

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4
5 August Term, 2014

6
7 (Argued: May 29, 2015

Decided: March 23, 2016)

8
9 Docket Nos. 14-1634-cv(L), 14-1729-cv(XAP)

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11
12 MHANY MANAGEMENT, INC., AKA New York Acorn Housing Company,

13
14 *Plaintiff-Appellee-Cross-Appellant,*

15
16 NEW YORK COMMUNITIES FOR CHANGE, INC.,

17
18 *Intervenor-Plaintiff-Appellee-Cross-Appellant,*

19
20 ACORN, THE NEW YORK ASSOCIATION OF COMMUNITY
21 ORGANIZATIONS FOR REFORM NOW, DAPHNE ANDREWS,
22 VIC DEVITA, VERNON GHULKIE, NATALIE GUERRIDO,
23 NEW YORK ACORN HOUSING COMPANY, INC., LISBETT
24 HUNTER, FRANCINE MCCRAY,

25
26 *Plaintiffs,*

27
28 v.

29
30 COUNTY OF NASSAU, COUNTY OF NASSAU PLANNING
31 COMMISSION, COUNTY OF NASSAU OFFICE OF REAL
32 ESTATE & DEVELOPMENT,

33
34 *Defendants-Cross-Appellees,*

1 INCORPORATED VILLAGE OF GARDEN CITY, GARDEN
2 CITY BOARD OF TRUSTEES,

3
4 *Defendants-Appellants.*
5
6

7 Before: POOLER, LOHIER, and DRONEY, *Circuit Judges.*
8

9 Defendants-Appellants the Incorporated Village of Garden City and the
10 Garden City Board of Trustees appeal from an April 22, 2014 final judgment
11 following a bench trial in the United States District Court for the Eastern District
12 of New York (Spatt, J.) finding Defendants-Appellants liable for violations of the
13 Fair Housing Act, Section 1981, Section 1983, and the Equal Protection Clause.
14 Plaintiff-Appellee-Cross-Appellant MHANY Management, Inc. and Intervenor-
15 Plaintiff-Appellee-Cross-Appellant New York Communities for Change, Inc.
16 cross-appeal from a February 15, 2012 grant of summary judgment by the same
17 district court in favor of Defendants-Cross-Appellees County of Nassau, County
18 of Nassau Planning Commission, and County of Nassau Office of Real Estate and
19 Development. We affirm in part, vacate in part, and remand.

1 MICHAEL CARVIN, Jones Day, Washington, DC, *for*
2 *Defendants-Appellants Incorporated Village of Garden City,*
3 *Garden City Board of Trustees.*

4
5 IRA M. FEINBERG, Hogan Lovells US LLP (Stanley J.
6 Brown, Chava Brandriss, Benjamin A. Fleming, Hogan
7 Lovells US LLP, New York, NY; Joseph D. Rich,
8 Lawyers' Committee for Civil Rights Under Law,
9 Washington, DC; Frederick K. Brewington, Hempstead,
10 NY, *on the brief*), New York, NY, *for Plaintiff-Appellee-*
11 *Cross-Appellant MHANY Management, Inc., AKA New*
12 *York Acorn Housing Company & Intervenor-Plaintiff-*
13 *Appellee-Cross-Appellant New York Communities for*
14 *Change, Inc.*

15
16 GERALD R. PODLESAK, Appeals and Opinions Bureau
17 Chief (Carnell T. Foskey, County Attorney of Nassau
18 County, Ralph J. Reissman, Deputy Nassau County
19 Attorney, *on the brief*), Mineola, NY, *for Defendants-Cross-*
20 *Appellees County of Nassau, County of Nassau Planning*
21 *Commission, County of Nassau Office of Real Estate &*
22 *Planning.*

23
24 POOLER, *Circuit Judge:*

25 This is a housing discrimination case relating to the community of Garden
26 City in Long Island, New York. Defendants-Appellants the Incorporated Village
27 of Garden City and the Garden City Board of Trustees (collectively "Garden
28 City") appeal from an April 22, 2014 final judgment following a bench trial in the
29 United States District Court for the Eastern District of New York (Spatt, J.)

1 finding Garden City liable for violations of the Fair Housing Act, Section 1981,
2 Section 1983, and the Equal Protection Clause. We affirm this decision.

3 Plaintiff-Appellee-Cross-Appellant MHANY Management, Inc. and
4 Intervenor-Plaintiff-Appellee-Cross-Appellant New York Communities for
5 Change, Inc., (collectively, “Plaintiffs”), also cross-appeal from a February 15,
6 2012 grant of summary judgment by the same district court in favor of
7 Defendants-Cross-Appellees County of Nassau, County of Nassau Planning
8 Commission, and County of Nassau Office of Real Estate and Development
9 (collectively “Nassau County”). We affirm this decision in part, vacate in part,
10 and remand.

11 **BACKGROUND**

12 The following facts are drawn from the district court’s factual findings
13 after the bench trial, which we accept unless clearly erroneous. *Diesel Props S.r.l v.*
14 *Greystone Bus. Credit II LLC*, 631 F.3d 42, 52 (2d Cir. 2011).

15 **A. Nassau County and Garden City**

16 The Village of Garden City is a municipal corporation organized under the
17 laws of the State of New York and located in Nassau County. As of the year 2000,
18 individuals of Hispanic or African-American ethnicity comprised 20.3% of

1 Nassau County's population. However, these minority groups comprised a
2 disproportionate share of the County's low-income population. While
3 constituting 14.8% of all households in Nassau County, African-Americans and
4 Hispanics represented 53.1% of the County's "very low" income, non-elderly
5 renter households. In addition, African-Americans made up 88% of the County's
6 waiting list for Section 8 housing. Under the Section 8 program, the federal
7 government provides funds to local housing authorities, which then subsidize
8 rental payments for qualifying low-income tenants in privately-owned buildings.
9 *See* 42 U.S.C. § 1437f(o)(1)(A).

10 Garden City's African-American and Hispanic population in the year 2000
11 was 4.1%. However, excluding the 61% of the minority population representing
12 students living in dormitories, Garden City's minority population was only 2.6%.
13 In addition, only 2.3% of the households in Garden City were headed by an
14 African-American or Hispanic person. However, several of the communities
15 surrounding Garden City are "majority-minority," communities in which
16 minorities make up a majority of the population.

1 Although the lack of affordable housing has long been a problem for
2 Nassau County, Garden City contains no affordable housing.¹ Indeed, in the
3 past, Garden City and its residents have resisted the introduction of affordable
4 housing into the community. According to a Garden City official, in 1989, a
5 developer proposed constructing 51 units of affordable housing at a site in
6 Garden City. This project was never completed, apparently due to a village
7 building moratorium, and a luxury development was ultimately approved for
8 the site. In addition, in May 2006, Nassau County announced that it intended to
9 sell a parcel of County land in Garden City known as the Ring Road Site, for the
10 development of mixed-income affordable housing. But after Garden City
11 residents expressed opposition to the construction of affordable housing in the
12 community, the project was abandoned. Finally, Garden City has repeatedly
13 declined to join the Nassau County Urban Consortium, a group of municipalities
14 in Nassau County that are eligible to receive federal funding to support
15 affordable-housing development.

¹ Affordable housing, as defined in this case, means housing which requires no more than 30% of a household's income for households earning 80% or less of the Area Median Income for the Nassau-Suffolk Metropolitan Statistical Area. Special App'x at 119.

1 **B. The Social Services Site**

2 In 2002, Nassau County faced a budget and infrastructure crisis. Under the
3 leadership of then-County Executive Thomas Suozzi, the County undertook a
4 Real Estate Consolidation Plan, which involved consolidating County operations
5 in several facilities and selling excess government property in order to raise
6 revenue to fund renovations of the County's existing operations.

7 One of the properties proposed for sale under the Real Estate
8 Consolidation Plan was a parcel of land owned by Nassau County within the
9 boundaries of Garden City. This parcel of land was part of Garden City's Public
10 or P-Zone. Garden City's P-Zone encompasses numerous Nassau County
11 Buildings, including the Nassau County Police Headquarters, the County
12 Executive Building, and the Nassau County Supreme Court Building.

13 The portion of the P-Zone site at issue in this case, referred to as the "Social
14 Services Site," is an approximately 25-acre site that housed the former Nassau
15 County Social Services Building, the parking lots for the Nassau County
16 Supreme Court, a garage, an ancillary building, and additional parking facilities.
17 The Social Services Site consists of two segments: (1) 21.44 acres located on the
18 eastern side of County Seat Drive, the site of the former Social Services building

1 and parking facilities; and (2) an additional 3.03 acres located on the western side
2 of County Seat Drive, on which a County-owned building and a parking garage
3 are located.

4 Nassau County planned to sell the Social Services Site to a private
5 developer, hoping to receive at least \$30 million for the property. In order to
6 facilitate this sale, Nassau County turned to Garden City, which controlled the
7 Site's zoning.

8 **C. Garden City's Rezoning**

9 In June 2002, at the County's request, Garden City began the process of re-
10 zoning the Social Services Site. This process was managed by the Garden City
11 Board of Trustees, the elected body which governs Village affairs. In response to
12 the County's request, the Board of Trustees created a sub-committee (the "P-
13 Zone Committee") charged with retaining a planner and reviewing zoning
14 options for the Social Services Site, as well as the remainder of the P-Zone
15 properties in Garden City. This P-Zone Committee consisted of Village Trustees
16 Peter Bee, Peter Negri, and Gerard Lundquist. Trustee Bee was the chairman of
17 the P-Zone Committee. Garden City also retained the planning firm of Buckhurst
18 Fish and Jacquemart ("BFJ") to provide a recommendation with regard to the

1 rezoning of the Social Services Site. Garden City had previously worked with BFJ
2 over several decades. Village officials trusted and respected BFJ's work and
3 generally adopted its recommendations. The P-Zone committee was supervised
4 by Garden City Village Administrator Robert Schoelle, who served as a liaison
5 between the Committee and the Board of Trustees. The Village also hired
6 attorney John Kiernan to advise it on the rezoning process.

7 In the early part of this rezoning process, BFJ and Garden City emphasized
8 that any proposal should rely on existing zoning mechanisms and respect the
9 existing character of the Village. In a September 13, 2002 fax outlining the general
10 planning principles for redevelopment of the P-Zone properties, BFJ stressed that
11 "[a]ny rezoning associated with the proposed development should be in
12 accordance with the goals and parameters set forth in the zoning code [of Garden
13 City]." App'x at 1063. This fax also emphasized that any proposed development
14 should "be consistent with the existing character and surrounding
15 neighborhoods of Garden City," "not overburden roads, utilities, and schools,"
16 and "not tend to depreciate the value of property in the village." App'x at 1063.
17 Similarly, in a November 15, 2002 memorandum entitled "Potential Approach to
18 'P' Zone Changes," and addressed to the P-Zone Committee, BFJ recommended

1 that Garden City borrow from its existing zoning regulations in rezoning the P-
2 Zone properties, rather than adopt a new form of zoning for the property.

3 On April 29, 2003, BFJ submitted its proposal to the P-Zone Committee,
4 recommending a “CO-5(b) zone” for the Social Services Site. BFJ proposed
5 applying “multi-family residential group” or “R-M” zoning controls to this
6 property. R-M zoning would have allowed for the construction of up to 311
7 residential apartment units on the Site, or 75 single-family homes. BFJ reiterated
8 the proposed R-M zoning in a May 2003 report to the P-Zone Committee, stating
9 that the rezoning would “be likely to generate a net tax benefit to the Village.”

10 App’x at 1382.

11 Throughout the rezoning process, the P-Zone Committee also kept Garden
12 City’s four Property Owners’ Associations (“POAs”) apprised of the process. The
13 POAs acted as liaisons between Garden City and the citizens living within their
14 respective neighborhoods. The Social Services Site is located within the
15 neighborhood of the Eastern Property Owners’ Association. On May 29, 2003,
16 BFJ gave a PowerPoint presentation of its May 2003 report at a public forum. At
17 the first forum, designed to solicit public input on the proposal, several residents

1 expressed concern about the impact of 311 residential units on traffic and
2 schools. In response to these citizen concerns, BFJ analyzed these issues further.

3 In July 2003, BFJ issued a revised version of its study, which reiterated the
4 proposal for R-M zoning. BFJ emphasized again that its proposal “would be
5 careful of not overwhelming the neighborhoods with any significant adverse
6 environmental impacts[,] particularly traffic, visual effects, or burdens on public
7 facilities.” App’x at 1115. Responding to issues raised at the citizen forum, the
8 July 2003 report states that “[t]here would be a smaller number of school children
9 generated by the new development than with the development of single-family
10 homes With a community aimed at young couples and empty nesters[,]
11 there could be as few as 0.2 to 0.3 public school children per unit.” App’x at
12 1123–24. Upon review of the report, the P-Zone Committee adopted BFJ’s
13 recommendation for R-M zoning for the approval of the Board of Trustees.

14 In September 2003, as required by state law, BFJ issued a draft
15 Environmental Assessment Form (“EAF”) for the proposed rezoning. The EAF
16 concluded that the proposed rezoning to R-M “will not have a significant impact
17 on the environment.” App’x at 1146. The EAF further stated that the proposed
18 multi-family development at the Site would not “result in the generation of

1 traffic significantly above present levels” and would have a minimal impact on
2 schools. *See* App’x at 1155. In addition, the EAF emphasized that “[i]n terms of
3 potential aesthetic impacts, the proposed zoning controls were specifically
4 designed to accommodate existing conditions, respect existing neighborhoods -
5 particularly residential neighborhoods, maximize the use of existing zoning
6 controls and minimize adverse visual impacts.” App’x at 1161. Michael Filippon,
7 the Superintendent of the Garden City Buildings Department, concurred in these
8 conclusions.

