CASE 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

On Appeal from the United States District Court for the Southern District of Texas, Case No. 1:17-cv-229

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The Appellate Case Number is 19-40717. The District Court Civil Case Number is 1:17-cv-229. The style of the case is "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."

The undersigned counsel of record certifies that the following listed persons and entities as 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.

1. Cameron County Housing Authority—Plaintiff/Appellant;
2. Community Housing & Economic Development Corp.—Plaintiff/Appellant;
3. Benjamin Ledbetter Riemer, Bell Nunnally & Martin LLP; Melissa M. Sloan, Texas Appleseed—Attorneys for Plaintiffs/Appellants;
4. City of Port Isabel, Texas, a governmental entity—Defendant;
5. J. Arnold Aguilar, Aguilar & Zabarte LLC—Attorney for Defendant/Appellee;
6. Texas Municipal League Intergovernmental Risk Pool, a governmental entity—risk pool for Defendant/Appellee; and
7. Hon. Rolando Olvera, United States District Court Judge.

s/J. Arnold Aguilar
Attorney of record for Defendant/
Appellee City of Port Isabel, Texas

STATEMENT REGARDING ORAL ARGUMENT

Appellee City of Port Isabel, Texas requests oral argument. Appellee believes oral argument would assist the Court in understanding the factual background, the relationships between the parties and their actions, the effect of the evidence filed by the parties, the issues presented to this court and the district court, and how the evidence affects the legal analysis and the requirements to establish liability against the City. Appellee therefore believes the decisional process could be significantly aided by oral argument.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Cameron County Housing Authority (CCHA) and Community Housing and Development Corporation (CHEDC) challenge the district court's dismissal of their claim under the Fair Housing Act (FHA), Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.*, against the City of Port Isabel, Texas (City).[1] In describing the issues, however, Appellants ignore certain evidence, argue unsupported conclusions, and disregard the standard for establishing liability against the City. The City would therefore identify the issues before this Court as follows:

> ISSUE NO. 1: Whether Appellants identified evidence that would establish intentional race discrimination by the City in violation of the Fair Housing Act, including an "injury in fact" caused by action fairly traceable to the City, rather than to some third party, which could reasonably be expected to be corrected by the court, necessary to establish Article III standing? *Lujan v. Defenders. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992); *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211, 45 L. Ed. 2d 343 (1975).

[1] Plaintiffs – Appellants do not challenge any other claims previously dismissed or any claims against any other defendants previously sued. Brief of Appellants, p. 1, n.1.

ISSUE NO. 2: Whether Appellants identified evidence that race was a significant factor in a final action of the City's decisionmaker, rather than in any preliminary decisions or comments by residents or staff? *Artisan/American Corp. v. City of Alvin*, 588 F.3d 291, 295 (5th Cir. 2009); *Hood v. Pope*, 627 F. App'x 295, 298 (5th Cir. 2015).

ISSUE NO. 3: Whether Appellants identified evidence that they were treated differently from other similarly situated parties and that the City did not have a legitimate nondiscriminatory reason for its actions? *L & F Homes & Dev., L.L.C. v. City of Gulfport*, 538 F. App'x 395, 400 (5th Cir. 2013); *Okoye v. Univ. of Tex. Hous. Health Sci. Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001).

ISSUE NO. 4: Whether Appellants identified evidence to establish they filed their claim within the applicable statute of limitations, *i.e.*, within two years of the City's actions about which they complain? 42 U.S.C. § 3613(a)(1); *Wallace v. Kato*, 549 U.S. 384, 387, 127 S. Ct. 1091, 1094, 166 L. Ed. 2d 973 (2007); *Humphreys v. City of Ganado*, 467 F. App'x 252, 255 (5th Cir. 2012).

STATEMENT OF THE CASE

The CCHA created and owns the CHEDC, which in turn owns the Neptune Apartments in Port Isabel, Texas, though the CCHA operates those apartments. ROA.9, 11, 444. Daisy Flores, the Executive Director of the CCHA and overseer of operations for the CHEDC, was presented as the Corporate Representative of the CCHA and the CHEDC. ROA.361-64. They alleged discriminatory conduct on the part of the City, though they did not identify any such conduct by the City. They relied instead on statements by local residents and City staff from which they ascribed discriminatory intent and action to the City. ROA.8.

A. The Neptune Apartments are destroyed during Hurricane Dolly and become uninhabitable.

The Neptune Apartments were built around 1942, on three and four fifths lots on Summit Street in the Hockaday Subdivision of Port Isabel, Texas. Lots 29 and 31 are zoned A-1 Multifamily and lots 30 and 32 are zoned R-1 (Single Family Residential). ROA.13, 365. The CCHA also owns two lots across the street, Lots 12 and 14, which are zoned R-2 (Two Family Duplex). The Neptune site is bordered by a motel on one side and single-family homes on the other, the surrounding blocks are a mix of A-1, R-1, and R-2 zoning. ROA.13. Summit Street is a very narrow street, however. ROA.489.

Following Hurricane Dolly in 2008, the Neptune Apartments had become uninhabitable and were closed down. ROA.7, 11, 366-67, 407. After all residents moved out, a homeless person had tried to stay in a room, and they had to ask him to leave two times. ROA.368. By 2008, Appellants determined the building was too old and too damaged to repair and that it would need to be torn down. ROA.369-70. Though the Neptune had been allowed to continue in operation as a nonconforming use for many years (because it had been built before passage of the City's zoning ordinance), the Port Isabel, Texas Code of Ordinances (City Code) provided that the nonconforming use designation lapsed once the building was abandoned. ROA.490-93, 536.

B. Appellants request and receive a grant for a 26-unit project without first investigating whether that project would fit on their lot.

