No. 19-40717

In the United States Court of Appeals for the Fifth Circuit

CAMERON COUNTY HOUSING AUTHORITY; COMMUNITY HOUSING & ECONOMIC DEVELOPMENT CORPORATION,

PLAINTIFFS - APPELLANTS,

v.

CITY OF PORT ISABEL; CITY OF PORT ISABEL CITY COMMISSION; PORT ISABEL PLANNING AND ZONING COMMISSION,

DEFENDANTS - APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

APPELLANTS CAMERON COUNTY HOUSING AUTHORITY AND COMMUNITY HOUSING & ECONOMIC DEVELOPMENT CORPORATION*

*There is no parent corporation or publicly held corporation that owns 10 percent or more of Appellants' membership interest.

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STATEMENT REGARDING ORAL ARGUMENT

This case involves a novel fact pattern, an extensive record, and multiple issues. Oral argument will allow the Court to clarify the fact pattern with regard to the multiple complex legal issues.

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TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

Plaintiffs-Appellants **CAMERON COUNTY HOUSING AUTHORITY AND COMMUNITY HOUSING & ECONOMIC DEVELOPMENT CORPORATION** ("Appellants" or the "Housing Authority") appeal the judgment in favor of Defendants-Appellees Defendants City of Port Isabel, Port Isabel City Commission, and Port Isabel Planning and Zoning Commission (collectively, "Appellees"), entered on July 18, 2019, by United States District Judge Rolando Olvera, in Civil Action No. 1:17-cv-00229, in the United States District Court for the Southern District of Texas, Brownsville Division. ROA.955.[1]

STATEMENT OF JURISDICTION

This appeal emanates from a final judgment that disposed of all parties and issues. ROA.955. The district court had jurisdiction because Plaintiffs' claims arise under federal law. 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 2202, and 42 U.S.C. § 3613(a). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. It is well settled that Title VIII of the Civil Rights Act of 1968 (the "Fair Housing Act" or "FHA") permits standing to the fullest extent permitted by Article III of the United States Constitution. The district court erred in deciding

[1] Plaintiffs - Appellants only appeal the district court opinion as it pertains to the claims against the City of Port Isabel under the Fair Housing Act. Plaintiffs do not appeal the district court's dismissal of the other claims and defendants.

that the Housing Authority lacked standing to pursue their claim under the FHA for at least two reasons.

a. First, the district court erred in granting summary judgment and holding that there are no material disputed fact issues as to whether the City of Port Isabel took official actions to block the Housing Authority from constructing what would have been a Latino-occupied affordable housing complex in a majority-Anglo neighborhood. There is extensive evidence in the record that agents of the City of Port Isabel, including the Planning and Zoning Commission ("P&Z Commission"), the City Manager, and City Commissioners took actions or failed to take actions in their official capacity to block the project. As a result of these actions, $1,704,845 in federal funding awarded to the Housing Authority to construct an affordable housing complex destroyed by Hurricane Dolly, was reallocated to another housing authority.

b. Second, the district court erred in dismissing the Housing Authority's FHA claim based upon "official action" jurisprudence emanating from 42 U.S.C.A. § 1983 ("Section 1983"). Unlike claims arising under Section 1983, which requires conduct "under color of law," the FHA does not require "official action." Indeed, an FHA claim such as the Housing Authority's claim here, cannot possibly require a specific type of official action because with the wrongful zoning regulation already in place, the municipality can simply "do nothing" and thereby

injure Plaintiffs in violation of the FHA. In Port Isabel, Texas, the process for seeking a zoning amendment begins with a request to the P&Z Commission. The P&Z Commission is then supposed to send its recommendation to the City Commission for final approval or denial. Here, there is no evidence that the P&Z Commission sent its denial of the Housing Authority's request for a zoning change to the City Commission. Because there was never a final vote by the City Commission, the P&Z Commission's denial had the effect of a final denial of the Housing Authority's request. Can a municipality avoid any liability under the FHA by simply failing to send the P&Z Commission recommendation to the City Commission, or by denying the Housing Authority a final vote by the City Commission, and thereby avoiding any "official action" as defined under Section 1983?

2. Ultimately, because of the City's actions, the Housing Authority reduced its proposed development from 26 units to 10, which would not have required a zoning change. The City refused to issue building permits which is an undisputed official action. The district court clearly erred in holding that there is no evidence to establish the City's denial of the building permits by sweepingly concluding that none of the statements made by the City could be admissible. There are extensive statements made by the City that are admissible as admissions by party opponent.

STATEMENT OF THE CASE

The key issue here is whether liability under the Fair Housing Act requires a final vote on zoning changes and replatting by the Port Isabel City Commission in order to establish an injury-in-fact traceable to the City sufficient to establish Article III standing. The district court's ruling below applies an interpretation of "official action" that contravenes existing case law and the broad remedial purpose of the Fair Housing Act to eliminate racial segregation and eradicate discrimination in housing.

