New Yorkers with the exact same income qualifications? What is the City's interest? The questions are especially salient both in view of the finding in the Beveridge Report that [Redacted] ,[27] and in view of Ms. Been's agreement with CM Glen that, ultimately, "having housing is – period – is more important than where the housing may be." Been Depo., at 92:19-93:22.[28]

C. The unique perspectives of the Council Members warrant discovery from them.

For depositions of high-ranking officials, it is the case, per *Lederman v. N.Y.C. Dep't of Parks and Recreation*, 731 F.3d 199, 203 (2d Cir. 2013), that the exceptional circumstances that warrant taking a deposition (such circumstances are not required for obtaining document discovery) include the official having "unique first-hand knowledge relating to the litigated claims . . . ." Here, it is evident that the CMs in question do have that knowledge. It is not knowledge that is interchangeable. An individual CM's particularized reasoning as to why he or she supports the ORP is unique to that CM. Only she or he could explain how she or he would weigh the importance of rejecting – because outsider-restriction was no longer available – land-use steps

[27] The Court has previously been provided a copy of the Beveridge Report in connection with plaintiffs' objections to the decision of the Magistrate Judge to keep that report secret. *See* Exhibit 9 to that report.

[28] Ms. Been was responding to having been read a published interview with DM Glen in which Glen said: "You have all of these people like you and my kids who can't live in the neighborhoods they grew up in. Is that so terrible? I'm not so sure that it is. My grandparents didn't live in the neighborhood they grew up in either. Change isn't per se bad. The biggest issue is not that you guys can't live in the Village anymore, it's that you may not be able to live *anywhere*." *See* Peter Moskowitz, *Can New York Save Itself from Out-of-Control Rents?*, Vice, Nov. 8, 2015, at 5, the relevant excerpt of which is annexed to the Gurian Sept. 28 Decl. as Ex. 10.

needed to facilitate affordable housing construction, versus the importance of having the housing and related benefits that the housing brings to the community. That is a highly individual process dealing with personal motivation. For example, CM Torres, one of the CMs from whom plaintiffs seek document discovery and a deposition, has been outspoken concerning the need for more action to combat segregation in schools.[29] Given that school segregation is significantly influenced by underlying housing segregation, how does he weigh outsider-restriction versus the diversifying effect (in housing *and* in schools) of awarding housing through an equal-access, citywide process?

CMs possess unique, first-hand knowledge of their motivations and thought processes in reaching land-use decisions – especially when competing considerations are at play – and thus deposition testimony should be permitted. *See United States v. City of New York*, 2009 WL 2423307, at *2-3 (S.D.N.Y. Aug. 5, 2009) (emphasis added) (permitting the deposition of then-Mayor Bloomberg in a case challenging the disparate impact of firefighter tests and pointing out that his statement that the test were job-related meant that he should be deposed because it "raise[d] the question of the basis for *the Mayor's* belief");[30] *see also Sherrod v. Breitbart*, 304 F.R.D. 73, 76 (D.D.C. 2014) (emphases added) (holding that the proposed deponent "alone has precise knowledge of what factors *he* considered and how they influenced *his* ultimate decision, so that information must come from him, not from third parties").

CMs are also particularly well-suited to receive and understand feedback from their local communities:

[29] *See, e.g.*, Ben Max, *First DOE School Diversity Report Will Spur Further Desegregation Efforts*, Gotham Gazette, Dec. 28, 2015, annexed to the Gurian Apr. 24 Decl. as Ex. 6, at 2-3, 7 (CM Torres asked rhetorically, "[w]hat could be more progressive than racial integration," expressed disappointment with the Department of Education for only "begrudgingly" embracing efforts "for promoting diversity in public education," and described the lack of effort as a "scandal").

[30] Note that the deposition was allowed even though Mayor Bloomberg was surely not the only City official to believe that the tests were job-related.