Appellants intended to rebuild the Neptune Apartments as a multi-family affordable housing development for low-income individuals and families. ROA.6-7, 11. To that end, in February 2013 the CHEDC approved a conceptual plan to redevelop the Neptune Apartments, for which they would be competing for a grant from the Lower Rio Grande Development Council (LRGVDC) for Dolly Disaster money, though there was a concern that the project had a sixteen month limitation with a December 31, 2015 deadline. ROA.371-72, 446-49. At that time, their Board

Attorney indicated "my understanding is that Port Isabel is a much friendlier environment" than Harlingen had been on a prior project. ROA.372-74, 447-49.

Appellants thereafter applied for funding for the project and received an award of approximately $1.8 million from the LRGVDC in April 2014 to build 26 housing units. ROA.375-76, 438. Before pursuing that project, however, Appellants did not investigate the size of the lot on which their project would be built or the City's requirements to do so. ROA.495-97, 599. Appellants simply did not check whether they had a site available to build 26 units that would have been in compliance with the City Code. ROA.440-42, 599. Regardless, former City Manager Edward Meza supported the project and sent Ms. Flores an email on May 8, 2014 congratulating her on the funding. He also mentioned a concern about a vagrant living in the Neptune and that a parking area across the street needed lighting because it was dark and being used as a drinking area and dump site. ROA.453, 456.

C. After a two year delay, Appellants begin the process to request a zoning change but do not provide a design plan or indicate how they would comply with the City Code.

The area around the Neptune Apartments is zoned for single families, while Appellants were asking to convert the area to allow a building for several families. ROA.389-90. They were aware that the normal process for a zoning change required first applying to the City's Planning and Zoning (P&Z) Commission, which would make its decision to approve or disapprove the request, after which that request

would go to the City Commission to approve or disapprove the decision of the P&Z Commission. ROA.422, 505-07. Between February 20, 2013, when the CHEDC approved a conceptual plan to redevelop the Neptune Apartments, and February 2015 when Appellants requested a hearing before the P&Z Commission, Appellants took no concrete action towards developing the Neptune, however. ROA.402-05.

On February 4, 2015, Flores requested a hearing before the P&Z Commission to rezone and replat Lots 29-32 from single family to R2 multifamily. ROA.379-81, 454-55. The City Code provides that "No subdivision plat shall be filed or recorded … until the plat shall have been considered by the Planning and Zoning Commission and approved by the City Commission." ROA.532. The City Commission only speaks for the City when they vote during a Commission meeting, however. ROA.484.

Appellants' original plan was to build 26 apartments, but they did not yet have any architectural plans. ROA.381-83. Nor had they presented any design to the City for consideration. ROA.383. Furthermore, Appellants did not have room for 52 parking spots on those lots, as would be required for 26 units to be in compliance with the City Code. ROA.384-86, 536. Though Appellants also had a lot across the street, the City Code requires parking on the same lot as the dwelling unit, and it did not appear they had enough room for sufficient parking spots anyway. ROA.387-88, 536. Appellants also did not specify how they would comply with the height,

size and setback regulations for their proposed project, as required by the City Code. ROA.535-36, 901.

D. Appellants' inability to address parking and similar issues results in opposition by residents and denial by the P&Z Commission.

Appellant's hearing before the P&Z Commission was held on March 11, 2015. ROA.457-59. Prior to that meeting, letters were submitted, and during the meeting comments were made, in opposition to Appellants' request for a zoning change, primarily because of parking issues, declining property values, traffic issues, safety, and similar matters. ROA.13-14, 395, 458-59, 461-67. Though Appellants understood the City had concerns with the health, safety and welfare of residents when multiple families move into an area that only allows single families, they did not conduct any community outreach to notify the neighbors of their proposed change before submitting that request to the P&Z Commission. ROA.391-94, 401.

After discussion and consideration of Appellants' request to rezone and replat their four lots, the P&Z Commission denied that request. ROA.459. Noone used the words "Latino," "Hispanic," or "minority," but because some made references to "those people," Flores assumed they were talking about the people in her housing units, *i.e.*, "low-income people," because she primarily serves Hispanics. ROA.396-400. At least one P&Z Commission member had concerns about the number of parking spots for such a high density complex and related safety issues, however.

ROA.508-15. Appellants did not request that the City Commission consider that denial, however.

E. Appellants resubmit their original application, now for a 16 unit project, but again fail to address parking and similar issues.

On May 26, 2015, Appellants presented the LRGVDC with a plat modification for their project to include either 26 units on two different sites or a 16 unit project on the original site of the Neptune. ROA.406, 473. That same day, Flores submitted another request for a hearing before the P&Z Commission, which was identical to the request she had earlier submitted on February 4, believing a new "cottage design" for 16 units would be acceptable because someone on her team had been doing outreach. ROA.409-16. That proposal also did not provide for 32 parking spaces as would be required by the City Code, however. ROA.408, 536. Appellants agreed neither their 16 unit proposal, nor their 26 unit proposal, ever met City Code requirements. ROA.437.

Appellants thereafter began a community engagement effort, which did not involve the City. ROA.14-15. They engaged in community meetings to build support, during which they received some negative comments from local residents. ROA.7-8. Despite Appellants' failure to present a design that complied with the City Code, the Mayor, three (of four) City Commissioners, a County Commissioner, and the City Manager, among others, supported their project and wanted it to move

forward. ROA.485-88. Appellants thereafter made additional modifications to their plan to rebuild the Neptune, and they had several meetings with members of the City Council and City Staff regarding their plans in an attempt to comply with the City's building codes and regulations. ROA.16-17, 423-25. Appellants still did not submit any final plans for approval by the City Council, however.

F. Appellants schedule a second P&Z hearing without identifying how they would comply with the City Code, then cancel that hearing and do not request any further hearings.