9 On October 17, 2003, an ad was placed in the Garden City News entitled,
10 “Tell Them What You Think About the County’s Plan for Garden City.” App’x at
11 1639. This notice stated:

12 Where is the Benefit to Garden City? Are We Being Urbanized? . . .

13
14 The County is asking the Village to change our existing zoning – P
15 (Public use) ZONE – to allow the County to sell the building and
16 land . . . now occupied by the Social Services Building, to private
17 developers. Among the proposed plans: Low-density (high-rise?)
18 housing – up to 311 apartments. . . .

19
20 These proposals will affect ALL of Garden City.

21
22 App’x at 1639.

1 The Village held a subsequent public forum on October 23, 2003, where
2 BFJ gave another PowerPoint presentation summarizing the proposed rezoning.
3 The record indicates that at this meeting, citizens again raised questions about
4 traffic and an increase in schoolchildren. BFJ again reiterated that traffic would
5 be reduced relative to existing use, and that multi-family housing would
6 generate fewer schoolchildren than the development of single-family homes. In
7 keeping with these conclusions, in November 2003, BFJ presented an additional
8 report to the P-Zone Committee, again confirming its proposal for the R-M
9 zoning control that allowed for a possible 311 apartment units on the Social
10 Services Site. The November 2003 report set forth a draft text for the rezoning.

11 In light of BFJ's final report, on November 20, 2003, the Garden City
12 Village Board of Trustees unanimously accepted the P-Zone Committee's
13 recommendation for the rezoning. In addition, on December 4, 2003, the Board
14 made a finding pursuant to New York State's Environmental Quality Review Act
15 that the zoning incorporated in what was now termed proposed Local Law 1-
16 2004 would have "no impact on the environment." App'x at 1996. The proposed
17 rezoning would, in keeping with Nassau County's wishes, permit residential
18 development on the Social Services Site in the new CO-5(b) zone. In light of the

1 R-M controls on the property, such development could include multi-family
2 units, or less dense alternatives such as single-family homes. Having endorsed
3 the proposed rezoning, the Board of Trustees moved Local Law 1-2004 to a
4 public hearing.

5 Starting in January 2004, three public hearings occurred in the span of one
6 month. At the first hearing, on January 8, 2004, residents voiced concerns that
7 multi-family housing would generate traffic, parking problems, and
8 schoolchildren. In response, Filippon emphasized, “[y]ou have to remember that
9 the existing use on that site now generates a certain amount of traffic, a fair
10 amount of traffic. That use is going to be vacated. The two residential uses that
11 are being proposed as one of the alternates, each of which on their face
12 automatically generate far less traffic than the existing use. That is something to
13 consider also.” App’x at 1435. In addition, although assured by Garden City
14 officials that the rezoning could result in single-family homes, one resident
15 expressed concern that Nassau County would ultimately only sell the property
16 to a multi-family developer in order to maximize revenue.

17 On January 20, 2004, the Eastern Property Owners’ Association held a
18 meeting at which Trustee Bee discussed BFJ’s recommendation for the Social

1 Services Site. A summary of the meeting reports that “Trustee Bee addressed
2 many questions from the floor” and, in doing so, expressed the opinion that
3 “Garden City demographically has a need for multi-family housing.” App’x at
4 1665. Trustee Bee also reiterated that because relatively few schoolchildren
5 resided in existing multi-family housing in Garden City, BFJ and the Board had
6 reasonably predicted that multi-family housing would have less of an impact on
7 schools than single-family housing. Trustee Bee “indicated he would keep an
8 open mind but he still felt the recommended zoning changes were appropriate.”
9 App’x at 1665. In addition, Trustee Bee addressed citizen concerns about the
10 possibility of affordable housing on the Site. In response to one question, Trustee
11 Bee stated that “[a]lthough economics would indicate that a developer would
12 likely build high-end housing, the zoning language would also allow ‘affordable’
13 housing (as referred to by [the] resident asking the question) at the [Social
14 Services Site].” App’x at 1665. The meeting notes further indicate that a majority
15 of the residents “who asked questions or made comments” at the meeting
16 supported restricting the rezoning of the Site to single-family homes. App’x at
17 1665. According to these notes, “[r]esidents want[ed] to preserve the single-
18 family character of the Village. One resident in particular requested the [Eastern

1 Property Owners' Association] Board take a firmer stand on the P-Zone issue
2 and only support R-8 zoning, i.e. zoning for single-family housing. App'x at
3 1665.

4 On February 5, 2004, the Village held a third public hearing on the
5 proposed rezoning. The record indicates that this hearing was well attended and
6 much more crowded than usual. App'x at 1209 ("Mindful of the number of
7 people who are here this evening and the likelihood that this hearing will take
8 some time"). After an introduction by Trustee Bee, the meeting commenced
9 with two presentations. First, Tom Yardley of BFJ emphasized that the proposed
10 rezoning preserved the possibility of single-family homes, and that any multi-
11 family housing would not result in high-rise apartments due to height and
12 density restrictions. Second, Nassau County Executive Suozzi, the author of the
13 County's Real Estate Consolidation Plan, emphasized the County's need to sell
14 the Social Services Site to a private developer, as well as the benefits of
15 developing multi-family housing on the property. During this discussion, a
16 member of the audience interrupted Suozzi.

17 Thomas Suozzi: Instead of putting commercial there or single family
18 there, you do something right in between the two that creates a
19 transition from the commercial area from one to the other. I
20 guarantee you that it will be much better than what is there now,

1 which is a building that is falling apart with a lot of problems in the
2 building, a lot of problems going on around the building on a
3 regular basis and a huge sea of parking. This will make it a much
4 more attractive area for the property. Multi-family housing will be
5 more likely to generate empty nesters and single people moving into
6 the area as opposed to families that are going to create a burden on
7 your school district to increase the burden on the school district

8
9 Unidentified Speaker: You say it's supposed to be upscale.

10
11 Thomas Suozzi: It's going to be upscale. Single people and senior
12 citizen empty nesters. If you sell your \$2 million house in Garden
13 City and you don't want to take care of the lawn anymore, you can
14 go into . . . who lives in Wyndham for example? It's a very upscale
15 place. There's a lot of retirees that live there.

16
17 App'x at 1231. When Suozzi finished his presentation, the meeting was opened
18 to questions from the public. The first question from the audience related to
19 Trustee Bee's statements "last time," referring to the January 20, 2004 meeting of
20 the Eastern Property Owners' Association.

21 Lauren Davies: I'm just confused between what Mr. Suozzi said
22 about the Social Services Building. You said you wanted it to be
23 upscale, from what I understand from what Peter Bee said the last
24 time is that they wanted it to be affordable housing. . . .

25
26 Trustee Bee: Well, either I mis-spoke or you misheard, because I do
27 not recollect using that phrase. If I did it was an inappropriate
28 phrase. The idea was a place for Garden City's seniors to go when
29 they did not wish to maintain the physical structure and cut the
30 lawns and do all the various things. But not necessarily looking at a
31 different style of life. In terms of economics.

1 Thomas Suozzi: We're absolutely not interested in building
2 affordable housing there and there is a great need for affordable
3 housing, but Garden City is not the location. We need to build
4 housing there. . . . We would generate more revenues to the County
5 by selling it to upscale housing in that location. That is what we
6 think is in the character of Garden City and would be appropriate
7 there.

8
9 Unidentified Speaker: How do you have control over what the
10 developer does . . .

11
12 Trustee Bee: Before the next speaker though, just to finish on that
13 last remark, neither the County nor the Village is looking to create . .
14 . so-called affordable housing at that spot.

15
16 Unidentified Speaker: Can you guarantee that, that it won't be in
17 that building?

18
19 App'x at 1236–37. In response to these questions, Suozzi indicated that the
20 County "would be willing to put deed restrictions on any property that we sold"
21 so "that it can't be anything but upscale housing." App'x at 1237.² In response to
22 further questioning, Suozzi stated "Don't take my word for it, we'll put whatever
23 legal codifications that people want. This will not be affordable housing projects.
24 That's number one." App'x at 1239. Gerard Fishberg, Garden City's counsel,

² In a subsequent question, another resident stated that she was "at that meeting," apparently the January 20, 2004 meeting of the Eastern Property Owners' Association, and she "did hear Peter Bee say that he couldn't guarantee that it wouldn't be a [tape change]. So I am really taking your word that it won't be." App'x at 1238. Although the transcript is interrupted by a tape change, we can reasonably infer from the context that this speaker too was requesting assurance that no affordable housing would be built on the Social Services Site.

1 further noted that the estimated sale prices for multi-family residential units
2 “don’t suggest affordable housing.” App’x at 1242.

3 Throughout the remainder of the meeting, residents indicated their
4 opposition to multi-family housing and their preference for single-family homes.
5 App’x at 1242–43 (“I’m completely opposed to any multi-family dwellings in that
6 area. I’m only in support of the single family R-8 units . . .”). One resident
7 emphasized that the proposed multi-family development was not “in the flavor
8 and character of what Garden City is now. Garden City started as a
9 neighborhood of single family homes and it should remain as such.” App’x at
10 1243. Others stated, to applause from the audience, that “[w]e’re not against
11 residential, we’re against multi-level residential. (Applause).” App’x at 1249; *see*
12 *also* App’x at 1252 (“Thomas Suozzi: You would probably like to see single
13 family housing I presume. Unidentified Speaker: Single Family. (Applause).”);
14 App’x at 1254 (“I don’t hear a compelling argument from anyone here tonight as
15 to why we should have multi-dwelling homes. Can we take it out of the
16 proposal?”). One resident expressed concern about the possibility of “four
17 people or ten people in an apartment and nobody is going to know that.” App’x
18 at 1275.

1 In keeping with these statements, citizens repeatedly expressed concern
2 about limiting the options of a developer.

3 Gail Madigan: [W]hen you sell this property you can guarantee that
4 it's . . . what control do you have when you sell it to a developer?

5
6 Thomas Suozzi: Guarantee what? What would you like us to
7 guarantee?

8
9 Gail Madigan: Well, I would like to know what you are going to be
10 able to do with it. You can tell them . . .

11
12 Thomas Suozzi: The zoning controls . . . what you can do.

13
14 Gail Madigan: Yeah, but if you sell it to a developer that comes in
15 and is going to make multi-family housing there.

16
17 Thomas Suozzi: He wouldn't do that if it was zoned for single
18 family housing. If it's zoned for single family housing you can't put
19 [in] multi-family housing.

20
21 App'x at 1253. Another citizen expressed concerns about the possibility of what
22 any multi-family housing might eventually become.

23 Anthony Agrippina: We left a community in Queens County that
24 started off similar, single family homes, two family homes, town
25 houses that became – six story units. It was originally for the elderly,
26 people who were looking to downsize. It started off that way. Right
27 now you've got full families living in one bedroom townhouses, two
28 bedroom co-ops, the school is overburdened and overcrowded.

29
30 App'x at 1259–60. In response, another resident emphasized that the only way to
31 control such consequences was to restrict the zoning. App'x at 1260 ("The only

1 guarantee is the zoning. This Board is the only set of people who are here who
2 can guarantee or do that. Mr. Suozzi is not going to be the County Executive
3 forever. We don't know what the predecessors [sic] will do.").

4 As at the previous meetings, residents also expressed concern about traffic
5 and schools. County and Village officials reiterated that a transition to residential
6 use, including multi-family housing, would generate far less traffic than the
7 existing use of the Social Services Site.

8 Thomas Suozzi: One thing that would happen is that you would
9 have 1,000 less employees that work in that building, that would no
10 longer be working there anymore.

11
12 Sheila DiMasso: But, we would also have more traffic because of
13 more people owning cars and leaving there in and out. As opposed
14 to . . . [applause]

15
16 Thomas Suozzi: You may want to clap for that, but that's irrational.
17 (Applause)

18
19 App'x at 1238–39. In addition, Suozzi and Garden City officials tried to explain to
20 citizens their view that the proposed multi-family housing would actually
21 generate fewer schoolchildren than development of single-family homes.

22 David Piciulo: If you have 311 units you will have more children
23 potentially in there than 956 single family homes.
24

1 Thomas Suozzi: That's not accurate. Based upon statistics, people
2 spend their whole lives looking at this stuff. That's not true. So you
3 may feel that way, but it's not accurate.
4

5 David Piciulo: Those are statistics having to do with a national
6 study. If you drive down into the neighborhood, the average home
7 here has two kids. They're in the system for 15 years and you are
8 going to have children in the system . . . let me just make a point.
9

10 Gerard Fishberg: Not to argue with you, again, I don't think
11 anybody has prejudged this. How many apartments are there in
12 Wyndham?
13

14 Michael Filippon: 312.
15

16 Gerard Fishberg: How many school children are there in 312
17 apartments?
18

19 Tom Yardley: Less than twenty.
20

21 Gerard Fishberg: Less than twenty children in 312 apartments.
22

23 App'x at 1255. BFJ's Fish later testified that those residents who claimed to prefer
24 single-family homes because of school impacts were "simply wrong." App'x at
25 277.

