UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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FAIR HOUSING JUSTICE CENTER, INC.,

v. 16 CV 9038(VB)

TOWN OF EASTCHESTER, ET AL.,

Defendants.
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U.S. Courthouse
White Plains, N.Y.
October 15, 2020
2:30 p.m.

Before: HON. VINCENT L. BRICCETTI,
United States District Judge

APPEARANCES

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THE COURT: Good afternoon. This is Judge Briccetti.

Donna, can you call the case.

THE CLERK: Yes. In the matter of Fair Housing Justice Center Incorporated against the Town of Eastchester, 16 Civil 9038.

On the phone for the Plaintiff is Diane Houk from Emery Celli, along with the Town of Eastchester by Brian Sokoloff, and then we have for Defendant Elide Enterprises LLC, we have Edmund Grainger.

We have a couple of members of the public, along with the court reporter and your staff.

THE COURT: Okay. Welcome everybody.

Plaintiff Fair Housing Justice Center brings claims in this case under the Fair Housing Act, which I'll refer to as the FHA, alleging that the Defendant Town of Eastchester made rental dwellings unavailable on the basis of race or national origin, and that the Town's zoning code imposes a racially discriminatory residency preference on housing developments for senior citizens.

Now, by order dated September 25th, 2020, I denied the Town's motion for summary judgment, and as I said I would do in that order, I will now explain why I did so.

First, I will briefly summarize the factual background of this case, as reflected in the parties' briefs,

statements of material fact, supporting affidavits, declarations, and exhibits. In doing so, I assume the parties' familiarity with the case, and I will recount the facts only to the extent necessary to resolve the motion.

The Town comprises the Villages of Bronxville and Tuckahoe, as well as an unincorporated area. The Town is governed by a Town Board, comprised of five members, one of whom is the Town Supervisor.

Now, let me first talk about Section 8, Section 8 Housing.

In the 1970s, Congress established the Section 8 Existing Housing Program, now known as the Housing Choice Voucher Program, and I'll refer to it as "Section 8" or "HCV" program, to help low-income individuals obtain residences through the use of vouchers to subsidize their rent in the private housing market.

Regulations of the Department of Housing and Urban Development permit certain residency requirements, but such requirements are prohibited from having the purpose or effect of delaying or otherwise denying admission to the Program based on race, color, or ethnic origin. And there is a Code of Federal Regulations cite, Title 24 Section 982.207(b)(1)-(iii). In addition, the FHA makes it unlawful "to refuse to sell or rent ... or otherwise make unavailable or deny, a dwelling to any person because of race, color, ... or

national origin." That's Section 3604(a) of Title 42 of the U.S. Code.

For decades, the Town maintained a Section 8 housing program under HUD supervision. The Section 8 program had a residency preference for applicants seeking vouchers for low-income housing in the Town.

Indeed, from at least 2014 until 2019, the Town's Section 8 program included two types of local preferences: a general preference and a residency preference. A general preference was given to individuals whose households have been involuntarily displaced or who were homeless, and a residency preference was given to individuals that already lived in the Town, or who worked or had been hired to work, in the Town.

Under the Town's Section 8 housing plan, the residency preference trumped the general preference. Accordingly, first priority went to applicants claiming both preferences; second priority went to applicants claiming a residency preference only; third priority went to applicants claiming a general preference only, and last priority went to applicants claiming neither the residency preference nor general preference. Generally, applicants for the Town's Section 8 housing program who did not already live or work in the Town remained on a waiting list until all applicants with pre-existing ties to the Town had received Section 8

benefits.

To enforce the preference system, the Town maintained waiting lists from which individuals were selected for participation in the program. As of June 2017, the resident waiting list had only 25 names, while the non-resident waiting list had 616 names. According to Plaintiff, fewer than 10 applicants who did not receive a residency preference had ever obtained a housing voucher.

Although the Town's Section 8 housing program defined "residents" to include those who worked in the Town, the Town did not advertise this fact to prospective program participants.

In 2008, Plaintiff had a tester applicant inquire about the Town's Section 8 program. During a recorded call, the tester was told by a Town Section 8 office employee that non-resident applicants faced an eight-to-ten-year wait, while resident applicants typically waited eight months to a year maximum. Plaintiff further states the tester was not told that the residency preference could be claimed by someone working in, but not yet living in, the Town.