This case arises out of the Cameron County Housing Authority's ("Housing Authority") attempts to rebuild a public housing development severely damaged by Hurricane Dolly in July 2008. The evidence establishes that the City of Port Isabel deliberately blocked the Housing Authority from re-developing this housing in a higher-income majority white neighborhood in Port Isabel, Texas. After receiving nearly $2 million in federal disaster relief funds, in March 2015 the Housing Authority began an arduous and expensive nine month effort to obtain the necessary approvals from the City of Port Isabel to re-develop the Neptune project. Today, the property sits vacant and dilapidated as it has for over ten years since Hurricane Dolly.

The majority of the complex project would have been inhabited by low-income Latino families with children; 99 percent of the families the Housing

Authority serve are Latino. There is extensive evidence in the record establishing that the City's failure to approve rebuilding the Neptune Apartments was driven by local opposition motivated by animus based on race, national origin, and familial status. At a minimum, there are disputed issues of material fact in relation to the Housing Authority' claims, and the district court, therefore, erred in granting summary judgment.

A. Ninety-Nine Percent of the Housing Authority's Tenant Households are Hispanic/Latino.

Plaintiff Cameron County Housing Authority provides low-income families with safe, decent, and affordable housing, and promotes programs that lead to economic self-sufficiency and enhance the quality of life of its resident families. ROA.597 ¶ 2. Ninety-nine percent of the Housing Authority's tenant households are Hispanic/Latino, 70 percent are Extremely Low Income, 22 percent are Very Low Income, and 74 percent are families with children. ROA.597-598 ¶ 2. Plaintiff Community Housing & Economic Development Corporation ("CHEDC"), is a public facility corporation created and wholly-owned by CCHA. ROA.597-598 ¶ 2. The Neptune Apartment complex, located at 407 Summit Street in Port Isabel, Texas, the property underlying this dispute, is owned by CHEDC. [2] ROA.597-598 ¶ 2.

[2] CCHA and CHEDC are at times referred to collectively herein as, the "Housing Authority."

Since at least 2003, the Neptune Apartment Complex has been owned by CHEDC, and operated by the CCHA as a multi-family affordable housing complex with at least 16 units. ROA.598 ¶ 2. The Neptune Apartments are subject to a Land Use Restriction Agreement (LURA), which was entered into on July 20, 1994, between the Resolution Trust Corporation as receiver for El Paso Federal Savings Association and the then-owner of the property. ROA.598 ¶ 2. At the time the LURA was signed, the Neptune Apartments consisted of a 27-unit rental housing project. ROA.598 ¶ 4. The LURA requires the Housing Authority to provide at least 10 units for Low-Income families as that term is defined under the LURA. ROA.598 ¶ 4, 606-616.

B. The Housing Authority Was Awarded Federal Funds to Rebuild the Neptune Apartment Complex.

In July 2008, Hurricane Dolly struck the Rio Grande Valley in South Texas, rendering the 16-unit multifamily Neptune Apartments largely uninhabitable. ROA.598 ¶ 5. As a result of the hurricane, the complex suffered broken windows and severe water damage, among other damage. ROA.598 ¶ 5. At that time, the Housing Authority did not have the funds to redevelop the property. ROA.598 ¶ 5. Although some residents continued living in the structure for a period of time after the hurricane, by 2010 at the latest, all residents had been relocated. Since that time, the building has been vacant. ROA.598 ¶ 5.

In April 2014, the Housing Authority was awarded Community Development Block Grant for Disaster Recovery ("CDBG-DR") funding through the Lower Rio Grande Valley Development Council (the "LRGVDC") to rebuild Neptune Apartments as a 26-unit mixed income development. ROA.599 ¶ 6. The City initially supported the Housing Authority's planned redevelopment of the Neptune Apartments because of the severe shortage of affordable housing in Port Isabel, particularly for people who work in the City, and the success of similar developments in other cities. ROA.599 ¶ 6.

C. The Neighborhood Surrounding the Neptune Apartments is Disproportionately Anglo.

The geographic area in which the Neptune site is located, Block Group 1 of Census Tract 123.04, is older, whiter, and more affluent than the surrounding areas. ROA.671. Two thirds (64.2 percent) of the residents of Block Group 1 are non-Hispanic whites, but non-Hispanic whites are only one-fourth (26.1 percent) of the population in Census Tract 123.04. ROA.670. Only one-tenth (10.1 percent) of the population of Cameron County is non-Hispanic White. ROA.670.

Affordable and subsidized housing in Port Isabel has been primarily concentrated in an area further inland from the Neptune Apartments, on the other side of Highway 100. This area has historically been referred to as "Mexiquito" or "Little Mexico." The area is also lower-income and located in close proximity to the port and industrial sites. ROA.680, 684-685, 781, 799, 806, 850-851.