26 In response to these questions Suozzi made clear that before any
27 development project was approved at the Site, the developer would have to
28 satisfy state environmental guidelines, including addressing concerns regarding

1 traffic and impact on public services, such as schools. He further emphasized
2 that these conclusions would be subject to public comment.

3 In March 2004, in the weeks after this meeting, a flyer began circulating
4 around Garden City. The flyer stated, in relevant part:

5 WILL GARDEN CITY PROPERTY VALUES DECREASE IF OVER
6 300 APARTMENTS ARE BUILT AT THE SITE OF SOCIAL
7 SERVICES? . . .

8
9 The Garden City Village Trustees are close to voting on how to zone
10 this property. They might choose to zone it for multi-family housing
11 (If Senator Balboni's current bill passes in June, as many as 30 of
12 those apartments would be considered "affordable housing".
13 According to this bill, "Affordable workforce housing means
14 housing for individuals or families at or below 80% of the median
15 income for the Nassau Suffolk primary metropolitan statistical area
16 as defined by the Federal Department of housing and urban
17 development." . . . NOT JUST GARDEN CITY INCOMES! . . .

18
19 ISN'T OUR SCHOOL DISTRICT CROWDED ENOUGH NOW?

20 The trustees are saying that there will be fewer additional students
21 to the Garden City school district if there are 340 apartments or
22 townhouses built at the "P ZONE["] as opposed to 90 single family
23 homes. HOW CAN THEY BE SURE OF THAT? ISN'T IT TRUE
24 THAT MANY FAMILIES MOVE TO GARDEN CITY TO ASSURE
25 THEIR CHILDREN OF A QUALITY EDUCATION? WHAT WILL
26 BRING MORE STUDENTS, OVER 300 FAMILIES OR 90 FAMILIES?

27
28 App'x at 1632. The reference to "Senator Balboni's current bill" in the flyer
29 related to legislation pending at the time which would impose affordable-
30 housing requirements on developers on Long Island. The flyer reached Garden

1 City Village Administrator Schoelle, who faxed it to Fish and at least one
2 member of the Board of Trustees. The flyer also came to the attention of Trustee
3 Lundquist.

4 At a Board meeting held on March 18, 2004, residents again raised
5 concerns about the possibility of affordable housing at the Social Services Site.
6 Schoelle's notes from that meeting indicate that residents expressed concern that
7 the Balboni Bill might apply "retroactive[ly]." App'x at 363. One resident urged
8 decision-makers to "play it safe" with respect to the Balboni Bill and "vote for
9 single family homes." App'x at 362. The following month, Trustee Negri told
10 residents at a Central Property Owners' Association meeting that he and other
11 Village officials met with state representatives to discuss the Balboni Bill. He
12 noted that the bill called for 10% of all new housing developments to include
13 affordable housing, and that a family of four making \$67,000 would qualify.
14 Negri indicated that he did not think the bill would pass.

15 In response to public pressure, BFJ and Garden City began modifying the
16 rezoning proposal. In materials produced in April 2004, BFJ changed the
17 proposal, reducing the number of multi-family units potentially available at the
18 Social Services Site to 215. However, by a memorandum to the Board dated May

1 4, 2004, BFJ scrapped the proposed R-M zoning entirely. Instead, BFJ proposed
2 rezoning the vast majority of the Social Services Site "Residential-Townhouse"
3 ("R-T"), an entirely new zoning classification. App'x at 1360. The May 2004
4 proposal only preserved R-M zoning on the 3.03 acres of the Social Services Site
5 west of County Seat Drive, and only by special permit. Thus, the development of
6 multi-family housing would be restricted to less than 15% of the Social Services
7 Site, and only by permit. BFJ's proposed description of the R-T zone defined
8 "townhouse" as a "single-family dwelling unit." App'x at 1361.

9 Whereas the previous proposed rezoning took more than a year to come
10 before the Board, the shift to R-T zoning moved rapidly through the Village's
11 government. BFJ issued a final EAF for R-T rezoning in May 2004. Even though
12 BFJ officials testified that a switch from R-M zoning to R-T zoning was a
13 significant change, no draft EAF was ever issued for the R-T rezoning. In
14 addition, the shift from the P-Zone to R-T zoning was proposed by the Board as
15 Local Law No. 2-2004 and moved to a public hearing on May 20, 2004. The
16 Trustees further stated at this meeting that they hoped to have a final vote on the
17 rezoning as soon as June 3, 2004, and that the bill had already been referred to

1 the Nassau County Planning Commission. Explaining the switch, Fish offered
2 the following rationale:

3 This was, this was a conscious decision, and I think those of you
4 who might have been at the last two . . . workshops, this was
5 discussed in quite a bit of detail, that there was, there was a concern
6 that if the whole 25 acres were developed for multi family it would
7 generate too much traffic and it didn't serve, it didn't serve as a true
8 transition

9
10 So, that, the proposal has been modified where previously multi
11 family would have been allowed in all 25 acres, as of right, the
12 proposal's been modified so that it's no longer allowed at all as-of-
13 right, you'd have to get a special permit for it, through the Trustees,
14 and it is a condition of the permit is that it can only be to the west of
15 County Seat Drive. So, in essence, what the Trustees have done, is
16 they have reduced the multi family to less than 15 percent of [the]
17 site.

18
19 App'x at 1471. At this meeting, a member of the Garden City community
20 thanked the Board of Trustees for responding to the concerns of residents:

21 [M]y husband works twelve hour, fourteen hour days so that we can
22 live here. We didn't inherit any money from anyone. We weren't
23 given anything. We didn't expect anything from anyone. We
24 worked very hard to live in Garden City because [of] what it is. And
25 I feel like very slowly it's creeping away by the building that is
26 going on. . . . [A]nd I just think to all of you, just keep, be strong,
27 like, just keep Garden City what it is. That is why people want to
28 come here. You know, it's just a beautiful, beautiful town, people
29 would like to live here, but I just think, just think of the people who
30 live here, why you yourselves moved here. You don't move here to
31 live near apartments. You don't move here so that when you turn
32 your corner there's another high-rise.

1
2 App'x at 1487–88. Toward the close of this meeting, a member of former Plaintiff
3 ACORN spoke about the need for affordable housing in Nassau County and
4 asked that Garden City consider building affordable housing.

5 [W]hat we're saying with respect to the people that live in Garden
6 City, you know, everybody wants to see their community, you
7 know, keep its values. . . .

8
9 So, we're asking other communities . . . to share and build affordable
10 housing in their community. I mean, I don't know how we're going
11 to, you know, I guess the county executive [has] to figure out, give
12 respect to each community. It's not just, just not good for affordable
13 housing to be built in s[o]me communities because it impacts on us
14 and our school districts. It's not turning out the best education
15 system we could if we move into the other areas. We'd be able to
16 get, we'd all benefit from it.

17
18 App'x at 1499.

19 ACORN members subsequently attended the Nassau County Planning
20 Commission the following week and again expressed opposition to R-T zoning.

21 At the same time, former Plaintiff MHANY, then known as New York Acorn
22 Housing Company ("NYAHC"), sent a letter to the Nassau County Planning
23 Commission strongly opposing R-T zoning and warning that the new zone
24 would "ensure that developers cannot create affordable multi-family housing."

25 App'x at 1871.

1 On June 3, 2004, Garden City Board of Trustees unanimously adopted the
2 Local Law No. 2-2004 and the Social Services Site was rezoned R-T. The
3 following month, Nassau County issued a Request for Proposals (“RFP”)
4 concerning the Social Services Site under the R-T zoning designation. The RFP
5 stated that the County would not consider bids of less than \$30 million.

6 Plaintiffs were unable to submit a bid meeting the specifications of the
7 RFP. Ismene Speliotis, Executive Director of NYAHC/MHANY, analyzed the R-T
8 zoning and concluded that it was not financially feasible to build affordable
9 housing under R-T zoning restrictions at any acquisition price. Testifying at trial,
10 Suozzi concurred with this assessment. Recognizing the futility of an affordable-
11 housing bid under R-T zoning, NYAHC contacted the County to work on a
12 proposal that would include multi-family affordable housing, and “urge[d] the
13 Planning Commission to delay any action on [its] proposal while its legal and
14 policy implications are considered more carefully.” App’x at 1871. NYAHC and
15 New York ACORN met with Suozzi and other County officials to discuss the
16 possibility of including affordable housing on the Social Services Site. But the
17 County did not reissue the RFP. Failing in these negotiations, on September 10,

1 2004, NYAHC submitted a non-conforming “protest” proposal to the County for
2 development of the Social Services Site.

3 The County ultimately awarded the contract to develop the Social Services
4 Site to Fairhaven Properties, Inc. (“Fairhaven”), a developer of single-family
5 homes, for \$56.5 million, the highest bid. Fairhaven proposed the development of
6 87 single-family detached homes, and did not include any townhouses.

7 After the contract was awarded to Fairhaven, NYAHC prepared four
8 proposals, or “pro formas,” for development at the Social Services Site under the
9 R-M zoning designation, with the percentage of affordable and/or Section 8
10 housing units of the 311 total rental units ranging from 15% to 25%. Plaintiffs’
11 expert Nancy McArdle evaluated each proposal in conjunction with the
12 racial/ethnic distribution of the available pool of renters and determined that,
13 had NYAHC been able to build housing under any of the four proposals in
14 accordance with the rejected R-M zoning designation, the pool of renters likely to
15 occupy all units, including market-rate, affordable, and Section 8 units, would
16 have likely been between 18% and 32% minority, with minority households
17 numbering between 56 and 101. Under the proposal predicting 18% minority

1 population, NYAHC would have been able to bid \$56.1 million for the Social
2 Services Site.

3 McArdle further analyzed the likely racial composition of the pool of
4 homeowners who could afford to purchase single-family units potentially
5 developed by Fairhaven. She determined that between three and six minority
6 households could afford such a purchase. Thus, while the NYAHC proposals
7 would likely increase racial diversity in Garden City, McArdle testified, the
8 Fairhaven proposal would likely leave the racial composition of Garden City
9 “unchanged.”

10 **D. Procedural History**

11 On May 12, 2005, ACORN, NYAHC, and several individual Plaintiffs filed
12 suit against Garden City and Nassau County. Plaintiffs asserted claims under the
13 Fair Housing Act (“FHA”), 42 U.S.C. § 3601 et seq., as well as 42 U.S.C. § 1981, 42
14 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et
15 seq. Plaintiffs principally argued that Garden City’s shift from R-M to R-T zoning
16 was racially discriminatory, and that Nassau County failed to prevent this
17 discrimination. Plaintiffs also argued that the abandonment of R-M zoning in
18 favor of R-T zoning had a disparate impact on minority groups, and thus

1 violated the disparate-impact component of the Fair Housing Act. Finally,
2 Plaintiffs argued that Nassau County's actions and policies in steering affordable
3 housing to certain communities violated its obligations under Title VI of the Civil
4 Rights Act not to discriminate in the administration of federal funding, and
5 under Section 808 of the Fair Housing Act to affirmatively further fair housing.

6 On July 21, 2006, the district court (Bianco, *J.*) denied Garden City and
7 Nassau County's motions to dismiss in their entirety. The district court rejected
8 Defendants' arguments that Plaintiffs lacked standing and concluded that they
9 had adequately alleged discrimination on the basis of race. Accordingly, the
10 district court directed the parties to discovery.

11 ACORN disbanded in early 2010. At the same time, NYAHC changed its
12 name to MHANY. In addition, NYCC, an organization with the same goals and
13 mission, and many of the same members as ACORN, moved to intervene in this
14 litigation. On June 15, 2010, the district court (Spatt, *J.*) granted NYCC permission
15 to intervene as ACORN's practical successor. SJA 135.

16 By Memorandum and Order dated February 15, 2012, the district court
17 (Spatt, *J.*) (1) granted the County's motion for summary judgment and dismissed
18 all claims against the County, and (2) denied Garden City's motion for summary

1 judgment. The district court concluded Nassau County was not causally
2 responsible for the alleged discriminatory conduct of Garden City. The district
3 court also rejected Plaintiffs' challenge to the County's policies regarding the
4 siting of affordable housing under Section 808 of the Fair Housing Act,
5 concluding that Plaintiffs lacked a private cause of action to enforce this
6 provision. The district court did not address Plaintiffs' parallel claim under Title
7 VI of the Civil Rights Act, assuming that this claim was premised on the alleged
8 discrimination regarding the Social Services Site.

9 In resolving the summary judgment motions, the district court rejected
10 Defendants' arguments that events at the Social Services Site had rendered this
11 case moot. Despite Nassau County's sale contract, the transaction with Fairhaven
12 had never closed, apparently due to the pendency of this litigation. On January 1,
13 2010, Suozzi was succeeded as County Executive by Edward P. Mangano. In its
14 summary judgment filing, the County informed the district court that rather than
15 proceed with plans for private development, Mangano had decided instead to
16 construct a new Nassau County's Family Court building at the Social Services
17 Site. Defendants thus argued that, because the County government was no
18 longer selling the Site to a private developer, and because Plaintiffs only sought

1 injunctive relief, the case had been rendered moot. The district court rejected this
2 argument, concluding first that it was still possible to grant Site-specific relief to
3 Plaintiffs, and second that even if the Site was not sold, the court could still grant
4 other effectual relief.