Appellants instead scheduled a second P&Z Commission hearing on their request to replat and rezone the site, for June 10, 2015. ROA.15-16, 476-77. Prior to June 10, however, Appellants submitted no additional documents to the City for its consideration, including any specific design plans. ROA.417-21. Because Appellants had not determined the size of the building they would propose, the number of units, size of the units, setbacks, the amount of parking spots and other questions that would be raised by the Commission, City Manager Hockema suggested having the meeting another time because he recognized they were not ready to present an acceptable proposal. ROA.500-02. As a result, that meeting was cancelled per Ms. Flores. ROA.478-80. Appellants did not submit any further request for a hearing before the P&Z Commission after June 2015, however. ROA.423-31, 494.

G. Appellants do not request approval of a plat or zoning change by the City Commission.

Appellants never presented an original or final plat description for the P&Z Commission to consider, as required by the City Code. The P&Z Commission can only recommend approval or disapproval of a final plat or zoning change for submission to the City Commission. ROA.532, 888, 900. Any final decision is left to the City Commission. ROA.902. Though there was a suggestion of an appearance before the City Commission, no requests were ever made for the City Commission to consider their project. ROA.423-24, 426-27, 429-31, 494.

By November 17, 2015, Appellants were aware that if they wanted four building permits (for their four lots), they could pick those up that same week, regardless of whether they were for Hispanic, Latino or any other category. ROA.433-34. Appellants refused to return to the P&Z Commission for approval of a larger project, however. ROA.498-99. Appellants therefore never submitted any request to the P&Z Commission or the City to build fewer than 26 units. ROA.439.[2]

[2] Although Appellants argue the City refused to issue building permits for a 10-unit plan, they rely only on their own hearsay statements, *i.e.*, statements of other persons' statements, to support that claim, and they attempt to characterize those statements as admissions by party opponents. *See* ROA.631-32 (Gonzalez' statement of non-specific City officials' statements); ROA.602 (Flores' statement of non-specific City officials' statements). Appellants are "trying to admit evidence of [Gonzalez' and Flores'] own recollection[s] of what someone else said in a conversation with [them]. [Their] assertion[s] that such evidence is not hearsay is unfounded. This is hearsay and does not fit any hearsay exceptions[, including as an admission by a party opponent under FRE 801(d)(2)(A)]. Although … such testimony could be used to impeach [the non-specific City officials,] impeachment evidence is not competent evidence for summary judgment." *Bellard v. Gautreaux*, 675 F.3d 454, 461 (5th Cir. 2012).

H. Appellants are unable to identify a compliant project before the LRGVDC deadlines expire and they lose funding.

By September 28, 2015, the funding for Appellants' project had decreased because of the number of units being proposed. ROA.432. On November 24 Appellants were notified the LRGVDC did not approve construction of only four units. ROA.435, 481. The following day, Appellants notified the LRGVDC they would not be able to construct their project in compliance with LRGVDC restrictions. ROA.436, 482.

I. Appellants identify no evidence of discrimination by the City.

Appellants argue that the City took some form of action because the area surrounding the Neptune is more Anglo than the surrounding areas and affordable housing has been primarily concentrated in another area of the city. ROA.12. Although Appellants reference an area as "Little Mexico" in Port Isabel, Flores had no knowledge of where that area is supposed to be and it was never mentioned at any P&Z or City Commission meeting. ROA.377-78. In an attempt to establish their claims, however, Appellants retained a professor of demography, Dr. Rogelio Saenz, who testified that the residents of the area surrounding the Neptune Apartments had a greater percentage of residents who were white, older, had fewer children, spoke only English, were employed in management, business, science and the arts, and had

a higher per capita income than the percentages for all residents in Port Isabel and Cameron County. ROA.518-21.

Professor Saenz' findings were consistent for Winter Texans and other people who live in other coastal areas when comparing bay front properties with those living in the surrounding properties. ROA.519, 521-22. His findings only concerned the comparison between the areas he researched, however, and he had no basis to believe any action taken by the City was *because of* any person's race. ROA.523-26. His role was only to determine demographics and whether Hispanics would be affected by Appellants' failure to construct a housing unit, not whether any loss of housing was *caused by* any actions of the City. For that matter, his conclusions of a disproportionate impact on Latinos or Hispanics would apply equally if the City had denied an application for the operation of a drug crack house. ROA.526-28.

J. The district court grants summary judgment.

Upon accepting Appellants' version of any factual evidence in dispute and discussing the applicable elements, the district court concluded the City was entitled to summary judgment, dismissed each of Appellant's claims, and entered final judgment. ROA.955-62. The CCHA and CHEDC thereupon timely filed a notice of appeal. ROA.963-64.

SUMMARY OF THE ARGUMENT

Prior to seeking funds for a contemplated housing project, Appellants did not investigate whether such a project would comply with City Code health and safety requirements. Instead, they haphazardly considered various development ideas in an attempt to create a project acceptable to their funding source, the LRGVDC. Appellants never requested that the City Commission consider any design or building plan, however, much less any plan for a project that complied with the City's zoning restrictions, before the CCHA's time for presenting an acceptable project expired and they lost that funding.

Appellants now seek to blame the City for their failure to identify and develop a project that would comply with the City Code and the LRGVDC's funding requirements, alleging that the City prevented them from pursuing a housing project because Hispanics would presumably be tenants, in violation of the FHA. While they argue they have standing as aggrieved persons under the FHA, they do not identify Article III standing through an "'injury in fact' … fairly traceable to Port Isabel's acts or omissions[, that] would be redressed by a favorable court decision." *Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2136.

To establish standing for a claim of disparate treatment, Appellants were required to identify a discriminatory intent through "evidence of discriminatory action or by inferences from the 'fact of differences in treatment.'" *L & F Homes &*

Dev., L.L.C., 538 F. App'x at 400. They failed to identify any such evidence. Though they argued that a disproportionate impact on Hispanics resulted from the City's failure to rezone their undefined project, they are not pursuing, and did not identify evidence of, a disparate impact claim, including any alleged policy about which they complain, how it was established by the City, or statistical evidence to establish the alleged impact was caused by the policy rather than other factors, necessary to establish a disparate impact claim. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523, 192 L. Ed. 2d 514 (2015).