In February 2016, a second tester was told the non-resident applicant wait time was ten to fifteen years, while the wait time for residents was much shorter. According to Plaintiff, this tester, like the first, was not told that he could qualify for a residency preference if he

worked in the Town.

In 2016, it was the Town's practice to send annual letters to non-resident applicants stating it "may take a minimum of ten (10) to fifteen (15) years before we reach your name," but in letters to resident applicants, the Town did not mention wait times.

Every five years, the Town submitted to HUD a Section 8 housing plan. A HUD representative testified she never reviewed any of the Town's Section 8 housing records to ensure that they matched the Town's Section 8 plan. Christopher Ingram, another HUD representative, testified HUD never conducted a compliance review respecting the Town's Section 8 program. Moreover, HUD advised the Town that its review of the Town's Section 8 program plans did "not constitute an endorsement of the strategies and policies in" those plans. That quote, by the way, was from Ms. Houk's Declaration; Exhibit 42 to the Houk Declaration.

Indeed, Karen Gizzo, who was the Town's Section 8 program administrator and Rule 30(b)(6) witness, testified that the Town had never received approval from HUD of the Town's use of residency preferences in its Section 8 program. And that's also attached to the Houk Declaration, at Exhibit 8, at Pages 371 to 72 and 412.

In February of 2016, Ms. Gizzo informed HUD by email that the Town utilized a resident wait list and a

non-resident wait list, and that the Town wished to close the non-resident wait list. In response, HUD representative Ingram stated the Town's request had to be reviewed by HUD's fair housing office to ensure the Town did not run into any fair housing issues. Gizzo replied: "LOL ... yes, I agree. I don't need to be front page of the news ... 4th page is ok ... not front!" That's Exhibit 18 to the Houk Declaration.

In February 2019, after the commencement of this lawsuit, the Town ceased administering its Section 8 housing program and transferred that authority to HUD, which found another Section 8 program in Westchester County that was willing to absorb the Town's program.

Under the terms of the transfer, applicants on the Town's resident and non-resident waiting lists were grouped together and reordered in order of the date of their applications. Accordingly, the new waiting list does not contain a residency preference.

Now, one building in the Town that facilitated the Town's Section 8 housing program was called Sleepy Hollow Apartments -- I'll refer to it as Sleepy Hollow; of course, I'm not saying the Village of Sleepy Hollow, I'm just saying that's the name of the building, Sleepy Hollow -- which was a private residential building with 117 HUD-subsidized units for low-income seniors.

In 1975, prior to obtaining funding from HUD, the Town entered into an agreement with Sleepy Hollow, which required that priority for apartment rentals be given to Town residents. And that's Exhibit 34 to the Houk Declaration. The agreement further provided that the Town, not Sleepy Hollow, would determine applicants' eligibility for occupancy.

From 1978 through 2005, the Town's Section 8 office oversaw Sleepy Hollow's waiting list and applicant eligibility. By 2005, over 95% of Sleepy Hollow's 100-plus tenants were white, with one Black tenant.

In 2005, HUD sent a letter to Sleepy Hollow directing it to suspend use of the residency preference, and stating that such preference "could have a disparate impact on African-Americans and Hispanics as they have significantly lower representation in the preference areas when compared to the Housing Market Area," namely, Westchester County. That's Exhibit 35 to the Houk Declaration. The letter continued: In this way -- "In this way, use of a residency preference in this instance could possibly violate Title VI of the Civil Rights Act of 1964."

Now, according to Plaintiff, following receipt of this correspondence, Sleepy Hollow management took over from the Town the administration of the waiting list and tenant selection process for Sleepy Hollow, and stopped applying a residency preference for available units.

Okay. Turning now to the Town's Senior Housing Law.

On September 28, 2009, the Town Board held a public workshop to discuss a proposed new law authorizing senior housing development in the Town.

On November 4th, 2009, the Town Board held a public hearing to discuss the proposed law. During this meeting, a Town resident voiced his opinion that the proposed law was a "major concern" that welcomed a "H.U.D. project" to the Town. That's from the Houk Declaration, Exhibit 20. The resident further stated his concern that a new development "might turn into a Sleepy Hollow, where we lose control of what we have."