As more fully described below, during the process which ultimately resulted in the City denying the Housing Authority the ability to receive CDBG-DR funds, or redevelop the Neptune Apartments, comments were made by members of the community and public officials suggesting that affordable housing should be limited to the area known as "Little Mexico," where the City's affordable housing is already concentrated.

D. CCHA Formally Applied for Rezoning and Replatting.

The Neptune Apartments are located on three and four fifths lots between Summit Street and Harbor Light Street, and CHEDC owns an additional lot across the street from the Neptune site. ROA.623-625. Two of these lots are zoned A-1 Multifamily, two lots are zoned R-1 Single Family Residential, and the lot across the street is zoned R-2 Duplex/Fourplex Residential. ROA.623-625. Because the original plans for the redevelopment project included constructing multi-family units on the lots zoned for single-family use, the Housing Authority requested that the City approve re-zoning and replatting the site in order for the project to proceed. ROA.623-625.

On March 11, 2015, during a P&Z Commission meeting on the Housing Authority's rezoning and replatting application, approximately 25 members of the public, overwhelmingly Anglo, appeared to oppose the rezoning request. ROA.623-625. This was an unusually large number of attendees, perhaps greater

than 70 percent of P&Z Commission Meetings. ROA.889. Public testimony in opposition to rebuilding was based on camouflaged racial expressions and discriminatory animus against members of protected classes. ROA.895-900. The meeting minutes specifically reflect this discriminatory animus: "The main concerns from the residents of the area are parking issues, property value declining, types of tenants, section 8, funding, and property maintenance. . . . Many people in the crowd that the complex would bring the same "type" of tenants and problems as the Neptune Apartments." ROA.624.

Comments at the public hearing included references to affordable housing as a "facility," repeated assertions that the neighborhood was single-family and not rental or multifamily housing, contrary to census data and city zoning. ROA.896-898. Two speakers stated that they did not care what the project looked like, they would still oppose it, and one added that "you-all ought to give it up and face the reality that it's not going up" which was greeted with applause. ROA.895-896, 899-900. Opponents also repeatedly suggested that the Housing Authority build housing "where it's not in a neighborhood," outside the city limits, or add units to "existing locations." Leo Sanders, a former Mayor of Port Isabel, and the leader of the anglo opponents of the project, stated the following:

> Now then, from my standpoint, if I wanted to live next to a housing authority, I could have bought property out on [Port] Road and built my house out there. But I didn't do that. Now why in the world would you folks want to do what you're doing? Bring a housing authority

> into a single-family area and then ask these folks to change the zoning for your benefit, not for our benefit, not to enhance our neighborhood, but to be detrimental to it so you can get a lot of government money, which is our tax money, to spend on this project and you're not going to pay any taxes on it. . . . but that isn't going to contribute anything to us, and it isn't going to contribute anything to the City of Port Isabel."

ROA. 898. The City Secretary also received five written comments from neighborhood residents opposing the zoning change, including similarly pre-textual and thinly-veiled racist discriminatory complaints. ROA.652-658.

The P&Z Commission voted unanimously to deny replatting and rezoning, based upon the same pre-textual bases voiced by the neighbors. ROA.625, 891. The normal procedure was for city staff to convey the P&Z Commission's recommendation to the City Commission for a final decision. ROA.888. However, there is no evidence that this happened after the March 11, 2015 meeting, and the City Commission never reviewed the recommendation.

E. The City Continued to Block the Project Even After the Housing Authority Modified Its Plans to Address Opponents' Alleged Non-Discriminatory Concerns.

On May 26, 2015, the Housing Authority submitted a request for a second hearing before the P&Z Commission. ROA.601. Before May 26, 2015, CCHA had also presented two alternative designs responsive to alleged concerns expressed by the P&Z Commission to the Housing Advisory Committee of the LRGVDC, which needed to approve substantial changes to the project. ROA.659-660. The Housing

Advisory Committee Memo reads, "[a]fter receiving input from the City, the developers will not build the proposed 4 story building and propose to replace the rental units with single-family cottage design. . . . Each unit will have parking spaces for 2 cars which will meet City of Port Isabel Code." ROA.660. The staff recommended option two, which reduced the number of units on site to 16, and reduced the CDBG-DR funding for the project by $655,709. ROA.661. The Staff's recommendation was approved by the LRGVDC, so by May 27, 2015, the Housing Authority had already lost over half a million dollars in federal funds and reduced the number of units it could rebuild by 10.

F. The Housing Authority and Its Partners Undertook an Ambitious Community Engagement Plan As Suggested by the City, Despite the Fact That No Such Process Is Required By the City For Approval Of a Zoning Change or Replatting.