5 On June 17, 2013, the district court commenced a bench trial that spanned
6 eleven days. In a December 6, 2014 post-trial decision, the district court
7 concluded that Plaintiffs had established, by a preponderance of the evidence,
8 liability on the part of the Garden City Defendants for the shift from R-M to R-T
9 zoning under (1) the FHA, 42 U.S.C. § 3601 et seq., based on a theory of disparate
10 treatment and disparate impact; (2) 42 U.S.C. § 1981; (3) 42 U.S.C. § 1983; and (4)
11 the Equal Protection Clause of the Fourteenth Amendment to the United States
12 Constitution. The district court reiterated the conclusions of previous opinions
13 that Plaintiffs had standing, and also rejected a renewed mootness argument
14 from Garden City.

15 The district court subsequently issued an order concerning appropriate
16 remedies in light of Plaintiffs' violations. In a final judgment issued April 22,
17 2014, the district court granted Plaintiffs the following relief against Garden City:
18 (1) a prohibitory non-discrimination injunction, (2) fair housing training for

1 Garden City officials, (3) a directive to Garden City to pass a Fair Housing
2 Resolution, (4) appointment of a third-party Fair Housing Compliance Officer by
3 Garden City, and (5) expenditure of reasonable sums to fund the relief required
4 by the judgment. The district court also ordered that if Nassau County decided
5 to sell the Social Services Site within one year of the date of judgment, then
6 Garden City must begin the process of rezoning the Social Services Site from R-T
7 to R-M controls. If Nassau County did not make such an announcement, Garden
8 City would be required to (1) join the Nassau County Urban Consortium, a
9 group of Nassau County municipalities eligible for HUD affordable-housing
10 funds; and (2) require that 10% of newly constructed residential development of
11 5 units or more be reserved for affordable housing.

12 Garden City then filed the present appeal. Plaintiffs cross-appealed,
13 challenging the district court's grant of summary judgment to Nassau County.
14 JA 1043-44. According to Defendants, Nassau County recently entered into a
15 contract with MPCC Corp. to build the courthouse. On June 9, 2014, MPCC Corp.
16 commenced interior demolition and asbestos abatement. Although construction
17 has begun, the project is not scheduled to be completed until 2018.

DISCUSSION

Section 804(a) of the Fair Housing Act, also known as Title VIII of the Civil Rights Act of 1968, makes it unlawful “[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, . . . or national origin.” 42 U.S.C. § 3604(a). “The phrase ‘otherwise make unavailable’ has been interpreted to reach a wide variety of discriminatory housing practices, including discriminatory zoning restrictions,” *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir. 1995), and its “results-oriented language counsels in favor of recognizing disparate-impact liability,” *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518 (2015). For this reason Sections 804(a) and 805(a) of the FHA provide for both discriminatory intent and disparate-impact liability.

I. Standing

In analyzing Plaintiffs’ standing here, we look to the requirements of Article III. Standing under the Fair Housing Act is as broad as Article III permits. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Fair Hous. in Huntington Comm. Inc. v. Town of Huntington*, 316 F.3d 357, 362 (2d Cir. 2003) (“Standing under the FHA, whether suit is brought under section 810 or section

1 812 of the Act, is coextensive with Article III standing.”). Similarly, the parties do
2 not argue, nor do we discern, any standing concerns that would prevent
3 Plaintiffs from bringing claims under Sections 1981 and 1983.

4 To establish Article III standing, “a plaintiff must show (1) it has suffered
5 an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or
6 imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the
7 challenged action of the defendant; and (3) it is likely, as opposed to merely
8 speculative, that the injury will be redressed by a favorable decision.” *Friends of*
9 *the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000). We evaluate
10 Plaintiffs’ standing “as of the outset of the litigation.” *Cook v. Colgate Univ.*, 992
11 F.2d 17, 19 (2d Cir. 1993).

12 In challenging standing, Garden City focuses on the latter two prongs of
13 the standing analysis, arguing that Plaintiffs’ alleged injury – denial of the
14 opportunity to build affordable housing at the Social Services Site – is not “fairly
15 traceable” to Garden City’s rejection of R-M zoning, nor redressable by a
16 favorable decision. Garden City contends, in essence, that there is no guarantee
17 Plaintiffs’ bid would have been accepted by Nassau County even under R-M
18 zoning, and no certainty that the project would be built if a court ordered a

1 return to R-M zoning. Garden City notes that, of Plaintiffs' four pro forma bids
2 under R-M zoning, the highest was \$56.1 million for a project containing 85%
3 market-rate apartments and 15% affordable housing. This bid was, in relative
4 terms, slightly less than the \$56.5 million Fairhaven bid for the development of
5 single-family homes which Nassau County ultimately accepted under R-T
6 zoning. Based primarily on this difference, Garden City speculates that even if
7 the property remained zoned as R-M, Plaintiffs would have nevertheless been
8 out-bid by a market-rate developer, due to Nassau County's hopes of
9 maximizing the sale value of the Site.

10 Garden City's standing argument requires both improper speculation and
11 unnecessary certainty. As an initial matter, Garden City's argument depends on
12 a level of certainty that we do not typically require in housing discrimination
13 cases. A housing plaintiff need not show with absolute certainty that a project
14 will succeed in order to establish standing. *See Fair Hous. in Huntington Comm.*
15 *Inc.*, 316 F.3d at 363 ("[A]bsent defendants' challenged conduct, there is a
16 'substantial probability' that housing with greater minority occupancy would
17 have been built . . ."). Because of the uncertainties inherent in the housing
18 market, we have permitted housing discrimination plaintiffs to proceed based on

1 “a realistic opportunity to proceed with construction.” *Huntington Branch,*
2 *N.A.A.C.P. v. Town of Huntington*, 689 F.2d 391, 394 (2d Cir. 1982)

3 For example, in *Huntington Branch*, this Court emphasized that
4 “[i]ndeterminacy of financing alone . . . is not enough to dismiss [a housing
5 discrimination action at the motion to dismiss stage].” 689 F.2d at 394. Indeed,
6 the Court noted that “the multitude of factors affecting ultimate financing
7 capability are too variable to permit certainty in prediction.” *Id.* Of course, “those
8 who have absolutely no realistic financing capability have no standing, because,
9 as to them, invalidation of an offending ordinance would afford only moral
10 satisfaction rather than a realistic opportunity to proceed with construction.” *Id.*
11 (internal citation omitted). However, in the case of the plaintiffs, who had
12 proposed a specific project, the Court concluded that “[i]nvalidation of the
13 challenged ordinance . . . would tangibly improve the chances of construction of
14 [the project].” *Id.* at 395; see also *Scott v. Greenville Cty.*, 716 F.2d 1409, 1416 (4th
15 Cir. 1983) (noting “[t]he uncertainty surrounding carrying any large-scale
16 housing development to fruition”).

17 Moreover, in *Village of Arlington Heights v. Metropolitan Housing*
18 *Development Corp.*, 429 U.S. 252 (1977), the Supreme Court found that the

1 defendants' "challenged action[s]" stood as an "absolute barrier" to the
2 construction project proposed by the plaintiff. *Id.* at 261. If plaintiff "secure[d] the
3 injunctive relief it [sought], that barrier [would] be removed." *Id.* The injunction
4 sought by the plaintiff "would not, of course, guarantee that [the proposed
5 housing development] w[ould] be built." *Id.* The Court recognized that the
6 plaintiff "would still have to secure financing, qualify for federal subsidies, and
7 carry through with construction." *Id.* (footnote omitted). But the Court
8 concluded that such contingencies associated with housing development did not
9 eliminate standing, because "all housing developments are subject to some
10 extent to similar uncertainties." *Id.* The Court found that the plaintiff's proposed
11 project was sufficiently "detailed and specific" that no undue speculation was
12 required to establish standing. *Id.*

13 In challenging standing here, Garden City essentially demands the sort of
14 certainty rejected in *Arlington Heights* and *Huntington Branch*. Pointing to the
15 slight difference between Plaintiffs' bid and the Fairhaven bid, the only other
16 market-rate bid in the record, Garden City contends that Plaintiffs cannot
17 *guarantee* that they would have outbid a market-rate developer. But Garden City
18 neglects to mention that, in addressing this exact same standing argument, the

1 district court concluded, as a factual matter, that Plaintiffs' bid and the Fairhaven
2 bid were "directly competitive." Special App'x at 140. Given the relatively small
3 difference in bids – a matter of only 0.7% – this finding was not clearly
4 erroneous.¹ See *Rajamin v. Deutsche Bank Nat'l Tr. Co.*, 757 F.3d 79, 84–85 (2d Cir.
5 2014) (noting that while we review a district court's legal conclusion as to
6 standing de novo, we review the factual findings underlying this determination
7 only for clear error).

8 Garden City also argues this case is distinguishable from *Huntington*
9 *Branch* and *Arlington Heights* because in those cases, the plaintiffs had secured
10 conditional contracts or options on the relevant properties. But "the plaintiff who
11 challenges a zoning ordinance or zoning practice[] [need not] have a present
12 contractual interest in a particular project" to have standing. *Warth v. Seldin*, 422
13 U.S. 490, 508 n.18 (1975). Given the uncertainties associated with financing in the

¹ Although Garden City never directly challenges the district court's finding as clearly erroneous, it does at times refer to Fairhaven's bid for the Social Services Site as in the amount of \$58.1 million. Garden City does not explain this \$1.6 million discrepancy, but we note that it appears to be driven by \$226,000 in transfer taxes and a \$1.3 million brokerage commission. However, Garden City neglects to mention that the purchase price proposed by Fairhaven, the number seemingly directly comparable to the purchase price proposed by Plaintiffs, is only \$56.5 million. Accordingly, we find no clear error in the district court's determination that these two bids were "directly competitive."

1 housing market, the fact that Plaintiffs' bid was directly competitive with the
2 only market-rate bid in the record provides us reason to believe that
3 "[i]nvalidation of the challenged ordinance . . . would tangibly improve the
4 chances of construction of [the project]." *Huntington Branch*, 689 F.2d at 395.
5 Although overturning the shift to R-T zoning would not *guarantee* Plaintiffs'
6 success, given their ability to bid neck-and-neck with a market-rate bidder, the
7 district court appropriately concluded that they enjoyed a "realistic opportunity
8 to proceed with construction." *Id.* at 394. To demand more "would be to close
9 our eyes to the uncertainties which shroud human affairs." *Id.* "Redressability is
10 not a demand for mathematical certainty." *Toll Bros., Inc. v. Township of*
11 *Readington*, 555 F.3d 131, 143 (3d Cir. 2009).²

12 Despite the district court's conclusion that Plaintiffs' bidding was
13 competitive with the only market-rate bid in the record, Garden City argues that

² We note that both *Arlington Heights* and *Huntington Branch* were decided at the motion to dismiss stage, and that this case has proceeded to a bench trial. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (noting that, at trial, the facts supporting standing "must be supported adequately by the evidence adduced at trial" (internal quotation marks omitted)). Nevertheless, this distinction is immaterial to our reasoning. Just as we do not require *allegations* of certain success at the pleading stage, we do not require *proof* of certain success at the trial stage. *Id.* (noting that the elements of standing must be shown "with the manner and degree of evidence required at the successive stages of the litigation").

1 other *hypothetical* bids under R-M zoning from for-profit developers might have
2 been higher than the Fairhaven bid. Yet Garden City's argument on this point is
3 founded in pure speculation. Garden City theorizes that because luxury
4 apartments would provide more units than single-family homes, this would
5 likely increase the return to the developer, and thus raise the bid price the project
6 could support. But no such market-rate bids for apartments exist in the record.
7 Moreover, our review of the record does not reveal a clear answer to Garden
8 City's surmise. *Compare* App'x at 1286 (BFJ zoning study suggesting that
9 apartments, although each lower priced than single-family houses, would yield a
10 greater total market value in light of the greater number of units), *with* App'x at
11 1104 (suggesting differing estimates for whether single-family homes or multi-
12 family development would yield a higher land value). Moreover, the mere fact
13 that Plaintiffs' bid includes an affordable-housing element does not necessarily
14 mean that a hypothetical market-rate apartment developer would outbid them.
15 As Plaintiffs note, an affordable-housing developer, unlike a market-rate
16 developer, need not consider profit in making its bid proposal. Moreover,
17 affordable-housing developers have access to sources of funds a market-rate

1 developer does not, including tax credits and others government programs
2 encouraging affordable housing.

3 **II. Mootness**

4 Next, both Nassau County and Garden City argue that, even if Plaintiffs
5 had standing at the outset of this litigation, this case is now moot. In light of the
6 County's plans to construct a courthouse on the Social Services Site, they contend
7 any injury to Plaintiffs regarding inability to construct affordable housing on the
8 Site is no longer caused by purported discriminatory zoning. Rather, the
9 superseding source of this injury is the decision to build a courthouse.

10 Defendants, and Garden City in particular, rely on the principle that
11 mootness is "standing set in a time frame: The requisite personal interest that
12 must exist at the commencement of the litigation (standing) must continue
13 throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520
14 U.S. 43, 68 n.22 (1997) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397
15 (1980)); see also Henry P. Monaghan, *Constitutional Adjudication: The Who and*
16 *When*, 82 Yale L.J. 1363, 1384 (1973) (providing the source of this formulation).