In response, Town Supervisor Anthony Colavita stated any senior housing permitted by the new law would be for "Eastchester, Tuckahoe, and Bronxville residents only." He also noted the Town would not use federal funding for senior housing, and further noted that if a developer "took HUD money, they therefore couldn't comply with our zoning code, and therefore they couldn't build a building and wouldn't get permission." And that's from Exhibit 20 to the Houk Declaration.

Following the November 4th, 2009 meeting, the Town Board voted unanimously to adopt the senior housing law. The law enabled developers, after obtaining a special permit, to build senior housing developments in the Town, and the law states in pertinent part as follows:

"Purpose and Intent. The Town Board ... has determined that there is a need for age-restricted housing located and designed to meet the special needs and habits of senior citizens, and that age-restricted affordable housing for senior citizens should be encouraged by the Town .... Age-restricted senior housing projects will contribute to the dignity and independence of senior citizens in retirement years. Accordingly, it is the intent of this local law to encourage the development of age-restricted multi-family buildings designed exclusively for senior citizens, which would permit the Town's senior citizen population to remain in the community, close to family and friends." That's from Exhibit L to the Sokoloff Declaration.

The new senior housing law amended Section 12.H of the Town's existing zoning law to include a residency-based preference system for senior housing developments, which required the owner of any such development to utilize a waiting list for prospective tenants or purchasers. That's also from Exhibit L to the Sokoloff Declaration.

First preference was granted to Town residents based on cumulative length of residency in the Town. Second preference was granted to immediate family members of current and former Town residents. Third preference was given to all other Westchester County residents based on cumulative length of any former residency within the Town. Fourth preference

was given to all other applicants with former residency in the Town. And, finally, the fifth preference -- well, it's not a preference. But, finally, all other applicants were offered housing based on cumulative length of residency within New York.

The senior housing law ensures enforcement of these preferences in perpetuity, by requiring developers who obtain a special senior housing development permit to file and record a covenant "ensuring ... that the priority system ... will be established and administered correctly." Also Exhibit L to the Sokoloff Declaration.

The law also ensures the Town's ability to police adherence to the residence preference policy by requiring senior housing development owners to provide the Town with waiting lists, lists of available units, notices of rentals and sales, and quarterly rent rolls.

Violations of the residence preference are punishable by a fine and imprisonment.

In 2011, a developer sought a special use permit to build a senior rental housing development called Summerfield Gardens.

In September 2013, at a public Planning Board meeting to discuss the Summerfield Gardens application, a Town resident said the development would turn the Town into "a Bronx neighborhood." That's Exhibit 29, at Page Number

134 in the ECF system, an exhibit to the Houk Declaration. Another resident stated "more Section 8 people will come in," and "we're going to have the first project in Eastchester. That's what it looks like to me, it looks like a housing project." That's also from the same exhibit -- excuse me one second -- at ECF Page 155.

The resident further stated "these people" would move in and "there goes our neighborhood." He also said: "Do you want this to become the Bronx again? ... This is not New Rochelle. This is not Yonkers. We don't want this. If we wanted that, we would live there" -- which is much -- "where it's much cheaper."

It is undisputed that Bronx County, as well as the Cities of Yonkers and New Rochelle have majority non-White populations, unlike Eastchester.

About a month later, Supervisor Colavita sent a letter to Town residents to address concerns expressed in "numerous phone calls and inquiries" that he had received respecting senior housing development applications. That's Exhibit 30 to the Houk Declaration. He noted that several residents had expressed -- several residents had expressed hearing rumors that prospective senior housing developments would become housing projects for "nonresidents," and he noted: "ALL OF THE ABOVE IS COMPLETELY FALSE," and that the development application was "for a brand new fair market" --

"a brand new fair market value rental apartment building for our Eastchester, Bronxville and Tuckahoe senior citizens."

Colavita then noted the Town's residency preference: "Eastchester, Tuckahoe and Bronxville seniors have priority over all others. Though it is extraordinarily unlikely, in the event there are no Eastchester, Tuckahoe and Bronxville seniors in need of an apartment, then immediate family members of our town residents ... have next priority."