During the Summer of 2015, the Housing Authority and its non-profit partners, Community Development Corporation of Brownsville ("CDCB"), and [bc] Workshop, engaged in an extensive community engagement effort, including, going door-to-door through the neighborhood and handing out flyers, meeting with residents, city staff, and elected officials, holding community meetings, and producing designs that incorporated community input and complied with city code requirements. ROA.846, 850, 853, 870. Members of the public made statements indicating discriminatory animus and using camouflaged racial expressions throughout this process. CDCB and [bc]workshop staff who canvassed the

neighborhood to invite residents to community meetings felt threatened by the hostile responses they received. ROA.853.

Residents said repeatedly "[w]e don't want them here" and "[w]e don't want to see them," and made very clear they were referring to Latino families by complaining about "Mexican" music and revealing that their concerns about parking were based on stereotypes about Latinos having extended family living with them and working on their cars in the street. ROA.914-918, 858. Opponents also made statements equating low-income Latinos with crime, asserting, "[w]e just cleaned up the city. We just cleaned up the neighborhood." ROA.915. At a June 3, 2015 community meeting and design charrette, residents asked who would be allowed to live in the units, how CDCB would ensure there would not be too many children in one apartment, ensure there would not be additional people living in a unit, asked how they would be protected from the future tenants, and generally expressed hostility towards families with children and used coded racial language. ROA.854-856.

The designs presented by CDCB and [bc]workshop at the June 9, 2015, community meeting specifically addressed concerns raised by neighborhood residents, including the number of units, the aesthetics of the design, and off-street parking. ROA.858, 864. At the end of the second community meeting, CDCB was told by a resident that no matter what they did the project would not go

forward, demonstrating, again, the pre-textual nature of residents' objections. ROA.858. Parking and related safety issues are the only allegedly non-discriminatory reasons that Defendants cite for refusing to rezone the Neptune site. ROA.890-892. Alleged concerns about parking and the single-family character of the neighborhood were clearly pre-textual and, therefore, discriminatory animus was a significant factor in the City's decision to block the project. "The Supreme Court has long held . . . that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of the majority of its citizens." *United States v. Yonkers Bd. of Educ. (Yonkers I*), 837F.2d 1181, 1224 (2nd Cir. 1987); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

G. The City Took Specific Actions To Prevent the Housing Authority From Presenting a Revised Project Plan That Addressed the City's Alleged Non-Discriminatory Objections to the P&Z Board.

The Housing Authority attempted repeatedly to respond to issues raised by the P&Z Commission and the public. ROA.857-858. By June 9, 2015, the Housing Authority had a design which specifically addressed concerns raised by neighborhood residents and the P&Z Commission, including a reduced number of units, a single family cottage design instead of a multistory building, and off-street parking. ROA.858, 864. The Housing Authority requested a second meeting of the

P&Z Commission on its modified request to replat and rezone the Neptune site. That meeting was scheduled for Wednesday, June 10, 2015. ROA.601. Before the meeting took place, however, the Port Isabel City Manager, Jared Hockema, called Daisy Flores, the Executive Director of the Housing Authority, and requested that she not attend the meeting because it would be "explosive and embarrassing." ROA.601, 648, 649. Based on the City's representations, Ms. Flores believed that attending the meeting would put her and her staff at risk of physical harm and pulled the item from the P&Z agenda. ROA.649. The June 10, 2015 meeting was cancelled. ROA.479.

H. The Housing Authority Modified Its Redevelopment Plan To The Point That Re-Zoning Was No Longer Necessary and The City Then Refused to Issue Building Permits.

The Housing Authority continued trying to work with the City and build support for the rezoning necessary to build the 16 unit design even after the cancellation of the June 10, 2015 P&Z hearing. ROA.867-868. However, opponents of rebuilding continued to influence elected and appointed officials. ROA.868. The Housing Authority scheduled a meeting with two City Commissioners who opposed the project, but neither Commissioner showed up. ROA.869. City officials or staff indicated that they felt the Commissioners had not shown up because of the influence of residents who opposed the project. ROA.869.

In September 2015, the Housing Authority met with the City and agreed to reduce the number of units on the Neptune site to 10. ROA.651. The LRGVDC approved the reduction of units on September 25, 2015, but also reduced the Housing Authority's CDBG-DR funding by an additional $440,935. ROA.629. At this point, Defendants' actions had already damaged the Housing Authority in an amount over $1 million dollars in CDBG-DR funds, and reduced the number of housing units that could be built on the Neptune site to fewer units than were on the site before Hurricane Dolly.

The Housing Authority submitted the final plans and applications for permitting for 10 units – four single-family homes and six units in a multifamily building – to the Port Isabel building inspector on October 28, 2015. ROA.631. These plans did not require a zoning change. ROA.602.