17 This principle, however, is "not comprehensive," *Laidlaw*, 528 U.S. at 190,
18 and it fails to capture exceptions to mootness, particularly voluntary cessation

1 cases and cases capable of repetition but evading review, *id.* These exceptions
2 underline the different aims of the standing and mootness doctrines. The burden
3 of establishing standing falls on the plaintiff, as it “functions to ensure, among
4 other things, that the scarce resources of the federal courts are devoted to those
5 disputes in which the parties have a concrete stake.” *Id.* at 191. By contrast, the
6 burden of showing mootness logically falls on a defendant because, “by the time
7 mootness is an issue, the case has been brought and litigated, often (as here) for
8 years. To abandon the case at an advanced stage may prove more wasteful than
9 frugal.” *Id.* at 191–92.

10 In our view, this case is appropriately analyzed under the voluntary
11 cessation doctrine. Under this principle, “a defendant’s voluntary cessation of a
12 challenged practice does not deprive a federal court of its power to determine the
13 legality of the practice.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289
14 (1982); *see also Laidlaw*, 528 U.S. at 189 (stating the voluntary cessation doctrine
15 applies in cases “mooted by the defendant’s voluntary conduct”). “The voluntary
16 cessation of allegedly illegal activities will usually render a case moot if the
17 defendant can demonstrate that (1) there is no reasonable expectation that the
18 alleged violation will recur and (2) interim relief or events have completely and

1 irrevocably eradicated the effects of the alleged violation.” *Granite State Outdoor*
2 *Advert., Inc. v. Town of Orange*, 303 F.3d 450, 451 (2d Cir. 2002) (internal quotation
3 marks omitted).

4 At bottom, the “rule traces to the principle that a party should not be able
5 to evade judicial review, or to defeat a judgment, by temporarily altering
6 questionable behavior.” *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S.
7 278, 284 n.1 (2001). “[A] defendant claiming that its voluntary compliance moots
8 a case bears the formidable burden. of showing that it is *absolutely clear* the
9 allegedly wrongful behavior could not reasonably be expected to recur.” *Laidlaw*,
10 528 U.S. at 190 (emphasis added). This is both a stringent, *City of Mesquite*, 455
11 U.S. at 289 n.10, and a formidable burden, *Laidlaw*, 528 U.S. at 190.

12 In this case, we are deeply skeptical that Defendants have met their
13 “formidable burden” of showing that it is “absolutely clear” that the Social
14 Services Site will never be used for housing. We are unpersuaded that the
15 County has committed to this course permanently. Although we recognize that
16 when “the defendant is a government entity, some deference must be accorded
17 to a legislative body’s representations that certain conduct has been
18 discontinued,” *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365,

1 376 (2d Cir. 2004) (internal quotation marks and alterations omitted), some
2 deference does not equal unquestioned acceptance. Indeed, in *City of Mesquite*,
3 the Supreme Court reached the merits despite the fact that the offending
4 language in the challenged ordinance had been removed during the pendency of
5 the appeal. 455 U.S. at 289. In finding the case not moot, the Court noted that
6 “the city’s repeal of the objectionable language would not preclude it from
7 reenacting precisely the same provision if the District Court’s judgment were
8 vacated.” *Id.*

9 Here, suspicious timing and circumstances pervade the County’s decision
10 to build a courthouse. Although the County has authorized funding for the
11 courthouse and has contracted with a construction management corporation,
12 Plaintiffs argue compellingly that various actions with respect to the courthouse
13 project appear to track the development of this litigation. For example, the
14 County announced its decision to build a courthouse on the Social Services Site
15 only on the eve of summary judgment motions. The County claims that plans for
16 the courthouse were in place as early as 2010. App’x at 118 (noting that schematic
17 designs for the building were issued in 2010). Despite counsel’s “continuing duty
18 to inform the Court of any development which may conceivably affect [the]

1 outcome” of litigation, *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J.,
2 concurring), the County failed to notify the district court of the proposal until
3 2011, when it moved for summary judgment, App’x at 119 (affidavit submitted
4 February 2011).

5 The Supreme Court has viewed mootness claims skeptically when they are
6 not timely raised. *See City of Erie v. Pap’s A.M.*, 529 U.S. 277, 288 (2000) (“[O]ur
7 appraisal of Pap’s affidavit is influenced by Pap’s failure, despite its obligation to
8 the Court, to mention a word about the potential mootness issue in its brief in
9 opposition to the petition for writ of certiorari . . .”). Bolstering our skepticism of
10 Defendants’ mootness claim, Plaintiffs assert, and Defendants do not contest,
11 that the project was dormant for years after Nassau County was dismissed at the
12 summary judgment stage, and the threat of liability against the County
13 diminished. Although Defendants note construction fences were recently put up
14 around the Site, Plaintiffs observe, again without contradiction, that these fences
15 went up approximately around the time the parties filed the respective notices of
16 appeal in this case, and the threat of liability against Nassau County again
17 reemerged. *Cf. Lillbask ex rel. Mauclaire v. Conn. Dep’t of Educ.*, 397 F.3d 77, 89 (2d
18 Cir. 2005) (finding the voluntary cessation doctrine applicable where “there

1 [was] no reason to doubt the sincerity of defendants' representation to the court"
2 that the challenged conduct had ceased).

3 Nor are we persuaded by Defendants' contentions that the injuries of two
4 workers during construction on the Site, along with asbestos abatement and
5 interior demolition, render the County's decision to build a courthouse
6 irreversible. Defendants argue that two workers have been injured during
7 construction. Asbestos abatement and interior demolition, at least on the basis of
8 the record before us, would appear to be actions necessary before *any* action
9 could be taken on the Site. In fact, the article cited in Garden City's brief makes
10 no mention of a courthouse, noting only that the workers were injured
11 performing asbestos abatement on the Social Services Site.

12 The County asserts that the courthouse project is in response to an
13 emergency need for a new courthouse. But the County's own filings indicate the
14 County has been aware of the alleged urgent need for a new courthouse since at
15 least 2004. "[An] emphasiz[s] that the change had been under consideration long
16 before the federal lawsuit . . . of course cuts two ways." *United States v. N.Y.C.*
17 *Transit Auth.*, 97 F.3d 672, 676 (2d Cir. 1996). We are left wondering whether the
18 courthouse project represents a convenient distraction, rather than a valid claim,

1 which the County can cite when under threat of liability, only to ignore it when
2 the threat of liability has passed. *See Christian Legal Soc’y Chapter of the Univ. of*
3 *Cal. v. Martinez*, 561 U.S. 661, 723 n.3 (2010) (Alito, J., dissenting) (“Particularly in
4 light of Hastings’ practice of changing its announced policies, these requests are
5 not moot.”).

6 Nor are we persuaded that a 2011 magistrate judge’s order stating that the
7 County’s decision to build the courthouse was “final,” App’x at 101, conclusively
8 resolves this issue. The district court did not view this order as conclusively
9 resolving the issue of mootness, construing the question de novo in both its
10 summary judgment opinion and at trial. Finally, although Garden City argues
11 that we are barred from reviewing this finding on appeal because it was not
12 specifically challenged by Plaintiffs. Plaintiffs are inherently challenging the basis
13 for this ruling, and “a notice of appeal from a final judgment brings up for
14 review all reviewable rulings which produced the judgment.” *SongByrd, Inc. v.*
15 *Estate of Grossman*, 206 F.3d 172, 178 (2d Cir. 2000) (internal quotation marks
16 omitted).

17 There are simply too many questions surrounding construction of the
18 courthouse for us to conclude that it is “absolutely clear” that the parties will not

1 resume the challenged conduct. We recognize that the County may ultimately be
2 sincere in its efforts to build a courthouse. However, given its actions up to this
3 point, we conclude that on the present record the County has not met its
4 “formidable burden” of showing that it will not permit the challenged conduct to
5 resume.

6 Though we conclude it is not “absolutely clear” that Nassau County will
7 not return to the challenged conduct, we need not decide at this time the parties’
8 other arguments concerning mootness.

9 **III. Disparate Treatment**

10 The district court concluded that Garden City’s decision to abandon R-M
11 zoning in favor of R-T zoning was made with discriminatory intent. “The
12 Supreme Court has long held, in a variety of circumstances, that a governmental
13 body may not escape liability under the Equal Protection Clause merely because
14 its discriminatory action was undertaken in response to the desires of a majority
15 of its citizens.” *United States v. Yonkers Bd. of Educ. (Yonkers I)*, 837 F.2d 1181, 1224
16 (2d Cir. 1987); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases
17 may be outside the reach of the law, but the law cannot, directly or indirectly,
18 give them effect.”). We find no clear error in the district court’s determination

1 that Garden City's decision to abandon R-M zoning was a knowing response to
2 the vocal and racially influenced opposition among Garden City's citizenry.

3 **A. Plaintiffs' Prima Facie Case**

4 A plaintiff can establish a prima facie case of disparate treatment "by
5 showing that animus against the protected group was a significant factor in the
6 position taken by the municipal decision-makers themselves or by those to
7 whom the decision-makers were knowingly responsive." *LeBlanc-Sternberg*, 67
8 F.3d at 425 (internal quotation marks omitted). This Court is required to give
9 substantial deference to the trial court's findings, and may not set them aside
10 unless they are clearly erroneous. *See Diesel Props S.r.l.*, 631 F.3d at 52 ("After a
11 bench trial, the court's '[f]indings of fact, whether based on oral or other
12 evidence, must not be set aside unless [they are] clearly erroneous.'" (quoting
13 Fed. R. Civ. P. 52(a)(6))). We review a district court's finding of discrimination
14 after a bench trial for clear error. *See Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d
15 565, 580 (2d Cir. 2003) ("The district court's finding of intentional discrimination
16 was not clearly erroneous.").

17 In finding intentional racial discrimination here, the district court applied
18 the familiar *Arlington Heights* factors. *See Arlington Heights*, 429 U.S. at 267.

1 Because discriminatory intent is rarely susceptible to direct proof, a district court
2 facing a question of discriminatory intent must make “a sensitive inquiry into
3 such circumstantial and direct evidence of intent as may be available. The impact
4 of the official action whether it bears more heavily on one race than another may
5 provide an important starting point.” *Id.* at 266 (internal quotation marks and
6 citation omitted). But unless a “clear pattern, unexplainable on grounds other
7 than race, emerges,” *id.*, “impact alone is not determinative, and the Court must
8 look to other evidence,” *id.* (footnote omitted). Other relevant considerations for
9 discerning a racially discriminatory intent include “[t]he historical background of
10 the decision . . . particularly if it reveals a series of official actions taken for
11 invidious purposes,” *id.* at 267, “[d]epartures from the normal procedural
12 sequence,” *id.*, “[s]ubstantive departures,” *id.*, and “[t]he legislative or
13 administrative history . . . especially where there are contemporary statements by
14 members of the decisionmaking body, minutes of its meetings, or reports,” *id.* at
15 268.

16 Here, the district court premised its finding of racial discrimination
17 primarily on two of these factors: (1) impact, i.e. “the considerable impact that
18 [the Village’s] zoning decision had on minorities in that community”; and (2)

1 sequence of events, i.e. “the sequence of events involved in the Board’s decision
2 to adopt R-T zoning instead of R-M zoning after it received public opposition to
3 the prospect of affordable housing in Garden City.” Special App’x at 161. The
4 district court noted a history of racial discrimination in Garden City, but declined
5 to place “significant weight” on this factor. *See* Special App’x at 151 (“Although
6 [past events] could tend to suggest that racial discrimination has historically
7 been a problem in Garden City, the Court declines to place significant weight on
8 them for various reasons.”).

9 The district court first noted statistical evidence that the original R-M
10 proposal would have created a pool of potential renters with a significantly
11 larger percentage of minority households than the pool of potential renters for
12 the zoning proposal ultimately adopted as law by Garden City. However, in
13 making its finding of discrimination, the district court relied primarily on the
14 sequence of events leading up to the implementation of R-T zoning. The court
15 first noted that Garden City officials and BFJ were initially enthusiastic about R-
16 M zoning. BFJ’s proposal permitted the development of up to 311 multi-family
17 units, and Trustee Bee expressed the opinion at a January 20, 2004 meeting that
18 “Garden City demographically has a need for multi-family housing,” and that

1 “he would keep an open mind but he still felt the recommended zoning change
2 were appropriate.” App’x at 1665.

3 However, the district court concluded that BFJ and the Board abruptly
4 reversed course in response to vocal citizen opposition to the possibility of multi-
5 family housing, including complaints that affordable housing with undesirable
6 residents could be built under this zoning. At a February 4, 2004 meeting,
7 Trustee Bee stated that “neither the County nor the Village is looking to
8 create . . . so-called affordable housing.” App’x at 1236. BFJ and the Board
9 subsequently endorsed the R-T proposal, which banned the development of
10 multi-family housing on all but a small portion of the Social Services Site and
11 then only by special permit.

12 The district court focused on the suddenness of this change. Although the
13 P-Zone Committee had consistently recommended R-M zoning for eighteen
14 months, R-T zoning went from proposal to enactment in a matter of weeks. The
15 district court noted that BFJ’s consideration of R-T zoning was not nearly as
16 comprehensive and deliberative as that for R-M zoning. In addition, the court
17 found it strange that members of the P-Zone Committee – the Village officials
18 most familiar with the situation – were excluded from the discussions regarding

1 R-T zoning. Indeed, after a final public presentation on the proposed R-M zoning
2 in April 2004, Schoelle, Filippon, and Fishberg met with BFJ to review the public
3 comments. For some unknown reason, members of the P-Zone Committee did
4 not participate in this meeting, and neither did the Village's zoning counsel
5 Kiernan. The district court also found it peculiar that Local Law 2-2004, adopting
6 R-T zoning, was moved to a public hearing even though no zoning text had yet
7 been drafted and no environmental analysis of the law's impact had been
8 conducted. Thus, in rejecting Garden City's argument below that the adoption of
9 R-T zoning was business as usual, the district court concluded that Garden City
10 was "seeking to rewrite history." Special App'x at 153.