In October -- in October of 2014, the Town Planning Board approved a special use permit for a different senior housing development called Elide Manor. The Town's zoning code requires Elide Manor to apply the senior housing law's residency preferences to all units in the building. Elide Manor has 117 units for tenants and is the only senior housing development in the Town built under the Town's senior housing law.

In March 2019, after Plaintiff had sought a preliminary injunction in this case to bar the Town from enforcing the residency preference at Elide Manor, the Town -- the Town amended its zoning code to remove the second, third, and fourth residency preferences of the senior housing law. Following such amendment, the first preference for senior housing -- which grants priority to Town residents -- remained.

In May 2019, the Town entered into an Agreement of

Covenants -- it was called an Agreement of Covenants and Restrictions with the developers of Elide Manor. The agreement requires Elide Manor to establish and implement the residency preference for the sale and/or rental of both market rate and affordable senior housing units.

In May 2019, Elide Manor began leasing units and, as of January 2020, it was still doing so. However, Elide Manor has not utilized the residency preference for its rentals or purchases because the building is not yet fully occupied and thus there is no wait list for occupancy.

About one-third of Elide Manor's leases have been signed by Town residents. Although Elide Manor's rental applications do not disclose prospective tenants' race or ethnicity, Plaintiff's Executive Director, Fred Freiberg, has stated in a declaration that based on a review of the applications, roughly 68 percent of Elide Manor tenants appear to be White, 8 percent Black, 10 percent Hispanic, and 8 percent Asian. That's from Paragraphs 72 to 75 of the Freiberg Declaration.

Of the Elide Manor defendant -- excuse me. Of the Elide Manor tenants who were Town residents prior to moving to the development, Plaintiff suggests 90 percent appear to be White, 5 percent Black, and 5 percent Hispanic. That's from the Steil Declaration at Paragraph 49. In addition, of the Elide Manor tenants who were not residents of the Town

prior to moving to the development, 63 percent appear to be White, 10 percent Black, 13 percent Hispanic, 13 percent Asian, and 3 percent of unknown race. And that's also from the Steil Declaration.

Now, the gist of Plaintiff's claims in this case is that the Town's use of a residency preference, for both its former Section 8 housing program and in its current senior housing law, discriminates against prospective tenants who are members of racial minorities.

Now, the following familiar legal standards apply to this motion.

First of all, regarding summary judgment, the Court must grant a motion for summary judgment if the pleadings, discovery materials before the Court, and any affidavits show there is no genuine issue as to any material fact and it is clear the moving party is entitled to judgment as a matter of law.

On summary judgment, the Court construes the facts, resolves all ambiguities, and draws all permissible factual inferences in favor of the non-moving party. If there is any evidence from which a reasonable inference could be drawn in favor of the non-moving party on the issue on which summary judgment is sought, summary judgment is improper.

Now, Section 804(a) of the Fair Housing Act, also known as Title VIII of the Civil Rights Act of 1968, makes it

unlawful "to refuse to sell or rent ... or otherwise make unavailable, or deny, a dwelling to any person because of" -- the race, color -- "because of race, color, ... or national origin." And that's Section 3604(a) of Title 42, U.S. Code.

The Second Circuit has observed that "the phrase 'otherwise make unavailable' has been interpreted to reach a wide variety of discriminatory housing practices, including discriminatory zoning restrictions, and its results-oriented language counsels in favor of recognizing disparate-impact liability." That's from a case called MHANY Management against the County of Nassau, 819 F.3d 581, at Page 600 (Second Circuit 2016). Again from that case, "For this reason, Sections 804(a) and 805(a) of the FHA provide for both discriminatory intent and disparate-impact liability."

Now, "To establish a prima facie case of intentional discrimination under the FHA, a plaintiff must present evidence that animus against a protected group 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." And that's a quote from a District Court case, Judge Karas's case, Congregation Rabbinical College of Tartikov against Village of Pomona, 280 F.Supp.3d 426, at Page 491, a Southern District case from 2017.