On November 10, 2015, the Housing Authority met with building inspector Larry Ellis, City Manager Jared Hockema, and Mayor Joe Vega and were told that, despite the current multifamily zoning of property, the City of Port Isabel would not issue building permits for multifamily buildings and would not issue permits for more than four single family homes on the Neptune site. ROA.602, 631.

Accordingly, the Housing Authority submitted plat amendments that would allow them to build four single-family rental homes on November 13, 2015. ROA.662-665. This requested plat amendment did not require consideration by

the P&Z Commission under City of Port Isabel Ordinance 156.003(E) because it met the exemptions detailed by the Texas Local Government Code §212.016. However, on November 19, 2015, City Manager Jared Hockema sent an email to the City Manager and City Attorney stating that he intended to submit the plat amendments to the P&Z Board and City Commission. ROA.922-923.

On November 24, 2015, LRGVDC sent a letter to the Housing Authority informing the Housing Authority that it was denying the Housing Authority's request to reduce the number of units to four, and asking if the Housing Authority would be able to close on and permit ten units by December 1, 2015. ROA.632. On November 25, 2016, the Housing Authority sent a letter to LRGVDC stating that the Housing Authority would be unable to close on 10 single-family units by December 1, 2018 because the City, "has indicated that they will only approve building permits for four single family homes." ROA.636. The Housing Authority, therefore, lost the funding, and the plan to re-develop the Neptune Project died.

SUMMARY OF ARGUMENT

The district court's opinion was based almost entirely upon the finding that the City never took "official action." More specifically, the district court found that: "There is no evidence the City Commission ever took any official action on Plaintiffs' request or that Plaintiffs ever asked the City Commission to take any such official action." ROA.959. That holding is both legally and factually

misplaced. The record in this action establishes that the Housing Authority took every conceivable action to try and gain the necessary approvals to re-develop public housing on the same site. The City blocked the Housing Authority at every turn, giving effect to the discriminatory animus of member of the public in clear violation of the FHA and other civil rights laws. The City only had to stall until December 1, 2015, when the federal grant funds expired. The district court misapplied the law and erred by failing to view the summary judgment evidence in the light most favorable to the Housing Authority. The district court improperly made a determination of genuine issues of material fact that it should have allowed a jury to decide. The Court should correct these errors.

STANDARD OF REVIEW

The Court reviews a district court's summary judgment decision *de novo*. *Davis v. Fernandez*, 798 F.3d 290, 292 (5th Cir. 2015). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When reviewing a summary judgment decision, the Court views all facts in the light most favorable to the non-moving party. *See Tolan v. Cotton*, 134 S.Ct. 1861, 1863 (2014) (*per curiam*).

The moving party bears the burden of "pointing out the lack of evidence to support the nonmoving party's case." *ContiCommodity Servs., Inc. v. Ragan*, 63 F.3d 438, 441 (5th Cir. 1995). In other words, the moving party must point to specific facts, considered undisputed, that establish that the moving party is entitled to summary judgment. See *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). See also Fed. R. Civ. P. 56(c) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by [ ] citing to particular parts of materials in the record . . . ."). *See also Little v. Liquir Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994) ("[T]he purpose of Rule 56 is to 'enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues.'") (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). Only if the moving party has pointed to specific, alleged undisputed facts, and the non-moving party has failed to address properly the moving party's assertion of facts, is summary judgment proper. See Fed. R. Civ. P. 56(e).

ARGUMENT AND AUTHORITIES

A. The District Court Erred in Finding that the Housing Authority Did Not Have Standing Under the Fair Housing Act.

The District Court erred in finding that the Housing Authority lacks standing. From the earliest cases interpreting the Fair Housing Act, the United States Supreme Court has held that, "the language of the Act is broad and

inclusive," and that, "[w]hile members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered." *Trafficante v. Metro. Life Ins. Co*., 409 U.S. 205, 209-210, 93 S. Ct. 364, 367, 34 L. Ed. 2d 415 (1972). The statute allows any "aggrieved person" to file a civil action seeking damages for a violation of the statute. §§ 3613(a)(1)(A), 3613(c)(1). The FHA defines an "aggrieved person" to include "any person who ... claims to have been injured by a discriminatory housing practice." § 3602(i). The United States Supreme Court, "has repeatedly written that the FHA's definition of person aggrieved reflects a congressional intent to confer standing broadly." *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct., at 1303 ("We have said that the definition of "person aggrieved" in the original version of the FHA, § 810(a), 82 Stat. 85, "showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'"); *see also Thompson v. North American Stainless, LP*, 562 U.S. 170, 176, 131 S.Ct. 863, 178 L.Ed.2d 694 (2011) ("Later opinions, we must acknowledge, reiterate that the term 'aggrieved' [in the FHA] reaches as far as Article III permits"). And "[s]tanding under the FHA extends to the full limits of Article III." *NAACP v. City of Kyle,* 626 F.3d 233, 237 (5thCir. 2010).