11 Although now recognizing the oddness and abruptness of this sequence of
12 events, Garden City argues that these facts should not raise any suspicion. The
13 Village contends that because BFJ, the Village Trustees, and Village residents had
14 discussed the zoning of the Site for more than a year, there was no need to spend
15 additional time discussing the same issues once they settled on a preferable
16 lower-density approach. While the adoption of R-T zoning may seem rushed,
17 and appear to be an abrupt change from Garden City's prior consistent course of
18 conduct, according to Garden City, this was actually just efficient local

1 government. Given the amount of time already invested in studying the Social
2 Services Site, R-T zoning could proceed more quickly through the legislative
3 process. While this may be one reasonable interpretation of the facts, the district
4 court was nevertheless entitled to draw the contrary inference that the
5 abandonment of R-M zoning was an abrupt change and that the “not nearly as
6 deliberative” adoption of R-T zoning was suspect. Special App’x at 153–54.
7 Indeed, it is a bedrock principle that “[w]here there are two permissible views of
8 the evidence, the factfinder’s choice between them cannot be clearly erroneous.”
9 *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

10 In considering the sequence of events leading up to the adoption of R-T
11 zoning, the district court also focused closely on the nature of the citizen
12 complaints regarding R-M zoning. Citizens expressed concerns about R-M
13 zoning changing Garden City’s “character” and “flavor.” App’x at 1243. In
14 addition, contrary to Garden City’s contentions that any references to affordable
15 housing were isolated, citizens repeatedly and forcefully expressed concern that
16 R-M zoning would be used to introduce affordable housing and associated
17 undesirable elements into their community. Residents expressed concerns about
18 development that would lead to “sanitation [that] is overrun,” “full families

1 living in one bedroom townhouses, two bedroom co-ops” and “four people or
2 ten people in an apartment.” App’x at 1260, 1275. Other residents requested that
3 officials “guarantee” that the housing would be “upscale” because of concerns
4 “about a huge amount of apartments that come and depress the market for any
5 co-op owner in this Village.” App’x at 1237.

6 The district court also noted Garden City residents’ concerns about the
7 Balboni Bill and the possibility of creating “affordable housing,” specifically
8 discussing a flyer warning that property values might decrease if apartments
9 were built on the Site and that such apartments might be required to include
10 affordable housing under legislation pending in the State legislature. This flyer
11 came to the attention of at least two trustees, as well as Fish and Schoelle.

12 Concerned about the Balboni Bill, Garden City residents urged the Village
13 officials to “play it safe” and “vote for single family homes.” App’x at 362.

14 Viewing this opposition in light of (1) the racial makeup of Garden City, (2) the
15 lack of affordable housing in Garden City, and (3) the likely number of minorities
16 that would have lived in affordable housing at the Social Services Site, - the
17 district court concluded that Garden City officials’ abrupt change of course was a

1 capitulation to citizen fears of affordable housing, which reflected race-based
2 animus.

3 We find no clear error in the district court's determination. The tenor of the
4 discussion at public hearings and in the flyer circulated throughout the
5 community shows that citizen opposition, though not overtly race-based, was
6 directed at a potential influx of poor, minority residents. Indeed, the description
7 of the Garden City public hearing is eerily reminiscent of a scene described by
8 the Court in *Yonkers I*:

9 At the meeting . . . the predominantly white audience overflowed
10 the room. The discussion was emotionally charged, with frequent
11 references to the effect that subsidized housing would have on the
12 "character" of the neighborhood. The final speaker from the
13 audience . . . stated that the Bronx had been ruined when blacks
14 moved there and that he supported the condominium proposal
15 because he did not want the same thing to happen in Yonkers.
16

17 *Yonkers I*, 837 F.2d at 1192. Although no one used explicitly racial language at
18 the Garden City public hearing, the parallels are striking. Like the residents in
19 *Yonkers*, Garden City residents expressed concern that R-M zoning would change
20 the "flavor" and "character" of Garden City. App'x at 1243. Citizens requested
21 restricting the Site's zoning to single-family homes in order to preserve "the
22 flavor and character of what Garden City is now." App'x at 1243. Citizens

1 repeatedly requested “guarantee[s]” that no affordable housing would be built at
2 the Social Services Site and that the development would only be “upscale.”
3 App’x at 1237–38, 1253. Expressing concerns about the sort of residents who
4 might occupy an eventual complex, one resident feared that the proposed
5 development “could have four people or ten people in an apartment and nobody
6 is going to know that.” App’x at 1275. And, as with the emotionally charged
7 scene in *Yonkers*, Suozzi stated that citizens at the public hearing were “yelling at
8 him.” App’x at 1246. Finally, recalling the Yonkers resident who spoke
9 regarding the Bronx being “ruined,” one resident explained that he had left
10 Queens because apartment buildings originally intended for the elderly resulted
11 in “full families living in one bedroom townhouses, two bedroom co-ops, the
12 school is overburdened and overcrowded. You can’t park your car. The
13 sanitation is overrun.” App’x at 1260. Another resident stated that she had left
14 Brooklyn to avoid exactly the sort of development potentially available for the
15 Social Services Site.

16 The district court concluded that, in light of the racial makeup of Garden
17 City and the likely number of members of racial minorities that residents
18 believed would have lived in affordable housing at the Social Services Site, these

1 comments were code words for racial animus. *See Aman v. Cort Furniture Rental*
2 *Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (observing that it “has become easier to
3 coat various forms of discrimination with the appearance of propriety” because
4 the threat of liability takes that which was once overt and makes it subtle). “Anti-
5 discrimination laws and lawsuits have ‘educated’ would-be violators such that
6 extreme manifestations of discrimination are thankfully rare. . . . Regrettably,
7 however, this in no way suggests that discrimination based upon an individual’s
8 race, gender, or age is near an end. Discrimination continues to pollute the social
9 and economic mainstream of American life, and is often simply masked in more
10 subtle forms.” *Id.* at 1081–82. “[R]acially charged code words may provide
11 evidence of discriminatory intent by sending a clear message and carrying the
12 distinct tone of racial motivations and implications.” *Smith v. Fairview Ridges*
13 *Hosp.*, 625 F.3d 1076, 1085 (8th Cir. 2010) (internal quotation marks and
14 alterations omitted).

15 Empirical evidence supports the reasonableness of the district court’s
16 conclusion. Indeed, “research suggests that people believe that the majority of
17 public housing residents are people of color, specifically, African American.” *See*
18 Carol M. Motley & Vanessa Gail Perry, *Living on the Other Side of the Tracks: An*

1 *Investigation of Public Housing Stereotypes*, 32 J. Pub. Pol’y & Marketing 48, 52
2 (2013); *see also id.* at 50 (“[I]n the United States, public housing residents are
3 perceived as predominantly ethnic peoples (mainly African American) . . .”).
4 Here, the comments of Garden City residents employ recognized code words
5 about low-income, minority housing.³ For example, “[o]pponents of affordable
6 housing provide subtle references to immigrant families when they condemn
7 affordable housing due to the fear it will bring in ‘families with lots of kids.’”
8 Mai Thi Nguyen, Victoria Basolo & Abhishek Tiwari, *Opposition to Affordable*
9 *Housing in the USA: Debate Framing and the Responses of Local Actors*, 30 Housing,
10 Theory & Soc’y 107, 122 (2013). Here, invoking this stereotype, Garden City
11 residents complained of “full families living in one bedroom townhouses,”
12 App’x at 1260, and “four people or ten people in an apartment,” App’x at 1275,
13 as well as the possibility of “overburdened and overcrowded” schools, App’x at
14 1260. In addition, research shows that “opponents of affordable housing may
15 mention that they do not want their city to become another ‘Watts’ or ‘Bayview-

³ Garden City argues that a code word theory only makes sense when it is the defendant’s statements at issue. We disagree. The notion of a code word implies that it will be understood by another. Indeed, *Yonkers I* implicitly recognized the relevance of code words in the context of legislators acting responsively to citizen animus by specifically invoking residents’ use of words like “character.” 837 F.2d at 1192.

Hunters-Point,’ both places with a predominantly African-American population.” *Nguyen*, at 123. So too here, Garden City residents expressed concerns about their community becoming like communities with majority-minority populations, such as Brooklyn and Queens. Moreover, “a series of studies have shown that when Whites are asked why they would not want to live near African-Americans (no income level is indicated in the question), common responses relate to the fear of property value decline, increasing crime, decreasing community quality (e.g. physical decay of housing, trash in neighborhood, and unkempt lawns) and increasing violence.” *Nguyen*, at 111. Repeatedly expressing concerns that R-M zoning would lead to a decline in their property values as well as reduced quality of life in their community, Garden City residents urged the Board of Trustees to “keep Garden City what it is” and to “think of the people who live here.” App’x at 1487–88. Considering these statements in context, we find that the district court’s conclusion that citizen opposition to R-M zoning utilized code words to communicate their race-based animus to Garden City officials was not clearly erroneous. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982) (finding “‘camouflaged’ racial expressions” based on concerns “about an influx of ‘undesirables,’” who would

1 “‘dilute’ the public schools”). While another factfinder might reasonably draw
2 the contrary inference from these facially neutral statements, “the district court’s
3 account of the evidence is plausible in light of the record viewed in its entirety.”
4 *Anderson*, 470 U.S. at 573–74.⁴

5 In response, Garden City notes that its officials testified that they did not
6 understand the citizen opposition to be race-based. But, quite obviously,
7 discrimination is rarely admitted. *See Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d
8 Cir. 1991) (“A victim of discrimination is . . . seldom able to prove his or her
9 claim by direct evidence and is usually constrained to rely on the cumulative
10 weight of circumstantial evidence.”); *Iadimarco v. Runyon*, 190 F.3d 151, 157 (3d
11 Cir. 1999) (“[A]n employer who discriminates will almost never announce a

⁴ Although the district court declined to place significant weight on subsequent objections to affordable housing in Garden City, as further support for its conclusion, the district court could have also looked to more overtly race-based opposition to the subsequent Ring Road development. Indeed, the comments opposing this development explicitly referred back to the rezoning of the Social Services Site. In comments opposing the Ring Road development in Garden City, citizens accused Suozzi of “catering to ACORN and black people,” App’x at 2684, and stated that they were “[a]damantly opposed to low income housing or affordable housing in Garden City – at the [Social Services] property or in the vicinity of Roosevelt Field. You live where you can afford to live – plain and simple . . . it is not a hand-out!” App’x at 2699. These more explicitly race-based comments echoed earlier comments during public hearings. App’x at 1487 (“We worked very hard to live in Garden City because [of] what it is. And I feel like very slowly it’s creeping away by the building that is going on.”)

1 discriminatory animus or provide employees or courts with direct evidence of
2 discriminatory intent.”). The district court reached its conclusion after a lengthy
3 trial, during which the court had the opportunity to hear and evaluate the
4 testimony of numerous witnesses, including all of the relevant Garden City
5 officials. Moreover, there is ample evidence from which to question the
6 credibility of these officials. Trustee Lundquist stated during his trial testimony
7 that he was unsure if Garden City – an overwhelmingly white community – was
8 majority black. Similarly, Building Superintendent Filippon stated that he did not
9 know if Garden City was majority white. Trustee Negri further stated that he
10 could not recall if he had *ever* had a conversation about affordable housing.

11 In addition to these incredible statements, which the district court would
12 have been entitled to discredit, there was abundant evidence from which the
13 district court could find that Garden City officials clearly understood residents’
14 coded objections to R-M zoning. During his testimony, Village Administrator
15 Schoelle indicated that he knew low-income residents of Garden City were
16 primarily African Americans and Latinos. *Cf. Catanzaro v. Weiden*, 140 F.3d 91, 96
17 (2d Cir. 1998) (“[Plaintiff] also presents evidence that the Mayor and City officials
18 knew the racial makeup of the Middletown community.”). In addition, County

1 Executive Suozzi testified to his knowledge that race is generally a factor in
2 opposition to affordable housing in Nassau County, and that Garden City
3 residents' opposition to affordable housing was motivated, at least in part, by
4 discriminatory animus. App'x 550, 556, 2266-67. Furthermore, employing the
5 code words apparently employed by Garden City residents, Trustee Negri
6 testified that housing occupied by low-income minorities is not consistent with
7 the "character" of Garden City. App'x at 570.

8 Garden City's argument appears to boil down to the following – because
9 no one ever said anything overtly race-based, this was all just business as usual.
10 But the district court was entitled to conclude, based on the *Arlington Heights*
11 factors, that something was amiss here, and that Garden City's abrupt shift in
12 zoning in the face of vocal citizen opposition to changing the character of Garden
13 City represented acquiescence to race-based animus.