The court also stated in that decision that:

"Relevant considerations for discerning a racially discriminatory intent include the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes, departures from the normal procedural sequence, substantive departures, and the legislative or administrative history, especially where there are contemporaneous statements by members of the decision-making body, minutes of its meetings, or reports." That's from the same case at Page 491 to 492.

Further quoting the Tartikov case: "After the plaintiff has established a prima facie case, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the action." That's at Page 492 of the opinion. "If the defendant proffers such a reason, the burden shifts back to the plaintiff to show that he or she has been the victim of intentional discrimination, either directly by persuading the court that a discriminatory reason more likely motivated the defendant or indirectly by showing that the defendant's proffered explanation is unworthy of credence."

And then continuing from the Tartikov case: "The allocation of burdens for a disparate impact claim are slightly different than those applicable to disparate treatment claims." And now we're talking about disparate impact. "First" -- this is a quote from the Tartikov case.

"First, a plaintiff must ... establish a prima facie case by showing (1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."

Further, "The defendant may rebut the prima facie case by proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the ... defendant." And, in addition, "If the defendant meets" this burden -- excuse me. "If the defendant meets its burden, the burden of proof shifts back to the plaintiff to show that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."

All right. First of all, the Town argues that, that Plaintiff's claims are moot inasmuch as they concern Defendant's Section 8 housing program. I disagree.

"It is well settled that the requisite personal interest" -- and this is a quote from that MHANY case that I cited earlier. "It is well settled that the 'requisite personal interest that must exist at the commencement of the litigation ... must continue throughout its existence.'"

And another quote from that case: "A case is moot when the issues presented are no longer live or the parties

lack a legally cognizable interest in the outcome." I'm sorry, I misspoke. That's a quote from City of Erie against Pap's A.M., 529 U.S. 277, at Page 287, a District Court decision from 2000.

Questions of mootness are threshold questions of law for the Court. The cite for that is Comer against Cisneros, 37 F.3d 775, at 787, a Second Circuit case from 1994.

This principle is "not comprehensive," and "fails to capture exceptions to mootness, particularly voluntary cessation cases and cases capable of repetition but evading review." That's from the MHANY case at Page 603.

Indeed, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." That's a quote from a Supreme Court case from 1982, City of Mesquite against Aladdin's Castle, Inc., 455 U.S. 283, at 289. Such action will usually render a case moot when "(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Also a quote from the MHANY Management case at Page 603. The defendant bears the "formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." A Supreme Court case from 2000, Friends of the Earth against Laidlaw Environmental,

528 U.S. 167, at Page 190.

Here, the Town ended its Section 8 housing program in early 2019, while this litigation was ongoing. The parties agree that the Town cannot reinstate or create a new Section 8 housing program absent HUD approval. And the cite for that is the Campanile Affidavit at Paragraph 5. The Town argues it has no need to or desire to create a new Section 8 program because there are "other Section 8 programs in Westchester County available to serve needy Eastchester residents." That's from Paragraph 6 of the same affidavit.

The Town also argues that these facts, coupled with its offer to reimburse Plaintiff for claimed diversion of resources damages, render moot Plaintiff's FHA claims insofar as they concern the Town's Section 8 program.

However, the record here does not make "absolutely clear" that the Town's allegedly unlawful behavior respecting its Section 8 housing program could not reasonably be expected to recur. On the one hand, the Town argues that the termination of its Section 8 program is permanent, but on the other hand, it concedes that it may re-employ its Section 8 program with HUD's approval. In other words, the Town is not foreclosed from re-establishing a Section 8 housing or other low-income voucher program and implementing a residency preference with respect to same.

Accordingly, that the Town has no current desire or

need to re-establish a Section 8 program does not demonstrate, as a matter of fact and law, that its implementation of a housing voucher program with a residency preference cannot reasonably be expected to recur.

For these reasons, Plaintiff's claims are not moot.

Next, the Town challenges Plaintiff's standing to maintain its claims. Whether Plaintiff has standing to sue is a question of law.

Specifically, the Town contends Plaintiff cannot demonstrate an injury in fact, because with more senior housing apartments available than there are applicants for senior housing, the Town's senior housing residency preference has not denied housing to any non-residents. I disagree.