The District Court's finding that the Housing Authority does not have standing under the FHA rests entirely on its finding that "[t]here is no evidence the City Commission ever took any official action on Plaintiffs' request or that Plaintiffs ever asked the City Commission to take any such official action." ROA.959. The Court concluded that because there was no evidence of official action, "Plaintiffs' FHA claims are not traceable to Port Isabel. Thus, Plaintiffs lack standing to assert an FHA claim against Port Isabel and summary judgement is warranted on Plaintiffs' FHA claims." ROA.959.

The District Court correctly stated the Article III standard, including that "the injury in fact is directly traceable to Port Isabel's acts *or omissions"* but then erroneously required that the Housing Authority be able to trace its injury specifically to a formal vote by the City Commission. ROA.958 (emphasis added). In this case, it is the City's omission, in other words, failure to take such a vote, and other discriminatory actions that are the source of the Housing Authority's injuries. ROA.479, 601-602, 622-625; 635-632; 634; 636; 648-649; 652-658; 659-661; 895-900.

The Housing Authority has Article III standing because: (1) the Housing Authority has suffered an injury in fact which is concrete, particularized and actual, because the City's discriminatory actions have prevented the Housing Authority from rebuilding the Neptune Apartments for the benefit of low-income

families, for which the Housing Authority had obtained grant funds and expended thousands of dollars on plans, consulting services, and other expenses; (2) the Housing Authority's injuries were caused by the discriminatory conduct of the City because the Housing Authority lost grant funds and was unable to re-develop the complex as a result of the City's actions; and (3) the Housing Authority's injuries would be redressed by a favorable decision because a monetary award could recompense the Housing Authority for their damages and the City may be enjoined from continuing to block the project. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

It is well settled that where the failure to re-zone creates a disproportionate impact on minorities, such failure constitutes a basis for asserting a discrimination claim under Section 3604 of the FHA. *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988), aff'd in part sub nom. *Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 109 S. Ct. 276, 102 L. Ed. 2d 180 (1988) ("In sum, we find that the disproportionate harm to blacks and the segregative impact on the entire community resulting from the refusal to rezone create a strong prima facie showing of discriminatory effect-far more than the Rizzo test would require."). Importantly, discriminatory animus displayed by members of the public alone is enough to support a finding of intentional discrimination by government officials; the expression of

discriminatory animus by such officials themselves is not necessary to prove discriminatory intent.[3]

1. The District Court Erred in Granting Summary Judgment and Holding that There Are No Material Issues of Disputed Fact as to Whether the City of Port Isabel Took Any Official Actions.

The district court erred in holding that there was no genuine issue of material fact regarding whether the City of Port Isabel took official action to block the Housing Authority's requests for rezoning, replatting, and building permits. The district court's finding that the Housing Authority never asked the City Commission to take official action is clearly erroneous. The process for requesting zoning changes is initiated through the P&Z Commission, which does not legally have final authority to approve or reject platting and zoning changes; its decisions are merely recommendations to the City Commission, which then has the responsibility for granting final approval or denial. Defendant has not claimed that there is any alternative process through which the Housing Authority could have

[3] "The presence of community animus can support a finding of discriminatory motives by government officials, even if the officials do not personally hold such views. *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir.1997), superseded on other grounds as recognized in *Zervos v. Verizon N.Y., Inc.*,252 F.3d 163 (2d Cir.2001); *LeBlanc–Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir.1995) (plaintiff alleging a disparate treatment claim under the FHA "can establish a prima facie case by showing that animus against the 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." (internal quotation marks omitted)). This standard "recognize[s] the reality of such controversial proposals in the urban setting," *United States v. City of New Orleans*, 2012 WL 6085081, at *9 (E.D.La. Dec. 6, 2012), in which council members may vote based on constituents concerns about "an influx of undesirables" into the neighborhood. *Smith v. Town of Clarkton*, 682F.2d 1055, 1066 (4th Cir.1982). *Avenue 6E Investments LLC v. City of Yuma, Arizona*, No. 13-16591, (9thCir. 2016).

requested these changes directly from the City Commission, nor has it produced any evidence that the Housing Authority was responsible for directly requesting a formal vote from the City Commission. The Housing Authority submitted two requests for replatting and rezoning to the Port Isabel P&Z Board. ROA.601, 623-625. There is no dispute that, until the federal funds expired, the Housing Authority continued their attempts to obtain replatting and rezoning of the Neptune site and at no point abandoned the project.

Ramona Kantack Alcantara, P&Z Commission Secretary at the time the Housing Authority submitted their first request for re-zoning and replatting, and who made the motion to deny those changes, testified that it was the responsibility of the city staff to administratively communicate the P&Z Commission's recommendation to the City Commission.