Appellants simply did not meet their Article III standing requirement of an "'injury in fact' … fairly traceable to Port Isabel's acts or omissions[, that] would be redressed by a favorable court decision…." *Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2136. Their attempt to establish discriminatory intent of the City through residents' comments did not identify an injury fairly traceable to the City, and they never presented an original or final plat description for the P&Z Commission or the City Commission to consider, much less a proposed project that would conform to the City Code for the health, welfare and safety of its residents, including parking, height, size and setback regulations for any contemplated project.

Though the district court did not address limitations, Appellants also failed to file their claim within the applicable statute of limitations.

ARGUMENT

After the CCHA applied for and received a grant to build a large housing project on a small plot of land owned by the CHEDC, they were in a rush to construct that project within the short timetable provided by the LRGVDC. Before applying for funding for that project, however, they did not consider whether their proposed project would fit on their plot of land, including whether it would comply with the City's established zoning requirements. Perhaps because of those restrictions, they never submitted a compliant design plan for the City to consider. Appellants failed to identify evidence of discriminatory action by the City, however, necessary to establish standing to pursue an FHA claim. Nor did Appellants file their claim within the FHA's statute of limitations.

I. Standard of Review

This Court reviews *de novo* the District Court's conclusion that summary judgment was proper. *Branton v. City of Dallas*, 272 F.3d 730, 738 (5th Cir. 2001). Summary Judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 261 (5th Cir. 1999). The movant must "demonstrate the absence of a genuine issue of material fact." *Id.*, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). If the movant meets its burden, the non-movant must then go beyond the pleadings and designate

specific facts showing that there is a genuine issue for trial. *Id*. The non-movant's burden is not satisfied with some metaphysical doubt as to the material facts, conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. *Willis v. Roche Biomedical Laboratories, Inc*., 61 F.3d 313, 315 (5th Cir. 1995).

"'Unsubstantiated assertions, improbable inferences, and unsupported speculation,' however, 'are not sufficient to defeat a motion for summary judgment.'" *Cormier v. Lafayette City-Parish Consol. Gov't*, No. 11-31125, 2012 U.S. App. LEXIS 21189, 2012 WL 4842272, at *8 (5th Cir. Oct. 12, 2012), *quoting Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003). Even if the evidence is more than a scintilla, some evidence may exist to support a position, which is yet so overwhelmed by contrary proof as to yield to a summary judgment. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported Motion for Summary Judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2508, 91 L. Ed. 2d 202 (1986). An issue is "material" if it involves a fact that might affect the outcome of the suit under the governing law. *Merritt-Campell, Inc., v. RxP Products, Inc*., 164 F.3d 957, 961 (5th Cir. 1999). Factual disputes that are irrelevant or unnecessary are not counted. *Anderson*, 477 U.S. at 247-8, 106 S. Ct. at 2508.

The CCHA and CHEDC were required to "come forward with 'specific facts showing that there is a *genuine issue for trial.'*" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), *quoting* FED. R. CIV. P. 56(e) (emphasis in original). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Id.*, *citing First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968). "Also, if an adverse party completely fails to make a showing sufficient to establish an essential element of that party's case on which it will bear the burden of proof at trial, then all other facts are rendered immaterial and the moving party is entitled to summary judgment." *Arredondo v. Flores*, 2008 U.S. Dist. LEXIS 77675, 2008 WL 4450311, at *13 (S.D. Tex. Sept. 30, 2008), *aff'd* 347 Fed. Appx. 62 (5th Cir. 2009), *citing Celotex*, *477 U.S. at 322-23*.

II. Appellants did not identify evidence to establish standing to pursue a Fair Housing Act claim.

Appellants complain generally that the City denied, or failed to approve, their request to rezone and replat Lots 29-32 from single family to R2 multifamily, though they never presented any architectural plans or design to the City for consideration, and they never specified how they would comply with City Code requirements for parking, height, size and setback regulations for their proposed project. Instead, they

rely on stray comments made by residents and City staff to contend the City somehow discriminated against them in violation of the FHA. Appellants' only argue they have standing as aggrieved persons under the FHA, but they do not identify Article III standing through an "'injury in fact' … fairly traceable to Port Isabel's acts or omissions[, that] would be redressed by a favorable court decision." ROA.958, *citing Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2136.

"Article III standing is a jurisdictional requirement." *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010), *citing Lewis v. Casey*, 518 U.S. 343, 349 n.1, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) & *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). "Standing under the FHA extends to the full limits of Article III." *NAACP*, 626 F.3d at 237, *citing Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982). Appellants are presumably pursuing organizational standing to challenge action that impaired their ability to perform their core functions, rather than associational standing to redress one of their members' injuries. *United Food & Commer. Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 552, 116 S. Ct. 1529, 1534, 134 L. Ed. 2d 758 (1996); *La. Sportsmen All., L.L.C. v. Vilsack*, 583 F. App'x 379, 380 (5th Cir. 2014), *citing Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441, 53 L. Ed. 2d 383 (1977).

"The 'case or controversy' limitation of Article III requires that a federal court act only to redress injury that can fairly be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Mylonakis v. M/T Georgios M.*, 909 F. Supp. 2d 691, 724 (S.D. Tex. 2012), *citing Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2136.

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision…."

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700 (1982), *citing Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979) & *Simon* v. *Eastern Kentucky Welfare Rights Org*., 426 U.S. 26, 38 (1976).