It is well settled that a non-profit fair housing organization, like Plaintiff, may sue on its own behalf for injunctive relief, declaratory relief, and for damages for diversion of resources and frustration of its mission. And the cite for that is a Supreme Court case from 1982, Havens Realty against Coleman, 455 U.S. 363, at Pages 378 to 79.

Indeed, "the Supreme Court and the Second Circuit have repeatedly found that organizations that have conducted investigations into alleged violations of the FHA have suffered an injury-in-fact and have standing under the FHA." And that's from a Second Circuit -- excuse me, a Southern District case, Fair Housing Justice Center against Cuomo, 2019

Westlaw 4805550, at star 7 (September 30th, 2019). Such injury-in-fact can be caused by, for example, expenditure of staff time and resources to investigate and respond to the Defendant's discriminatory practices, diverting such resources away from other activities the organization could otherwise conduct. And the support for that proposition is the same citation of the Fair Housing Justice Center against Cuomo case.

Even at the summary judgment phase, "only a perceptible impairment of an organization's activities is necessary for there to be an injury in fact." That's from a case -- a Second Circuit case, 2011, Nnebe against Daus, 644 F.3d 147, at Page 157.

Here, the record evidence suggests Plaintiff has been harmed by the Town's Section 8 housing practices and its enactment and enforcement of its senior housing law. The record suggests Plaintiff has, for years, diverted resources to investigate the Town's housing practices, which has frustrated Plaintiff's mission.

For these reasons, I find Defendant's standing arguments to be unavailing. Simply put, Plaintiff has set forth sufficient allegations and evidence suggesting it has suffered an actionable injury in fact.

Next, the Town argues that Plaintiff's claims regarding the senior housing law are not ripe. Ripeness, like

standing and mootness, presents a threshold question for the Court's consideration.

I disagree with the Town. First, Plaintiff's claims are constitutionally ripe.

To say a claim is constitutionally unripe "is to say the plaintiff's claimed injury, if any, is not actual or imminent, but instead conjectural or hypothetical." That comes from National Organization for Marriage against Walsh, 714 F.3d 682, at Page 688 (Second Circuit 2013).

Now, the FHA defines "aggrieved persons" who may maintain statutory claims as those who "have been injured by a discriminatory housing practice" or those who believe they "will be injured by a discriminatory housing practice that is about to occur." And that's Section 3602(i) of Title 42 of the United States Code.

To that end, the Second Circuit has noted: "The explicit grant of standing to anyone who believes he 'will be injured by a discriminatory housing practice that is about to occur' means that a person who is likely to suffer such an injury need not wait until a discriminatory effect has been felt before bringing suit. Thus, where it has been established that a zoning ordinance will likely be applied in a discriminatory manner, it is unnecessary that the municipality actually so apply it before the ordinance may properly be challenged." That comes from LeBlanc-Sternberg

against Fletcher, 67 F.3d 412, at Page 425, a Second Circuit case from 1995.

Here, the record evidence suggests Plaintiff has been injured by the Town's allegedly unlawful housing practices vis-à-vis its Section 8 program, and also that future injury will likely occur if and when Elide Manor -- the Town's only development built pursuant to the senior housing law -- becomes fully occupied and then utilizes the residency preference for occupancy. Accordingly, Plaintiff is an "aggrieved person" under the FHA.

Moreover, because the "FHA prohibits the implementation or enforcement of housing policies or zoning ordinances in a discriminatory manner," -- that's a quote from Anderson Group, LLC against City of Saratoga Springs, 557 F.Supp.2d 332, at 339, a Northern District of New York case from 2008 -- the Town's enactment of the residency preference in its senior housing law suffices to establish constitutional ripeness in this case.

Second, Plaintiff's claims are prudentially ripe, in addition to being constitutionally ripe. "Prudential ripeness is concerned with whether a case will be better decided in the future, such that the Court may enhance the accuracy of its decisions and avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination, of, especially, constitutional issues that time

may make easier or less controversial." That comes from Exxon Mobil against Schneiderman, 316 F.Supp.3d 679, at 694, a Southern District case from 2018.

To assess prudential ripeness, the Court evaluates the fitness of the issues for judicial decision and the hardship to the parties of withholding judicial consideration. That's also from the Exxon Mobil case that I just cited.