> Mr. Riemer: Okay. And what is the process for that recommendation going from the planning and zoning commission to the city council?
>
> Ms. Alcantara: That was something that was handled administratively by the city staff, so would make our decision, and then that was communicated, as I understand, to the city council.

ROA.888.

In June 2015, The Housing Authority submitted a second application to the P&Z Board. Just prior to the meeting, however, the City Manager convinced the Housing Authority not to attend the meeting because it would be "explosive and

embarrassing." ROA.601. The Housing Authority then requested building permits for 10-units, which did not require a zoning change. ROA.631.

The Housing Authority went above and beyond their obligations under City Ordinance to initiate the process of seeking a zoning change and address concerns expressed by the City and the public. The district court's ruling therefore, that "there is no evidence . . . that the Housing Authority ever asked the City Commission to take any such official action," is clearly erroneous.

2. The District Court Erred in Applying the Section 1983 "Official Action" Standard to Discrimination Claims Under the Fair Housing Act.

Liability under Section 1983 is limited to actions taken under color of law. *See* 42 U.S.C.A. § 1983. Accordingly, there is a vast body of jurisprudence regarding what constitutes "official action," under Section 1983. *See, e.g.*, *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690–91 (1978) (Under Section 1983, Municipalities may be held liable for depriving individuals of their constitutional "rights, privileges, or immunities," if the deprivation proximately results from "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipality's] officers" explicitly or by the municipality's custom and practice.). However, liability for discrimination under the Fair Housing Act has not been so narrowly defined. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1982 & Supp. III 1985) (the "Fair

Housing Act" or the "FHA"), has a broad remedial purpose: to eradicate discrimination in housing, and to promote racial integration. *Huntington Branch, N.A.A.C.P.*, 844 F.2d at, 936.[4] In *Trafficante*, the Supreme Court held that Title VIII should be broadly interpreted to fulfill this congressional mandate. *Id*. (citing 409 U.S. at 212, 93 S.Ct. at 368). Standing under the FHA is much broader than standing Section 1983, with FHA claims applying to private citizens, and relevant to this case, applying to omissions as well as actions.

Perhaps more importantly, the legal precedent on this point establishes that FHA claims against municipalities based upon the failure to approve zoning changes, do not require the same type of official action as §1983 claims. The Second Circuit decision in *Huntington Branch, N.A.A.C.P. v. Town of Huntington* is directly on point. *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844

[4] In the mid-1960s, "widespread racial segregation threatened to rip civil society asunder." *See Huntington Branch, N.A.A.C.P.*, 844 F.2d, at 928. After the assassination of Dr. Martin Luther King, Jr. in April 1968, the Nation faced a new urgency to resolve the social unrest caused by substandard housing and racial segregation. *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc*., 135 S. Ct. 2507, 2516, 192 L. Ed. 2d 514 (2015). In response, Congress adopted broad remedial provisions to promote integration. One such statute, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1982 & Supp. III 1985) (the "Fair Housing Act" or the "FHA"), was enacted "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The statute addressed the denial of housing opportunities on the basis of "race, color, religion, or national origin." Civil Rights Act of 1968, § 804, 82 Stat. 83. Then, in 1988, Congress amended the FHA. Among other provisions, it created certain exemptions from liability and added "familial status" as a protected characteristic. See Fair Housing Amendments Act of 1988, 102 Stat. 1619. As Senator Mondale, the bill's author, said, the proposed law was designed to replace segregation "by truly integrated and balanced living patterns." *Id*. (quoting 114 Cong.Rec. 3422 (1968), quoted in *Trafficante*, 409 U.S. at 211, 93 S.Ct. at 368.)

F.2d 926, 932 (2d Cir. 1988), *aff'd in part sub nom. Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 109 S. Ct. 276, 102 L. Ed. 2d 180 (1988). In *Huntington*, the district court dismissed the plaintiffs' FHA claims and refused to order re-zoning because Plaintiffs, "did not formally apply to rezone their parcel." The Second Circuit overturned the district court, holding that, "contrary to the Town's assertion, appellants were not required to exhaust local remedies by filing a formal application for rezoning." *Huntington I,* 689 F.2d at 393 n.3. The Second Circuit further held that, although the Town Board had not made a formal decision on the zoning changes that Plaintiff developer needed in order to construct affordable multifamily housing, the Town Board had effectively, denied the requested changes. *Huntington,* 844 F.2d at 932.

Similarly, in January 2017, the United States Department of Housing and Urban Development (HUD) made an administrative finding that the City of Houston was in violation of Title VI of the Civil Rights Act of 1984 for actions it took to prevent a mixed-income development, that would have included public housing units, from being built based on the discriminatory animus of neighbors. The finding was based, in part, on the City's refusal to take official action on a resolution of support for the purposes of obtaining Low Income Housing Tax Credits that were critical to funding the development. *See* letter from Department

of Housing and Urban Development, dated January 11, 2017 – available at http://stopfountainviewproject.org/wp-content/uploads/2017/04/HUD-letter.pdf.