Appellants could establish that any alleged "inability to obtain adequate housing … was fairly attributable to [a] challenged ordinance instead of to other factors." *Simon*, 426 U.S. at 44, 96 S. Ct. at 1927. Alternatively, "a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention." *Warth*, 422 U.S. at 508, 95 S. Ct. at 2210. Either standard requires action by the City's decisionmaker, rather than action by some advisory commission.

As the district court explained, "Article III requires Plaintiffs to show (1) an 'injury in fact'—a concrete and particularized invasion of a legally protected interest; (2) the injury in fact is fairly traceable to Port Isabel's acts or omissions; and (3) the injury in fact would be redressed by a favorable court decision." ROA.958, *citing Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2136.

As the Supreme Court had previously explained,

> the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized[3], … and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61, 112 S. Ct. at 2136 (internal citations omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. "In response to a summary judgment motion, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." *Id.*, *citing* FED. R. CIV. P. 56(e).

[3] "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560, n.1.

A. Appellants identified no evidence of intentional discrimination by the City on the basis of race.

The FHA prohibits discrimination in the sale or rental of housing. 42 U.S.C. § 2604. "[V]iolation of the FHA can be shown either by proof of intentional discrimination or by proof of disparate impact." *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 280 (5th Cir. 2014), *aff'd sub nom. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015). *See also Artisan/American Corp.*, 588 F.3d at 295; *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996).

Appellants appear to pursue only a claim of intentional discrimination, or disparate treatment, rather than a claim of disparate impact. "'Disparate treatment' is 'deliberate discrimination.' Such discrimination is shown by evidence of discriminatory action or by inferences from the 'fact of differences in treatment.'" *L & F Homes & Dev., L.L.C.*, 538 F. App'x at 400, *quoting Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977); *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir. 2000).

FHA claims are analyzed under a burden-shifting framework. *L & F Homes & Dev., L.L.C.*, 538 F. App'x at 400. If a plaintiff provides "'Direct evidence of discrimination … which, if believed, would prove … unlawful discrimination … without any inferences or presumptions,' the burden of persuasion shifts to the defendant [to] 'establish by a preponderance of the evidence that the same decision

would have been made regardless of the forbidden factor.'" *Arbor Bend Villas Hous., L.P. v. Tarrant Cty. Hous. Fin. Corp.*, No. 4:02-CV-478-Y, 2005 U.S. Dist. LEXIS 48518, at *18-20 (N.D. Tex. Mar. 8, 2005), *quoting Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir. 1993) & *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993) and *citing Price Waterhouse v. Hopkins*, 490 U.S. 228, 246, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) & *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995).

Appellants contend that the City somehow stymied their efforts to reconstruct the Neptune Apartment complex, constituting intentional discrimination on the basis of race, though they did not identify any actions of the City. For a claim of intentional discrimination, Appellants were required to "establish (1) a fact issue as to whether the City's stated reason for its decision--i.e., that the project violates the City's municipal ordinances--is pretextual *and* (2) a reasonable inference that race was a significant factor in the refusal." *Artisan/American Corp.*, 588 F.3d at 295 (emphasis in original). *See also Hood*, 627 F. App'x at 298. "The evidence taken as a whole must … create a reasonable inference that race was a significant factor in the refusal." *Simms*, 83 F.3d at 1556.

For an FHA "disparate-treatment case, … a 'plaintiff must establish that the defendant had a discriminatory intent or motive…." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2513, *quoting Ricci* v.

DeStefano, 557 U. S. 557, 577, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009). "With discriminatory treatment claims, there can be no liability without a finding that the protected trait (*e.g.*, race) motivated the challenged action." *Inclusive Cmtys. Project v. Lincoln Prop. Co.*, 920 F.3d 890, 910 (5th Cir. 2019). "The City's 'refusal may have been unsound, unfair, or even unlawful, yet not have been violative of the [FHA] if there is no evidence … that race was a significant factor in [the City's] decision.'" *Artisan/American Corp.*, 588 F.3d at 295, *quoting Simms*, 83 F.3d 1556.

B. Appellants did not identify a development plan, a request for City Commission consideration, or other similarly situated parties who were treated differently, necessary to show an injury likely to be redressed by a favorable decision.

Appellants did not identify evidence that they submitted a plan for developing this property to either the P&Z Commission or the City Commission, that they requested a variance from the City to develop the property according to a proposed plat, or that either option was rejected by the City. The P&Z Commission can only recommend approval or disapproval of a final plat or zoning change to the City Commission. ROA.532, 888, 900. But Appellants only requested that the P&Z Commission recommend Lots 29-32 be rezoned and replatted from single family to R2 multifamily, without any explanation of the intended use for the property, how any development would comply with the City Code, or why the P&Z Commission should recommend their request. ROA.454-55.

After the P&Z Commission's recommendation that Appellants' request be denied, Appellants did not request consideration of their project or a variance by the City Commission, nor did they ask to return to the P&Z Commission after June 10, 2015. ROA.426-31, 494. *See also* § II (B), below.

> Thus, in the face of [Appellants'] refusal to follow the procedures for requesting a variance, and [their] refusal to provide specific information about the variances [they] would require, [Appellants] hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 190, 105 S. Ct. 3108, 3118, 87 L. Ed. 2d 126 (1985), *overruled on other grounds, Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179, 204 L. Ed. 2d 558 (2019).

Appellants also did not identify any similarly situated developments that were approved notwithstanding noncompliance with the City Code. *L & F Homes & Dev., L.L.C.*, 538 F. App'x at 401. "[T]o establish disparate treatment [Appellants] must show that the [City] 'gave preferential treatment to … [another] … under "nearly identical" circumstances'" *Okoye*, 245 F.3d at 514, *quoting Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991). Appellants identified no "similarly situated individuals [who] were treated differently," however. *Bryan*, 213 F.3d at 276. Without evidence that the City acted outside of its normal policies and procedures, Appellants cannot establish that non-protected applicants or applications were treated any differently from them. *Artisan/American Corp.*, 588 F.3d at 296.