> We also focus on the needs of our local constituents. We are on the ground each and every day in our districts. We respond to the individual concerns and needs of residents and to issues affecting our local communities. From Port Richmond to Sheepshead Bay and from Laurelton to Washington Heights and Soundview, we advocate for our constituents and work with them to solve problems."[31]

It is the local CM, Speaker Mark-Viverito has said, that knows the "nuances" of local development issues.[32] Understanding constituents' and community groups' feedback in terms of opposition to affordable housing development, the desire to maintain the racial status quo, as well as the CM's evaluation of and response to such information, is direct information that the CMs uniquely have.

D. Council Members as individuals do, in fact, possess relevant information.

The decision also mistakenly concludes that the "actions of the [council] as a whole that are relevant and not the subjective beliefs or motivations of any single [council] member." Decision Trans., at 9:20-10:2. The assertion is wrong in three respects. First, as discussed previously, how CMs try to influence the administration in terms of development policy, outsider-restriction, and the overarching policy of not disturbing the racial status quo is a matter of individual CM influence and administration responsiveness to that CM. Second, it is entirely clear that, when it comes to land-use decisions, the local CM *is* effectively the decision maker. As an article discussing Council Speaker Mark-Viverito's authority in East Harlem development put it:

> In other neighborhoods, as here, that [decision-making] boils down to one person: the local council member, given that council tradition is for members to vote with the local member. So the pressure on both sides, from community and administration/developers, funnels down to one. Mark-Viverito said in no uncertain terms that it should stay that way, as the local

[31] *See* N.Y.C. Council, Speaker's 2016 Annual Report. The relevant "About the Council" excerpt is annexed to the Gurian Apr. 24 Decl. as Ex. 11.

[32] *See* Mark Chiusano, *Can Melissa Mark-Viverito help East Harlem balance development and affordability?*, amNewYork, Oct. 3, 2016, annexed to the Gurian Apr. 24 Decl. as Ex. 10, at 3.

council member knows the "nuances" of such projects.[33]

This informal veto power belies the decision's presumption that only formal action by the Council is what is relevant. That *de facto* individual-member veto is an important means by which individual CMs have leverage to cajole the administration as to issues and district-benefits important to those CMs. In other words, to understand both what the executive and legislative arms of defendant are getting from each other, and how and why they are influencing each other on issues related to affordable housing, one needs to focus on the individual member.

Lastly, even when there is ultimately a formal vote on a matter by a city council, that does not mean that individual statements – including statements made outside the formal council record – are irrelevant. For example, in *Yonkers*, the Circuit found that "[t]he record amply supports the finding that many City officials were leaders, not mere puppets, of their constituencies. Thus, on several occasions, the mayor or councilmen exhorted their constituents to action." *Yonkers*, 837 F.2d at 1223. The first example given was this: "[A] councilman whose ward was near the School 4 area sent letters to all of his constituents, urging them to support the sale of the property for luxury housing and defeat 'the wishes of the NAACP' for low-income housing." *Id.* Here, too (where it should be noted again that there are already race-based comments that plaintiffs have found from some CMs), it is entirely proper to look at conduct and comments of individual CMs.

E. The substitute sources of information suggested by the decision are inadequate.

In the Magistrate Judge's view, it is enough that plaintiffs have access to some Planning Commission meetings and to transcripts from City Council meetings. Decision Trans., at 10:7-16. These sources are not nearly adequate for myriad reasons. First, looking to public records is simply

[33] *See* Gurian Apr. 24 Decl., Ex. 10 at 3. *See also* excerpt of Madina Toure, *Should Council Members Hold So Much Sway in Land Use Decisions?*, Observer, Sept. 7, 2016, annexed to the Gurian Apr. 24 Decl. as Ex. 17, at 2 ("It's no secret that local Council members typically have veto power over what developments go up in their districts.").

not a substitute for reviewing that which is disclosed privately:

> Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record.

Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1064 (4th Cir. 1982); *see also MHANY*, 819 F.3d at 609 (citation omitted) ("Anti-discrimination laws and lawsuits have 'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare.... Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms.").

Second, the questions relevant to this case would not necessarily have been explored at City Council or Planning Commission meetings. No one at any such public meetings was questioning the ORP; as a "given," there was no reason for its general existence to have been discussed, nor was its relative importance as compared with genuine City interests (like ending housing and school segregation) apt to have arisen.