Here, the fitness of the issues is not contingent on future events. Even though Elide Manor has not yet used a residency preference for its senior housing, and might never do so, the Town's senior housing law and the covenant running with Elide Manor's property require Elide Manor and its successors to utilize the residency requirement when such a need arises, that is, when the development is fully occupied and a waiting list begins. Consideration of the validity of the residency preference need not wait until a non-resident prospective tenant is placed on a wait list.

Moreover, the record evidence suggests Plaintiff will suffer hardship if the Court were to avoid adjudicating Plaintiff's claims. As noted before, Plaintiff has demonstrated a sufficient injury in fact and would be prejudiced if the Court were to avoid, at this time, consideration of Plaintiff's claims.

Okay. Finally, turning to the merits, the Town first argues that Plaintiff fails as a matter of law to

establish a FHA disparate impact claim insofar as such claim concerns the Town's senior housing residency preference.

I disagree.

As a preliminary matter, the Town argues the Court should take into consideration a proposed HUD regulation that, if promulgated, might affect the burden-shifting analysis required for disparate impact claims under the FHA.

I will not do that. Clear, precedential authority governs Plaintiff's claims in this action. Moreover, if this argument were taken to its logical extreme, then federal courts should always refrain from adjudicating claims based on clear and established precedent whenever a proposed amendment to a statutory framework is considered, but not yet enacted, by the legislature, or whenever a proposed regulation or policy guidance is considered, but not yet prescribed, by an agency like HUD.

In any event, the record evidence demonstrates genuine issues of material fact concerning the disparate impact of the Town's senior housing law.

For example, the record evidence raises questions of fact as to whether the Town's residency preference will have an adverse disparate impact on Black and Hispanic renters and buyers. Indeed, Plaintiff's expert, Justin Steil, hypothesized, based on a statistical analysis and population demographics, that the Town's senior housing residency

preference is highly likely to create an adverse impact based on race and ethnicity.

For example, Plaintiff's expert notes that: "Assuming a randomized applicant pool that reflects the demographics of Westchester County -- the marketing region identified by Defendant itself -- the likely application pool for senior housing ... in Eastchester will be 70 percent white and 30 percent nonwhite. But with the Town's residency preference ..., the recipients of such housing would likely mirror the demographics of the Town age 55 and over: namely, 91 percent white and 9 percent nonwhite, even under the most conservative estimates." And that's the Steil Declaration at Paragraph 26.

Plaintiff's proffered expert testimony also suggests senior housing in the Town would be more racially diverse and more available to minority non-residents if the senior housing law residency preference did not exist. Indeed, Mr. Steil reports that in 2016, the Town was more than 80 percent white, with only 3 percent Black and 6 percent Hispanic residents, while Westchester County as a whole was significantly more diverse. That same year, Steil reports, 91 percent of age-eligible residents of the Town were white, while only 2 percent of the age-eligible population was Black, and 3 percent Hispanic.

Accordingly, Steil reports "the Town's demographics

make it almost certain that the residency preference would have an adverse impact on Black and Hispanic" prospective renters and buyers of senior housing dwellings in the Town. That's from Paragraph 21 of the Steil Declaration.

The Town argues in its reply brief that Plaintiff's suggested demographics of Elide Manor's tenants should be disregarded as improper expert testimony, and, for this reason, it was improper for Steil, Plaintiff's expert, to refer to those suggested demographics in his declaration. Defendant further argues the Court should reject the portion of Steil's declaration in which Steil opines the adverse impact of the senior housing law cannot be explained by income disparities.

These arguments are red herrings, and, in any event, not the subject of a properly briefed motion to preclude expert testimony. Even without considering the data and opinions Defendant suggests are improper, the record evidence, as a whole, raises material issues of fact as to whether the Town's residency preference for senior housing disparately impacts non-resident minority prospective tenants.

Indeed, putting aside Steil's income-based and Elide Manor demographics analyses, his declaration largely considers a variety of historical and statistical data, including data related to the Town's Section 8 housing program, to determine the Town's demographics as compared to that of the surrounding

housing market area. In doing so, Plaintiff's expert concluded that the Town's senior housing residency preference is highly likely to create an adverse impact based on race and ethnicity.