"Art[icle] III requires the party who invokes the court's authority to "show … that the injury … 'is likely to be redressed by a favorable decision….'" *Valley Forge Christian Coll.*, 454 U.S. at 472, 102 S. Ct. at 758. Appellants never presented an original or final plat description for the P&Z Commission or the City Commission to consider, however. Nor did they identify a proposed project that would conform to the City's established codes for the health, welfare and safety of its residents, including requirements for parking, height, size and setback regulations for their contemplated project. ROA.384-86, 535-36. Without evidence that their project would comply with the City Code or that similarly situated parties were treated differently, Appellants have not identified an injury that is likely to be redressed by a favorable decision before this Court.

C. Concerns for health, safety and welfare of residents are legitimate, nondiscriminatory reasons for City officials' actions.

Even if Appellants could establish their prima facie case, the City's "actions were justified by a legitimate, nondiscriminatory reason." *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 468 (5th Cir. 2002). Cities are authorized to adopt rules governing plats and subdivisions of land within their jurisdiction "to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality." TEX. LOC. GOV'T CODE § 212.002. "[A]s to governmental entities, they must not be prevented from achieving legitimate

objectives, such as ensuring compliance with health and safety codes." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2524.

Appellants were aware the City had legitimate concerns for the health, safety and welfare of residents that it protected through its zoning requirements. ROA.391-92. As this Court previously held,

> concerns includ[ing] problems with traffic and parking, light and noise, danger to children posed by vehicles, fire protection issues, … consistency with other city development plans [and] … concern over the depression of property values[, where no] speaker at the hearing mentioned race … does not support that any City official acted with racial motivations.

L & F Homes & Dev., L.L.C, 538 F. App'x at 401. The City took no action relating to Appellants' proposed development other than in enforcing its zoning ordinances, as a legitimate exercise of its police power, rationally related to a legitimate governmental objective.

Although Appellants do not challenge the legitimacy of the City's zoning codes, "[z]oning is, of course, a valid exercise of a municipality's police power, and courts accord such municipal decisions considerable deference." *Islamic Ctr. of Miss., Inc. v. Starkville*, 840 F.2d 293, 299 (5th Cir. 1988). "The authority of state and local governments to enact land use restrictions has long withstood constitutional scrutiny." *Tex. Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095, 1104 (5th Cir. 1996), *citing Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

"A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests[].'" *Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). "Conservation of property values is a legitimate governmental interest well within the broad scope of the police power." *Tex. Manufactured Hous. Ass'n*, 101 F.3d at 1105. Generally, "some adverse effect on economic value will be tolerated in the interest of promoting the health, safety, welfare, or morals of a community." *Id.* at 1106. Even if a City "Ordinance might be intended to preserve the property values of single family homes" that does not establish race was a factor. *Artisan/American Corp.*, 588 F.3d at 297-98.

D. Local residents' comments and demographics are not evidence of discriminatory intent of the City.

Appellants' only allegation of discriminatory intent involved comments by local residents relating to parking issues, declining property values and similar matters, some of which were raised at the P&Z Commission's March 11, 2015 meeting. ROA.13-14, 395, 458-59, 461-67. Appellants contend discrimination was intended because Flores assumed local residents' references to "those people," were to Hispanics, rather than broadly to "low-income people," because she primarily serves Hispanics. ROA.396-400. Appellants cannot establish a discriminatory intent of the City through residents' comments that they contend were "camouflaged racial expressions", however.

Even if residents had made comments such as "'we don't want those people here' and 'we already have enough of those people here' [such comments would be] insufficient summary judgment evidence to support a reasonable inference of racial animus" by the City. *Artisan/American Corp.*, 588 F.3d at 298. Even "Defendants-Appellees' presumed awareness that the [resident] population in the [service] area is disproportionately [Hispanic] cannot alone be enough." *Inclusive Cmtys. Project v. Lincoln Prop. Co.*, 920 F.3d at 911.

Furthermore, Appellants identified no racial comments or discriminatory actions by any City official or representative that they even attempt to attribute to the City. To the contrary, City officials were working with Appellants to develop a project that complied with City zoning laws and were in favor of that project. The Mayor, three (out of four) City Commissioners, a County Commissioner, and the City Manager, among others, supported their project and wanted it to move forward. ROA.485-88.

Reliance on Dr. Saenz' research similarly did not support a claim of discrimination because he only compared the demographics in areas he researched, and he had no basis to believe any action taken by the City was *because of* any person's race.

> Q Do you have any basis to conclude that any actions taken by the city were based on any socioeconomic or other demographic factors that you've discussed here?

> A Direct information, I don't have the direct. And again, goes back, like I indicated to the social sciences, that you have a lot of the probabilities, but not the cause and effect.
>
> Q Right. And I think what you are telling me is that you see certain patterns or certain numbers that you are analyzing, right?
>
> A Correct.
>
> Q But you don't know anything that the city actually did?
>
> A Correct. I don't know the micro levels of details.

ROA.525-26.

E. The City may only be liable for its "final decisions," not for preliminary decisions or comments by residents, staff or officials.

Appellants did not establish their *prima facie* case because they did not identify a practice of the City, rather than stray comments by residents or City staff. Though they reference the P&Z Commission's denial of their initial request, they have no evidence to establish that action constituted final action of the City. As previously explained, the P&Z Commission can only recommend a final plat or zoning change to the City Commission. ROA.532, 888, 900. Any final decision was left to the City Commission. ROA.422, 505-07, 902. Appellants did not request any hearing or decision before the City Commission, however. ROA.423-24, 426-27, 429-31, 494.