In the current case, as in *Huntington*, there are a "myriad of factual disputes surrounding [Plaintiffs] dealings with the Town Board." *Town of Huntington*, 844 F.2d 926, 932. In *Huntington*, the court found that, based upon the various actions and communications and activities underlying the factual background in the case, "Both parties clearly understood that an application for a zoning change had been made." *Town of Huntington*, 844 F.2d 926, 932. Similarly, there can be no question that all parties clearly understood that an application for a zoning change had been made in this case. The record in this case establishes that it was clear to the City that the Housing Authority was requesting a zoning change and that the City understood that the Housing Authority was pursuing a zoning change.

Moreover, as described above, Defendants engaged in multiple acts and omissions to wrongfully thwart the Housing Authority's efforts to re-develop the complex, giving rise to the Housing Authority's standing under Article III. In fact, unlike in *Huntington*, here, there *was* an official request to approve zoning changes submitted to the City, making standing even more appropriate here than in *Huntington*. Although the P&Z Commission may not be the final decision making body to approve zoning changes in Port Isabel, the application process nonetheless begins with the P&Z Commission. In addition, there is unquestionably an official

policy in place in this matter which has been, and continues to be, in violation of the FHA, namely, the underlying zoning regulation, which wrongfully prevented the Housing Authority from re-developing the project constitutes official policy. By this action, the Housing Authority has sought federal court intervention to amend that zoning policy.

B. The District Court Erred By Not Viewing the Evidence in the Light Most Favorable to the Housing Authority.

The district court dismissed claims as they pertain to the City's refusal to issue building permits after the Housing Authority submitted a proposal which did not require any zoning changes, based on its own determination that, "Plaintiffs produced no concrete evidence to support this allegation beyond conclusory assertions and hearsay." ROA.959. This was clearly erroneous because courts "may not make credibility determinations or weigh the evidence" at the summary judgment stage. *Bailey v. Napolitano*, No. 3:11-CV-1110-L, 2012 WL 1658790, at *3 (N.D. Tex. May 11, 2012) (internal quotations omitted) (*quoting Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 150 (2000)).

In order to retain CDBG-DR funding to rebuild public housing damaged by Hurricane Dolly, the LRGDVD voted to "to require the Neptune project of ten units to closed and permitted on or before December 1, 2015." ROA.634. On November 17, 2015, the Housing Authority notified the LRGVDC that the City refused to issue permits for the 10-unit plan. ROA.631-632. Daisy Flores also

testified in her Declaration that the City's representatives made such representations during a meeting on November 10, 2015. ROA.602. On November 24, 2015, the LRGVDC rejected the Housing Authority's request to reduce the number of units from ten to four. ROA.634. On November 25, 2015, Jose Gonzalez again informed the LRGVDC that "the City of Port Isabel has indicated that they will only approve building permits for four single family houses." ROA.636.[5] Following the expiration of December 1, 2015 deadline, the LRGVDC reallocated funds for rebuilding public housing in Port Isabel to another housing authority in the region. ROA.634.

This evidence clearly establishes that the City of Port Isabel refused to issue building permits for the 10-unit plan, and Defendants have provided no admissible controverting evidence. Moreover, this extensive evidence of Port Isabel City officials refusing to issue building permits is admissible as admissions by party opponents, pursuant to Federal Rule of Evidence 801:

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> *****
>
> (2) An Opposing Party's Statement. The statement is offered against an opposing party and:

[5] Despite the fact that two-thirds of the Housing Authority's site were zoned either A-1 Multifamily or R-2 Duplex/Fourplex Residential. PORT ISABEL, TEX., CODE §158.01 (2007). La Playa Mapping, City of Port Isabel, Texas and Property Atlas (December 2010) Map 2 of 13. http://portisabel-texas.com/cityhall/wp-content/uploads/2011/05/20101228_zoning-map.pdf

(A) was made by the party in an individual or representative capacity

FED. R. EVID. 801.

At minimum, there is a genuine issue of material fact on this point, which precludes summary judgment. Because the Housing Authority has presented evidence that the City of Port Isabel has discriminated in violation of the FHA, there are material facts in dispute precluding summary judgment for the City on the Housing Authority's discrimination claims.

CONCLUSION

For all of the reasons stated herein, in granting Defendant Appellee's Motion for Summary Judgment, the district court erred, and its judgment should be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served by delivering the same to the person listed below in the manner and on the date indicated:

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Dated this the 31st day of October, 2019.

/s/ Benjamin Ledbetter Riemer
Benjamin Ledbetter Riemer

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this document was produced in proportionally spaced typeface (Times New Roman, 14 point font) on a computer using Microsoft Word. The document contains 8,024 words according to the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

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