Moreover, the record further shows that there are issues of fact regarding the Town's legislative interest in the senior housing law and its residency preference. The Town points to some evidence suggesting that "aging in place" generally may be a substantial and legitimate reason for a residency preference for local senior housing, and to that end, the Town relies on the testimony of Town Board members to argue that, at the time the Town enacted the senior housing law, it had a substantial and legitimate interest in promoting the development of senior living facilities for, principally, its senior citizen population. But other than the Town Board members' say-so, there is no evidence in the record that the Town conducted research to determine the housing needs of seniors prior to the enactment of the senior housing law and residency preference.

Accordingly, issues of fact abound with respect to the Town's allegedly legitimate and substantial interest in the use of a residency preference for senior housing occupancy.

Finally, there are also issues of material fact respecting the necessity of the residency preference. It is

undisputed that the Town currently operates programs that may help local seniors age in the community, for example, free transportation for errands and medical appointments, free assistance for minor home projects and repairs, and low-cost house cleaning. In addition to those programs, Plaintiff proffers evidence suggesting additional programs and initiatives obviate any alleged need for a residency preference in the senior housing law. Indeed, Plaintiff points to HUD-approved reverse-mortgage and tax benefit programs for seniors as just some examples of programming available to the Town to promote aging in place for its senior citizen population.

Accordingly, whether or not a residency preference is necessary to foster adequate aging-in-place among Town residents presents a question of material fact.

For all of these reasons, the Town is not entitled to summary judgment on Plaintiff's claims inasmuch as those claims are based on a disparate impact theory of liability.

Finally, the Town argues Plaintiff fails as a matter of law to establish an intentional discrimination claim, which the parties refer to as a disparate treatment claim, under the FHA. For this argument, the Town again focuses solely on its senior housing residency preference. And, again, I disagree with the Town.

Although the Town argues its only purpose in

enacting the senior housing law was to protect its seniors by promoting aging in their own community, the record, in fact, raises genuine issues of material fact with respect to legislative intent.

For example, the evidence demonstrates that in November 2009, during a public hearing to discuss the then-proposed senior housing law, a resident voiced his belief that the proposed law was a "major concern" that welcomed a "H.U.D. project" to the Town. In response, Supervisor Colavita assured residents that any senior housing would be for "Eastchester, Tuckahoe, and Bronxville residents only."

The record also reflects that in September 2013, at a public meeting to discuss a developer's senior housing application, a Town resident said the development would turn the Town into "a Bronx neighborhood." A second resident stated "more Section 8 people will come in," and "we're going to have the first project in Eastchester. That's what it looks like to me, it looks like a housing project."

He further stated "these people" would move in, and "there goes our neighborhood," and also remarked: "Do you want this to become the Bronx again? ... This is not New Rochelle. This is not Yonkers. We don't want this. If we wanted that, we would live there where it's much cheaper."

Shortly thereafter, Supervisor Colavita sent a letter to fellow residents -- "fellow residents" to respond to

"numerous phone calls and inquiries" regarding concerns that senior housing developments would create housing projects for "nonresidents." Colavita explained that any such developments would be "for our Eastchester, Bronxville and Tuckahoe senior citizens," and referred to the Town's residency preference in support of his response.

Based on the record evidence, a reasonable factfinder could conclude that the Town was motivated, at least in part, by its residents' fears of racial integration when it enacted the senior housing law and residency preference.

Indeed, to prevail on such a disparate treatment claim, Plaintiff need not establish that discriminatory animus was "the sole motivating factor" for the Town's implementation of its" -- housing -- "of its senior housing law." That's a quote from Village of Arlington Heights against Metro. Housing Development Corp. -- Metropolitan Housing Development Corp., a Supreme Court case, 429 U.S. 252, at 265, in 1977.

In short, genuine issues of material fact exist as to whether discriminatory animus was a significant factor in the Town's implementation and enforcement of its senior housing residency preference.

And, accordingly, for all of these reasons, the Town's motion for summary judgment is denied. Just for technically, I've already denied it, but those are the reasons

1 why I denied the new Town's motion for summary judgment.