As previously explained, "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant….'" *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136,

quoting Simon, 426 U.S. at 41, 96 S. Ct. at 1926. This element "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561, 112 S. Ct. at 2136. Appellants were required to identify action of the City, not merely action by an employee or advisory commission.

The Port Isabel City Charter is the City's organic law, and its relation to the City is like that of the Texas Constitution to the State of Texas. *See City of Fort Worth v. Morrison*, 164 S.W.2d 771, 772 (Tex. Civ. App.—Fort Worth 1942, writ ref'd). City Charter § 1.02 provides that the City

> shall have the rights, immunities, powers, privileges and franchises herein conferred and granted, as specified in the Statutes and Constitution of the State of Texas and the United States Government, including the application of the City's zoning and subdivision powers and other powers to its extraterritorial jurisdiction area as specified by Article 970a of the Texas Civil Statutes, and subsequent amendments thereto.

ROA.537. The Charter further provides that "[t]he governing body of the City of Port Isabel shall consist of the City Commission," which "shall enact all Ordinances and resolutions and adopt all regulations, and constitute the legislative body of the City. The Commission and the Mayor shall constitute the governing body of the City with all the powers and authority herein granted." *Id.*, §§ 2.01 & 2.07

> The City of Port Isabel shall have the power to enact and enforce all ordinances necessary to protect health, life and property, … and to enact

> and enforce ordinances on any and all subjects, provided that no ordinance shall be enacted inconsistent with the provisions of this Charter or the general laws or Constitution of the State of Texas.

ROA.538, City Charter § 6.02.

"A plaintiff may 'establish a *prima facie* case [of discrimination] by showing the 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 responsible.'" *Cox v. Phase III, Invs.*, No. H-12-3500, 2013 U.S. Dist. LEXIS 85725, 2013 WL 3110218, at *27-28 (S.D. Tex. May 14, 2013) (emphasis added), *citing LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995). The City Commission is the decision-maker for the City, and Appellants identified no action attributable to that Commission. The City Commission only speaks for the City when they vote during a Commission meeting. ROA.484.

Appellants identified no action by the City Commission, much less any evidence that the City considered race in taking any action. Though they reference the P&Z Commission's March 15, 2015, denial of their initial request to rezone and replat Lots 29-32 from single family to R2 multifamily, they identified no evidence to establish that action was approved by the City Commission or otherwise constituted a decision or action *by the City*. The City could only be responsible for action by the City Commission to approve or disapprove a request from Appellants. ROA.422, 505-06, 888, 902. "No subdivision plat shall be filed or recorded … until

the plat shall have been considered by the Planning and Zoning Commission *and approved by the City Commission*." ROA.532 (emphasis added). Appellants did not request any further hearing or decision before the City Commission, however. ROA.423-24, 426-27, 429-31, 494.

Appellants identified no action or decision of the City, such as through an ordinance or acceptance or rejection of a requested zoning change, that they are challenging as discriminatory. *See Artisan/American Corp.*, 588 F.3d at 295. They complain only of comments by residents and staff and a decision by the P&Z Commission, none of which establish a final policy decision by the City, and they "rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise…." *Warth*, 422 U.S. at 507, 95 S. Ct. at 2209-10. Appellants were required to establish that any alleged "inability to obtain adequate housing … was fairly attributable to [a] challenged ordinance instead of to other factors," however. *Simon*, 426 U.S. at 44, 96 S. Ct. at 1927.

For comparison, "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 186, 105 S. Ct. at 3116. The Second Circuit

derivatively held that "a plaintiff alleging discrimination in the context of a land-use dispute is subject to the final-decision requirement unless he can show that he suffered some injury independent of the challenged land-use decision." *Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118, 123 (2d Cir. 2014). "[I]n light of administrative avenues for relief outlined in the zoning ordinance … we conclude that neither of these acts gave rise to an injury independent of the city's ultimate land-use decision." *Id.* at 124.

"[T]here can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself. *St. Louis v. Praprotnik*, 485 U.S. 112, 126, 108 S. Ct. 915, 925-26, 99 L. Ed. 2d 107 (1988).

> [W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

Id., 485 U.S. at 127, 108 S. Ct. at 926. "Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Board of County Commissioners of Bryant County v. Brown*, 520 U.S. 397, 403-04, 117 S. Ct. 1382, 1388, 137 L. Ed. 2d 626 (1997). Otherwise, parties could assert liability of the City for every allegedly

discriminatory action of every employee, official or committee, even if the City's decisionmaker was never made aware of such alleged discrimination.

Cases referenced by Appellants, such as *Huntington Branch, NAACP*, are inapposite because they challenged ultimate decisions by those defendants, not simply comments by residents or staff. *See, e.g., Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 932 (2nd Cir. 1988) (Town Board's rejection of proposed zoning change); *LeBlanc-Sternberg*, 67 F.3d 412 (challenge to Village ordinance). Appellants have not identified any alleged injury that resulted from discriminatory action directly attributable to the City Commission, however, rather than to a resident or a City employee or official, necessary to establish an actual "case or controversy" against the City under Article III.

F. Appellants only complain of disparate treatment, which requires evidence of intentional discrimination, rather than disparate impact, which does not.

Appellants rely on a Second Circuit case, *Huntington Branch, NAACP*, for the proposition that a failure to re-zone can have a *disparate impact* on minorities. *Huntington Branch, NAACP*, 844 F.2d at 932. A disparate impact claim does not evoke an intent-based standard. *Id.* Appellants only assert facts to support an *intentional* discrimination claim, however. Brief of Appellants, at 8-10, 13-16. "[D]isparate-impact claims 'involve [policies or] practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group

than another and cannot be justified by business necessity.'" *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003), *quoting Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15.

To recover on a disparate impact claim, Appellants would be able to establish a *prima facie* case by identifying "'a challenged practice [that] caused or predictably will cause a discriminatory effect.' If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a *prima facie* case, and there is no liability." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2514, *quoting* 24 C.F.R. § 100.500(c)(1). Evidence of intentional discrimination is not necessary for a disparate impact case, however. *See Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 934 (2d Cir. 1988).