Third, even where there are public statements, that is not a substitute for sworn testimony responding to targeted questioning in a deposition. A public statement is not self-probing about the reasons for decisions or the factors considered by the official. *Cf. Sherrod*, 304 F.R.D. at 76 (emphasis added) (in case involving proposed deposition of Secretary of Agriculture who had issued a public statement and held two press conferences about a decision he had made, court held that the press, "which had very different motivations than do the parties to this case, did not ask the type of probing follow-up questions counsel expect to ask at this deposition regarding who he spoke to, what information he was presented with and considered, and how, if at all, different

factors influenced his decision. The public statements the Secretary *chose to make* cannot possibly substitute for the answers to questions specifically directed to his underlying reasoning"). The questions to be posed to CMs concern issues precisely like these, involving what the CM thought or observed; what factors are important to the CM in determining the relative importance of outsider-restriction, and whether the CM would squash housing development because of its absence; and what the CM did with that information he or she received about opposition to or support for housing development or outsider-restriction.

Fourth, the decision implicitly assumes that the work of local politics (or any politics for that matter) is simply transacted at public meetings, as opposed to being a process where much of the work is done in private – in discussions, negotiations, and assurances that frequently take the form of conversational encounters (and that are certainly not necessarily memorialized by all of the participants).[34] Take, for example, one illustration of defendant's overarching policy of not disturbing the racial status quo. The Mayor has critiqued 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."[35] In pursuing this path, the Mayor is explicitly aware that shelter residents (who are disproportionately African-American) will be geographically placed in starkly unequal concentrations: "If [a] community board has 50 people in [the] shelter

[34] It is common knowledge that legislators engage in this sort of informal, back-channel political bargaining. *See, e.g.*, *Gravel v. United States*, 408 U.S. 606, 625 (1972) ("Members of Congress 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.").

[35] See excerpt of transcript of Mayor de Blasio's speech on the City's homelessness plan, Feb. 28, 2017, at 7, annexed to Gurian Sept. 28 Decl. as Ex. 12 (emphasis added).

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."[36]

Plaintiffs have no way of knowing whether there have been CMs who have had private discussions with the Mayor about this segregation-perpetuating step, or whether they praised him or criticized him, or whether he responded, for example, that "political reality" in the City – perhaps the City's racial politics – left him no viable alternative. This, of course, is exactly what discovery is for.

F. The rejection of document discovery was based on faulty premises.

The Magistrate's decision as it relates to plaintiffs' document requests, Decision Trans., at 11:5-12:19, rests not on privilege or on any restriction applicable to high government officials. It mistakenly states that plaintiffs have not identified what documents are being sought or why the documents would be relevant. *Id*. at 11:16-18. In fact, plaintiffs explained that "it's the same document requests from November 1st where we defined the City to include both its executive officers and its legislative officers . . . ."[37] And the requests include matters such as documents concerning demands to maintain the racial status quo of a part of the City or that the current racial status quo is desirable or undesirable (Rqts. 11 and 12); documents concerning any desire on the part of anyone to maintain the "culture," "cultural heritage," "cultural character," "identity," "look," or "feel" of any part of the City (Rqts. 13 and 14); and documents concerning defendant's (*i.e.,* the City's executive or legislative officers') expressions of opposition to or support for community opposition to the construction of affordable housing (Rqt. 39). All of these deal with

[36] *Id.* at 13.

[37] *See* excerpt of Transcript of June 5, 2017 Court Conference, at 80:9-15, annexed to the Gurian Sept. 28 Decl. as Ex. 13.

topics that, as discussed, are entirely relevant.

This portion of the decision also restates the mistaken notion that lack of relevance is shown by the fact that the city council is not responsible for maintaining the outsider-restriction. Decision Trans., at 11:18-21. *See* discussion, *supra*, at 2-4. Its suggestion that communications between a CM and a member of the administration would be duplicative of that already being provided, and that other documents could be obtained in other ways, *id*. at 11:24-12:6, is also mistaken. It appears that the decision failed to consider memorialized communications between a CM and a constituent or an advocacy organization; failed to consider documents created and only maintained within a CM's office about issues relating to this case; and failed to consider that there might be internal records of communications between the CM or an aide and a member of the administration that occurred face-to-face, especially if concerning the cajoling a CM is doing in respect to development "carrots" that CM is seeking from the administration, or any matter with racial implications that the administration did not want to commit to writing.