14 Failing to show clear error in the district court's factual findings, Garden
15 City also argues that the district court applied the wrong legal standard for
16 claims involving official responses to citizen-based discrimination. But the
17 district court recognized the appropriate standard, stating that "[u]nder the
18 theory of disparate treatment, 'a plaintiff can establish a prima facie case by

1 showing that animus against the protected group “was a significant factor in the
2 position taken” by the municipal decision-makers themselves or by those to
3 whom the decision-makers were knowingly responsive.’” Special App’x at 148
4 (quoting *LeBlanc-Sternberg*, 67 F.3d at 425) (emphasis omitted). Although Garden
5 City cites this same case and the same standard, it contends that the district
6 nevertheless applied the wrong standard, because at two points in its 65-page
7 opinion, the court noted that the comments of Garden City residents “reflected
8 race-based animus or at least could have been construed as such by the Board.”
9 Special App’x at 156, 180. Seizing on the “could have been construed” language,
10 Garden City argues that the district court only found that Garden City officials
11 responded to citizen-based opposition and that this opposition was race-based,
12 but never actually concluded that Garden City officials *knew* this citizen
13 opposition was race-based.

14 Although Garden City is correct that the standard is not “could have been
15 construed,” and local officials must knowingly respond to race-based citizen
16 opposition, we do not think this stray language reflects the legal standard that
17 the court applied. As noted, at other points in its opinion, the district court set
18 out in detail the correct legal standard and cited the exact same cases that Garden

1 City relies on. Moreover, statements during trial indicate that the district court
2 and all of the parties understood the appropriate standard. In denying Garden
3 City's Rule 50 motion at the close of Plaintiffs' case, the district court recognized
4 that Plaintiffs had presented evidence that Garden City officials changed the
5 zoning "to limit minorities from buying in the Garden City area." App'x at 808.
6 In addition, during trial and in their post-trial briefing, both parties made this
7 standard clear. App'x at 801 (defendants reiterating that "plaintiffs must show
8 that . . . animus against the protected group was a significant factor in the
9 position taken by the municipal decision makers themselves or by those to whom
10 the decision makers were knowingly responsive"); App'x at 805 (plaintiffs
11 arguing that "it is disingenuous of [Garden City's] decision makers, for example
12 trustee [Bee] . . . to claim that they did not know that racial animus played a part
13 in residents['] opposition to multifamily and affordable hous[ing]"); App'x at
14 1013 ("Garden City government officials could not have been unaware that their
15 constituents' opposition to affordable housing was grounded in opposition to the
16 likely minority occupants of such housing."). In light of these statements, we
17 believe the district court understood the applicable standard.

1 In any case, as discussed at length, the district court’s analysis and factual
2 findings support the conclusion that Garden City officials acted with knowledge
3 of their constituents’ discriminatory animus. *See FTC v. Bronson Partners, LLC*, 654
4 F.3d 359, 372 (2d Cir. 2011) (“[A]n error in terminology can be harmless so long
5 as the substantive legal standard applied was the correct one.”). As the foregoing
6 analysis of the district court’s factual findings shows, even if the district court
7 applied a somewhat looser standard, its evidentiary findings are sufficient to
8 support a conclusion of discrimination even under the correct standard, i.e., that
9 Garden City officials knowingly acquiesced to race-based citizen opposition.
10 Accordingly, we find no error in the district court’s conclusion that Plaintiffs
11 have made out a prima facie case of racial discrimination.

12 **B. Discrimination Vel Non**

13 Garden City argues that, even if Plaintiffs have made out a prima facie
14 case, its residents opposed (and its officials understood them to oppose) R-M
15 zoning based on legitimate concerns. Although it expressed significant
16 skepticism about the legitimacy of these non-discriminatory motives, the district
17 court concluded that these other reasons may have played some role in the
18 rezoning decision. However, applying a mixed-motive analysis, the district court

1 nevertheless concluded that discrimination against minorities played a
2 determinative role in the shift from R-M to R-T zoning. We find no error in the
3 district court's mixed-motive analysis and affirm its conclusion.

4 Once a plaintiff presents a prima facie case of discrimination based on the
5 *Arlington Heights* factors, the burden shifts to the defendant to proffer a
6 legitimate, non-discriminatory reason for its actions. *See Reg'l Econ. Cmty. Action*
7 *Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir. 2002). Here, the district
8 court found that Garden City met its minimal burden of production on this issue,
9 as Garden City contended that R-T zoning was adopted instead of R-M zoning
10 because of concerns regarding traffic and school crowding, and because R-T
11 zoning would facilitate the development of townhouses as a residential form.

12 If a defendant meets its burden of production, "the sole remaining issue is
13 discrimination *vel non*. The plaintiffs . . . must prove that the defendants
14 intentionally discriminated against them on a prohibited ground." *Id.* (internal
15 quotation marks, citations, and alterations omitted). Although noting that some
16 of Garden City's alternative justifications for the rezoning were "not just
17 disputed, but unsupported by the record," Special App'x at 160, the district court
18 expressed reluctance "to second-guess citizens and decision-makers' legitimate

1 concerns about traffic and the promotion of townhouses, even if those concerns
2 may have been ill-founded,” Special App’x at 160. Deeming these additional
3 concerns legitimate, the district court followed our decision in *Cabrera v.*
4 *Jakabovitz*, 24 F.3d 372, 383 (2d Cir. 1994), and applied the mixed-motive analysis
5 set out in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989) to Plaintiffs’
6 claims.

7 While this standard has been modified by statute in the context of Title VII,
8 there is no indication it remains inapplicable to claims under the Fair Housing
9 Act, and therefore a plaintiff bears the “burden of proof” in showing “that the
10 adverse action was motivated, at least in part, by an impermissible reason.”
11 *Cabrera*, 24 F.3d at 383. If the plaintiff “has sustained this burden, then the
12 defendant can prevail if it sustains its burden of proving its affirmative defense
13 that it would have taken the adverse action on the basis of . . . permissible
14 reason[s] alone.” *Id.*

15 Here, relying on its analysis of Plaintiffs’ prima facie case, the district court
16 concluded that the shift in zoning had been motivated, at least in part, by
17 discriminatory animus. It then proceeded to the second half of the *Price*
18 *Waterhouse* analysis – the “same decision” defense – assessing whether Garden

1 City would have taken the same action solely on the basis of its purported
2 legitimate reasons for rezoning. Reviewing these alternative rationales, the
3 district court concluded that even accepting these legitimate reasons, Garden
4 City would not have adopted R-T zoning in the absence of discriminatory
5 animus.

6 Garden City challenges the district court's mixed-motives analysis. Yet
7 because Garden City is challenging the district court's finding of discrimination,
8 and because these issues are ultimately factual findings, *see Cabrera*, 24 F.3d at
9 383 (noting that the issue can be decided by a jury), our review is again for clear
10 error. *See Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 206 (D.C. Cir.
11 1997), ("This constituted an acceptable finding of mixed motives, and was not
12 clearly erroneous."), *vacated in part on reh'g* 1998 WL 1988451 (D.C. Cir. 1998).
13 And again, we find no clear error in the district court's factual analysis.

14 Garden City argues that although citizens expressed concern about the
15 possibility of affordable housing and the residents who might occupy it, public
16 comment focused more broadly on mundane problems such as traffic and school
17 overcrowding. Yet the district court did not err in concluding that these other

rationales were insufficiently weighty to justify a shift from R-M to R-T zoning in the absence of discriminatory intent.

With respect to traffic, Garden City argues that its zoning expert testified that R-T zoning, as compared to R-M zoning, would potentially reduce traffic concerns. While the district court recognized this evidence, it also noted that traffic concerns became important to Garden City officials only after the increase in public opposition to affordable housing. Indeed, when residents raised questions regarding traffic from R-M zoning in 2003 and early 2004, Garden City officials repeatedly dismissed these concerns. Indeed, Suozzi, agreeing with Garden City officials at earlier presentations, criticized traffic-related concerns regarding R-M zoning as “irrational.” App’x at 1238–39. Although BFJ’s April 2004 presentation stated that R-T zoning would reduce traffic relative to R-M zoning, this study was only prepared after the public meetings, and the district court reasonably questioned the credibility of figures potentially created to justify a particular result. In addition, the district court noted other record evidence suggesting any decrease in traffic between R-M and R-T zoning was de minimis. Fish testified that, even using a conservative approach, the elimination of multi-family housing would only reduce peak traffic by 3%. App’x at 337–38.

1 The district court thus did not err in questioning whether such concerns were
2 sufficiently strong to cancel out any discriminatory animus.

3 In conducting its mixed-motive analysis, the district court also
4 appropriately questioned the strength of Garden City's interest in developing
5 townhouses. Although Garden City's zoning expert testified that R-T zoning
6 facilitated the development of townhouses and thus potentially expanded the
7 available forms of housing in Garden City by defining townhouses within the
8 Village's zoning code for the first time, there is minimal evidence in the record
9 that Garden City had any real interest in adding townhouses as a residential
10 form prior to the rise in public opposition to R-M zoning. Indeed, the only
11 evidence cited for this point by Garden City is brief testimony from Filippon that
12 Garden City had previously recognized the fact that it did not have townhouses
13 available for prospective buyers. Yet R-T zoning was not actually necessary to
14 further this goal, nor did it actually accomplish it. Fish and Filippon both
15 testified that townhouses would have been permissible as a residential form even
16 under R-M zoning. Similarly, R-T zoning did not actually "promote"
17 townhouses, as Fairhaven, the winning bidder for the Social Services Site,
18 planned to develop single-family homes. The same logic also undermines

1 Garden City's purported interest in using R-T as a transition zone between
2 single-family homes and the commercial district abutting the Social Services Site.
3 Multi-family housing would have provided a similar transition and the ultimate
4 selection of Fairhaven meant no transition at all.

5 Finally, citizen concerns regarding school overcrowding do not cast doubt
6 on the district court's mixed-motive analysis. The district court noted Fish's
7 estimate that while single-family homes would, on average, produce one
8 additional schoolchild, under R-M zoning "[w]ith a community aimed at young
9 couples and empty nesters there could be as few as 0.2 to 0.3 public school
10 children per unit." Special App'x at 158 (citing App'x at 1382). At trial, Fish
11 reiterated these assessments. App'x at 273 (agreeing that "it still holds true" "that
12 there would be a smaller number of children generated by multifamily housing
13 under RM than with the development of single-family homes"). Fish further
14 agreed that those who questioned these assessments "were simply wrong."
15 App'x at 277. In addition, at the public hearing, Suozzi and others deemed
16 citizen complaints about potential school overcrowding "not accurate." App'x at
17 1255. Although Garden City argues that a change in the resident mix would have

1 altered these numbers, the district court was entitled to rely on the figures in the
2 record undercutting this concern.⁵

3 Accordingly, we find no clear error in the district court's determination
4 that, while these concerns may have motivated in part the decision to adopt R-T
5 zoning, the decision would not have been made in the absence of a
6 discriminatory motive.

7 Failing to show clear error in the district court's mixed-motive analysis,
8 Garden City questions the mode of this analysis. Garden City argues that the
9 district court improperly placed the burden on the Village to show that it would
10 have made the same decision even in the absence of a discriminatory motive, and
11 should have instead placed the burden on Plaintiffs to show that discrimination
12 was the "but-for" cause of the rezoning decision. Garden City's critique of the
13 district court's analysis relies on the Supreme Court's decision in *Gross v. FBL*
14 *Financial Services, Inc.*, 557 U.S. 167 (2009), where the Court held that because the
15 ADEA prohibits adverse actions taken "because of" an employee's age, ADEA
16 plaintiffs cannot rely on the *Price Waterhouse* analysis, and instead bear the

⁵ Although the district court never explicitly stated that school crowding concerns would not have led Garden City to adopt R-T zoning in the absence of discriminatory animus, this conclusion is the obvious implication of its discussion of this issue.

1 burden of showing that “age was the ‘but-for’ cause of the challenged employer
2 decision.” *Id.* at 177–78. Garden City contends that because the Fair Housing Act
3 similarly prohibits “mak[ing] unavailable or deny[ing] a dwelling . . . because of
4 race,” 42 U.S.C. § 3604(a), the district court should have placed the burden on
5 Plaintiffs to show that race-based animus was the but-for cause of the shift to R-T
6 zoning.⁶

7 This argument is forfeited. Garden City concedes that it failed to raise this
8 argument before the district court, and “it is a well-established general rule that
9 an appellate court will not consider an issue raised for the first time on appeal.”
10 *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994). Although we can exercise
11 our discretion to entertain new arguments “where necessary to avoid a manifest
12 injustice or where the argument presents a question of law and there is no need
13 for additional fact-finding,” *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir.
14 2006) (internal quotation marks omitted), “the circumstances normally do not

⁶ Garden City does not take issue with the district court’s analysis regarding Plaintiffs’ parallel claims under Section 1981, Section 1983, and the Equal Protection Clause, only arguing that *Gross* rejects the district court’s mixed-motive analysis in the context of the Fair Housing Act. We assume, without deciding, that the original *Price Waterhouse* analysis, not the modified version adopted in the Civil Rights Act of 1991, applies to claims under Section 1981. *See Hardy v. Town of Greenwich*, 629 F. Supp. 2d 192, 199 (D. Conn. 2009) (noting that “[t]he Second Circuit has not directly addressed this question”).

1 militate in favor of an exercise of discretion to address new arguments on appeal
2 where those arguments were available to the parties below and they proffer no
3 reason for their failure to raise the arguments below,” *In re Nortel Networks Corp.*
4 *Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) (internal quotation marks and
5 alterations omitted). Garden City requests that we excuse the present forfeiture
6 because the parties did not brief the issue of mixed motives below, in light of
7 Plaintiffs’ contention that Garden City’s legitimate non-discriminatory reasons
8 for rezoning were pretextual.