"[D]isparate impact plaintiffs 'must engage in a "systematic analysis" of the policy or practice,' and '[i]n doing so, they "must, of necessity, rely heavily on statistical proof."'" *AHF Cmty. Dev., LLC v. City of Dall.*, 633 F. Supp. 2d 287, 304 (N.D. Tex. 2009), *quoting Frank v. Xerox Corp.*, 347 F.3d 130, 135 (5th Cir. 2003) & *Munoz v. Orr*, 200 F.3d at 299. "[I]f the [Appellants] cannot show a causal connection between the [City's] policy and a disparate impact...that should result in dismissal of this case." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2523. Appellants would therefore have "to prove more

than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Int'l Bhd. of Teamsters*, 431 U.S. at 336, 97 S. Ct. at 1855.

Appellants do not pursue, or identify evidence to support, a disparate impact claim, however. Appellants have not identified any alleged policy about which they complain, how it was established by the City, or statistical evidence to establish the alleged impact was caused by the policy rather than other factors.

> [A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies *causing that disparity*. A robust causality requirement ensures that "[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create.

Tex. Dep't of Hous. & Cmty. Affairs, 135 S. Ct. at 2523 (emphasis added), *quoting Wards Cove Packing Co. v. Atonio*, 490 U. S. 642, 653, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989), *superseded by statute on other grounds*, 42 U. S. C. §2000e-2(k).

Because Appellants failed to identify evidence of disparate treatment, "Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the [City's] decision." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270, 97 S. Ct. 555, 566, 50 L. Ed. 2d 450 (1977). "[T]he vague and conclusory allegations of disparate treatment that [Appellants] assert[] collectively against Defendants-Appellees are legally insufficient to support a reasonable inference of intentional race discrimination." I*nclusive Cmtys. Project v. Lincoln Prop. Co.*, 920 F.3d at 911.

III. The statute of limitations expired on Appellants' claims.

Though the district court did not reach this issue, the Fair Housing Act claims provide for a two year statute of limitations. 42 U.S.C. § 3613(a)(1). Appellants' cause of action accrued when they had "a complete and present cause of action," *i.e.*, when "the plaintiff can file suit and obtain relief." *Wallace v. Kato*, 549 U.S. at 387, 127 S. Ct. at 1094, *quoting Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S. Ct. 542, 139 L. Ed. 2d 553 (1997).

Though there was a suggestion for an appearance before the City Commission, Appellants never requested that the City Commission consider their project or that they appear before the P&Z Commission after June 2015. ROA.423-31, 426-27, 429-31, 494.

> Q Okay. Are you aware of any requests to be before -- to come before the meeting on August 22 -- before the city commission on August 22? Any request by Nick Mitchell Bennett, Mr. Gonzalez, or anybody from P&Z -- I'm sorry, anybody from CCHA or CHEDC or anybody else?
>
> A I do recall a conversation from Nick wanting to do that.
>
> Q Okay. But other than -- do you recall seeing any written requests to be put on the agenda?
>
> A No.

ROA.426-27. If any action of the City was discriminatory, Appellants had a complete cause of action on the day of that discrimination. Even if cancellation of the June 10, 2015 P&Z Commission meeting is considered action of the City,

Appellants do not complain of any actions occurring after that date. They did not file suit until November 6, 2017, however, over two years after that last act of the City about which they complain. ROA.1-22.

Though Appellants reference a meeting with the Mayor, City Manager and Building Inspector on November 10, in which they contend they were told that "the city would not issue any permits for any multi-family buildings," those statements are inadmissible hearsay. Gonzalez' and Flores' "recollection[s] of what someone else said in a conversation with [them] … is hearsay and does not fit any hearsay exceptions." *Bellard*, 675 F.3d at 461. *See* n. 2, above. Regardless, Appellants do not identify any request for a multi-family building that they submitted at that time or any specific request that was denied.

Appellants' contention that their claims did not ripen under the "continuing violation doctrine" until they lost their federal funds in December 2015 also does not withstand scrutiny because they identified no evidence that the City denied a zoning request, or any other request, after June 2015. Whether the City discriminated against Appellants under the FHA does not depend on whether they lost any funding. *See Tolbert v. Ohio DOT*, 172 F.3d 934, 940 (6th Cir. 1999), *quoting National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991) ("A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation.").

In addition, "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." *Havens Realty Corp.*, 455 U.S. at 380-81, 102 S. Ct. at 1125, *quoted in Cox*, 2013 U.S. Dist. LEXIS 85725, 2013 WL 3110218, at *41. Appellants do not complain of any acts of the City after they lost their federal funds in December 2015, and they did not file suit within 180 days after that. Therefore, they may not rely on the continuing violations theory or complain of any alleged acts of the City prior to November 6, 2015, two years before they filed suit.

CONCLUSION

For the foregoing reasons, the City of Port Isabel, Texas respectfully requests that this Court affirm the district court's granting of Defendant's Motion for Summary Judgment.

Electronically signed on this the 2nd day of December, 2019.

Respectfully submitted,

s /J. Arnold Aguilar
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEES** will be forwarded to counsel of record through the court's automatic notice of e-filing, as well as by e-mailing an electronic copy, on this the 4th day of December, 2019, addressed as follows:

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CERTIFICATE OF COMPLIANCE WITH RULES 32 AND 25

The undersigned certifies this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 9,360 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface produced by Microsoft Word 2013 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

The undersigned further certifies that the electronic submission is an exact copy of the paper document pursuant to I.O.P. to FED. R. APP. P. 25.2.1.

s /J. Arnold Aguilar
J. Arnold Aguilar

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Dated: December 2, 2019