The decision also rests on defendant's claim that the six CMs in question together have over a million e-mails. *Id*. at 12:10-16. Note that defendant did not claim that there were a million emails *responsive* to the requests; rather, there are a million emails *total.* Quite obviously, many of these emails will be on issues not inquired about in the document requests, and the ESI portion of requests will either be handled by search terms (as was the case initially with some administration custodians) or through predictive coding. Accordingly, the documents ultimately to be reviewed will surely be a small fraction of the number summoned up to connote burden.[38]

[38] As explained in the Gurian Sept. 28 Decl., at 1-2, ¶¶ 2-7, comparison with a group of HPD custodians where defendant used search terms and then "predictive coding" suggests that fewer than 4 percent of documents (*i.e.,* fewer than 40,000) would have to be reviewed. And that does not take into the fact that CMs, unlike the HPD custodians, are working across a wide range of subjects (thus making it less likely for there to be a large number of hits to be reviewed).

The decision also neglects to recognize that plaintiffs document discovery is sought from only six of 51 CMs. In other words, plaintiffs already have substantially narrowed what would otherwise be discoverable. The decision also did not consider the fact that CMs would be able to limit their search burden because they would recognize that many of the document requests – addressed to defendant as an entity with multiple branches – sought material on topics as to which the CMs would not have documents. To make this point more clearly, the declaration submitted herewith identifies only 10 document requests that plaintiffs will pursue in respect to these CMs.[39]

In short, the decision does not engage in any balancing at all between benefit and burden because it fails to recognize the clear benefits, exaggerates the burden, and rejects document discovery of any of the six CMs whatsoever. The decision also does not take into account the high stakes involved in this case: according to plaintiffs' allegations, a decades-long *and continuing* policy that perpetuates segregation, deprives New Yorkers of an equal chance to compete for affordable housing regardless of race, and contradicts the principle that all of New York belongs to all of us. Such a decision does not comply with the commands of Fed. R. Civ. P. 26.

POINT II

DEPRIVING PLAINTIFFS OF COUNCIL MEMBER DISCOVERY IS FUNDAMENTALLY UNFAIR.

Defendant has affirmatively placed at issue the entire subject of whether its policy is in fact needed *because* CMs will oppose land-use decisions that facilitate the construction of affordable housing *without the challenged policy in place*. Courts have recognized the need for the opposing party to be able to rebut an assertion *even in circumstances where the material would otherwise be protected by the (usually) rock-solid attorney client privilege.* For example, "[t]he assertion of

[39] The list of the 10 (including the five discussed, *supra*, at 23) is annexed to the Gurian Sept. 28 Decl. as Ex. 14. *See also* Gurian Sept. 28 Decl., at 2-3, ¶¶ 8-9 (listing Requests 11-15, 18, 20, 23, 28, and 39).

an 'advice-of-counsel' defense has been properly described as a 'quintessential example' of an implied waiver of the [attorney-client] privilege." *In re Cty. of Erie*, 546 F.3d 222, 228 (2d Cir. 2008) (citation omitted). This is because "the attorney-client privilege cannot at once be used as a shield and a sword." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). It "may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications." *Id.*

The key to the broad principle underlying these cases is "'the type of unfairness to the adversary that results in litigation circumstances when a party uses an assertion of fact to influence the decisionmaker while denying its adversary access to privileged material potentially capable of rebutting the assertion.'" *Erie*, 546 F.3d at 229 (citation omitted). The principle certainly has no less strength because the decision is *not* based on a privilege; plaintiffs are suffering the same type of unfairness condemned by the Circuit: defendant has asserted a justification and is being allowed to preclude plaintiffs' access to material potentially capable of rebutting the assertion.

CONCLUSION

Each of the premises of the decision being objected to is incorrect. CMs are central to this case. The decision should be reversed and the motion to quash and for a protective order denied.

Dated: New York, New York
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