9 A review of Plaintiffs’ post-trial briefing undercuts this contention.
10 Although much of the discussion in the district court focused on pretext, an
11 entire section in Plaintiffs’ post-trial brief is devoted to the issue of burden-
12 shifting under a mixed analysis. App’x at 1020 (“Garden City Did Not Meet Its
13 Burden to Prove that R-T Zoning Would Have Been Adopted Had The
14 ‘Impermissible Purpose’ Not Been Considered.”) In this section, Plaintiffs argue
15 that “[e]ven if R-T addressed any legitimate zoning concerns, that discriminatory
16 animus motivated the change even in part is enough to support a finding of
17 discriminatory intent.” App’x at 1020. In addition, Plaintiffs noted that “[h]ad the
18 ‘impermissible purpose’ of excluding minorities from Garden City *not* been

1 considered, R-T zoning would not have been adopted.” App’x at 1022. The issue
2 of causation and who bore what burden in showing causation among the various
3 motives was sufficiently raised by Plaintiffs that Defendants were on notice that
4 they could have raised their *Gross* argument. Accordingly, we decline to exercise
5 our discretion to overlook Garden City’s failure to address this issue below.

6 In any event, even if we considered this argument, it runs headlong into
7 Circuit precedent. In *Cabrera*, 24 F.3d at 383, considering, inter alia, a Fair
8 Housing Act claim, this Court adopted the *Price Waterhouse* analysis, concluding
9 that once a plaintiff proves an adverse action “was motivated, at least in part, by
10 an impermissible reason, . . . the defendant can prevail if it sustains its burden of
11 proving its affirmative defense that it would have taken the adverse action on the
12 basis of the permissible reason alone.” We are bound by *Cabrera*. *In re Zarnel*, 619
13 F.3d 156, 168 (2d Cir. 2010) (noting that a panel of this Court is “bound by the
14 decisions of prior panels until such time as they are overruled either by an en
15 banc panel of our Court or by the Supreme Court).

16 Moreover, when Congress amended the FHA in 1988, the circuits were
17 largely in agreement that if one of the motivating factors for an act was unlawful,
18 the act violated the FHA. *See Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1042

(2d Cir. 1979); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Jordan v. Dellway Villa, Ltd.*, 661 F.2d 588, 594 (6th Cir. 1981); *United States v. Pelzer Realty Co.*, 484 F.2d 438, 443 (5th Cir. 1973); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349–50 (7th Cir. 1970). When Congress amends an Act “without altering the text . . . , it implicitly adopt[s] [the Court’s] construction of the statute.” *Inclusive Communities Project*, 135 S. Ct. at 2520 (quoting *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009)). Although *Gross* may cast doubt on this conclusion, by its terms, *Gross* applies only to the ADEA, and we decline to address whether *Gross* applies to the FHA in the absence of clearer guidance from the Supreme Court. Accordingly, even if we overlooked Garden City’s present forfeiture, we would adhere to our existing precedent.

IV. Disparate Impact

Garden City also challenges the district court’s conclusion that the shift from R-M to R-T zoning violated the disparate impact prong of the Fair Housing Act. The Supreme Court recently affirmed that disparate impact claims are cognizable under the Fair Housing Act. *See Inclusive Communities Project*, 135 S. Ct. at 2525 (holding that “disparate-impact claims are cognizable under the Fair

1 Housing Act upon considering its results-oriented language, the Court's
2 interpretation of similar language in Title VII and the ADEA, Congress'
3 ratification of disparate-impact claims in 1988 against the backdrop of the
4 unanimous view of nine Courts of Appeals, and the statutory purpose").

5 The Second Circuit has outlined a burden-shifting test for a disparate
6 impact claim. Under this test, a plaintiff must first establish a prima facie case by
7 showing, "(1) the occurrence of certain outwardly neutral practices, and (2) a
8 significantly adverse or disproportionate impact on persons of a particular type
9 produced by the defendant's facially neutral acts or practices." *City of*
10 *Middletown*, 294 F.3d at 52–53 ; *see also Tsombanidis*, 352 F.3d at 575. Once a
11 plaintiff has presented a prima facie case of disparate impact, "the burden shifts
12 to the defendant to 'prove that its actions furthered, in theory and in practice, a
13 legitimate, bona fide governmental interest *and* that no alternative would serve
14 that interest with less discriminatory effect.'" *Tsombanidis*, 352 F.3d at 575
15 (quoting *Huntington Branch*, 844 F.2d at 936) (emphasis added).

16 In 2013, however, before the district court's decision was rendered, the
17 Secretary of Housing and Urban Development ("HUD") issued a regulation
18 interpreting disparate-impact liability under the FHA. *See* Implementation of the

1 Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15,
2 2013) (codified at 24 C.F.R. Part 100). In addition to affirming disparate impact
3 liability as an element of the FHA, it outlined the "[b]urdens of proof in
4 discriminatory effects cases." 24 C.F.R. § 100.500(c). Under this framework, the
5 first two steps are substantially the same as in our case law: First, a plaintiff or
6 charging party must come forward with a prima facie case; and second, the
7 defendant or respondent may rebut the prima facie case by proving that the
8 "challenged practice is necessary to achieve one or more substantial, legitimate,
9 nondiscriminatory interests of the respondent or defendant." 24 C.F.R. §
10 100.500(c)(1)–(2). However, unlike *Huntington Branch* and its progeny, if the
11 defendant meets its burden, the burden of proof shifts back to the *plaintiff* to
12 show that the "substantial, legitimate, nondiscriminatory interests supporting
13 the challenged practice could be served by another practice that has a less
14 discriminatory effect." 24 C.F.R. § 100.500(c)(3).

15 Instead of following HUD's framework, despite being well aware of
16 HUD's regulation, *see* Special App'x at 168, the district court applied our
17 traditional test. The district court concluded that Plaintiffs had established a
18 prima facie case of disparate impact, finding that Garden City's rejection of R-M

1 zoning in favor of R-T zoning had a significant disparate impact on minorities
2 because it “largely eliminated the potential for the type of housing that
3 minorities were disproportionately likely to need – namely, affordable rental
4 units.” Special App’x at 170. But the district court also found that R-T zoning
5 advanced certain legitimate, bona fide governmental interests, noting that R-T
6 zoning (1) would have reduced traffic and (2) would have provided for the
7 construction of townhouses. But the district court held that Garden City “did not
8 establish the absence of a less discriminatory alternative.” Special App’x at 174.
9 Plaintiffs argue that, as a practical matter, the district court did place the burden
10 on Plaintiffs to show that R-M zoning was a less discriminatory alternative. *See,*
11 *e.g.,* Special App’x at 175 (“Plaintiffs have established, by a preponderance of the
12 evidence . . . [that] less discriminatory alternatives to the current zoning
13 ordinance existed.”). We are unpersuaded. It is clear that the district court shifted
14 the burden to Defendants to prove both a legitimate, bona fide governmental
15 interest *and* “that no alternative would serve . . . with less discriminatory effect.”
16 Special App’x at 174. The district court may have found Defendants’ reasons
17 unpersuasive, but that does not mean it placed the burden of proof on Plaintiffs
18 in accordance with 24 C.F.R. § 100.500(c)(3).

1 For this reason, Garden City argues that the district court erred in
2 requiring it to prove the absence of a less discriminatory alternative. Plaintiffs
3 argue that Garden City’s argument to this effect is waived and, in any case,
4 contrary to Circuit precedent. But appellate courts are “bound to consider any
5 change, either in fact or in law, which has supervened since the [district court’s]
6 judgment was entered.” *Patterson v. Alabama*, 294 U.S. 600, 607 (1935); *see also*
7 *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (“When an issue or claim is
8 properly before the court, the court is not limited to the particular legal theories
9 advanced by the parties, but rather retains the independent power to identify
10 and apply the proper construction of governing law.”). Here, we exercise our
11 prudential discretion to review a potentially waived argument. *See Bogle-Assegai*,
12 470 F.3d at 504.

13 Section 808(a) of the FHA gives the Secretary of HUD the “authority and
14 responsibility for administering [the] Act,” 42 U.S.C. § 3608(a), and confers upon
15 the Secretary authority to “make rules (including rules for the collection,
16 maintenance, and analysis of appropriate data) to carry out this subchapter.” 42
17 U.S.C. § 3614a. Because Congress afforded HUD the authority to implement the
18 FHA, under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467

1 U.S. 837 (1984), this Court must defer to the agency’s reasonable interpretation
2 unless “the intent of Congress is clear.” 467 U.S. at 842–43. The Supreme Court
3 implicitly adopted HUD’s approach, *see Inclusive Communities Project*, 135 S. Ct. at
4 2518 (stating that before rejecting a business or public interest, “a court must
5 determine that a plaintiff has shown that there is ‘an available alternative . . .
6 practice that has less disparate impact and serves the [entity’s] legitimate needs’”
7 (alteration in original) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009))), and
8 while the approaches of our sister circuits have varied in the past, many had
9 already placed the burden of proving a less discriminatory alternative on the
10 plaintiff or have now since deferred to HUD’s interpretation, *see Mt. Holly*
11 *Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 382 (3d Cir.
12 2011) (placing the burden on plaintiffs to “demonstrate that there is a less
13 discriminatory way to advance the defendant’s legitimate interest”); *Gallagher v.*
14 *Magner*, 619 F.3d 823, 834 (8th Cir. 2010) (same); *Groach Assocs. #33, L.P. v.*
15 *Louisville/Jefferson Cty. Metro Human Relations Comm’n*, 508 F.3d 366, 374 (6th Cir.
16 2007) (same); *see also Inclusive Communities Project, Inc. v. Tex. Dep’t of Hous. &*
17 *Cnty. Affairs*, 747 F.3d 275, 282 (5th Cir. 2014) (adopting HUD’s interpretation),
18 *aff’d and remanded* 135 S. Ct. at 2507.

1 While the district court did not address this issue below, the question of
2 whether one of our decisions has been abrogated by an agency regulation that
3 reflects the agency’s interpretation of an ambiguous statutory provision is a
4 question of law that we can, and should, answer ourselves. *See Nat’l Cable &*
5 *Telecomms. Ass’n v. Brand X Internet Servs. (Brand X)*, 545 U.S. 967, 986–88 (2005)
6 (considering de novo whether a previous Ninth Circuit decision was abrogated
7 by a subsequent agency regulation). Our earlier burden-shifting approach
8 applied in *Huntington Branch* and *Tsombanidis* may only survive if we previously
9 held that our “construction follows from the unambiguous terms of the statute
10 and thus leaves no room for agency discretion.” *Brand X*, 545 U.S. at 982. Because
11 we did not hold that the statute was unambiguous, *see Tsombanidis*, 352 F.3d at
12 575; *Huntington Branch*, 844 F.2d at 936, we are obliged to defer to the more recent
13 HUD regulations. Thus, we remand to the district court for consideration of
14 whether Plaintiffs satisfied their burden of proving an available alternative
15 practice that has less disparate impact and serves Defendants’ legitimate
16 nondiscriminatory interests.

17 At the same time, we are mindful of the Supreme Court’s admonishment
18 that all too often “zoning laws and other housing restrictions . . . function

1 unfairly to exclude minorities from certain neighborhoods without any sufficient
2 justification” and that “[s]uits targeting such practices reside at the heartland of
3 disparate-impact liability.” *Inclusive Communities Project*, 135 S. Ct. at 2521–22.
4 For this reason, we believe the district court’s extensive analysis of Plaintiffs’
5 prima facie case merits discussion.

6 First, as the Supreme Court has made clear this year, zoning laws or
7 ordinances prohibiting construction of multi-family dwellings have been found
8 in violation of the FHA. *Id.* at 2522 (citing *Huntington Branch*, 488 U.S. at 16–18
9 and *United States v. City of Black Jack*, 508 F.2d 1179, 1182–88 (8th Cir. 1974)
10 (invalidating ordinance prohibiting construction of new multi-family
11 dwellings)). Second, we find no merit in Defendants’ argument that the district
12 court improperly allowed Plaintiffs to challenge a single, isolated zoning
13 “decision,” rather than a general zoning “policy.” Garden City argues that
14 disparate impact liability does not exist when a plaintiff challenges a defendant’s
15 one-off decision. Rather than challenging the Village’s zoning ordinances in
16 general, the Plaintiffs complain about a decision affecting one piece of property.
17 We decline Defendants’ invitation to draw a line defining what constitutes a
18 “one-off” zoning “decision” as opposed to a zoning “policy.” Even assuming this

1 distinction is relevant, given the many months of hearings and meetings, *see*
2 Special App'x at 127–30, with charges that R-M zoning would harm traffic
3 conditions and increase school overcrowding, and that the change required
4 passage of a local law, we are confident this case falls well within a classification
5 of a “general policy.”

6 Additionally, in the Title VII and ADEA contexts, courts have permitted
7 “cases dealing with disparate impact challenges to single decisions of
8 employers.” *Council 31, Am. Fed’n of State, Cty. & Mun. Emps., AFL-CIO v. Ward*,
9 978 F.2d 373, 377 (7th Cir. 1992); *see also Nolting v. Yellow Freight Sys., Inc.*, 799
10 F.2d 1192, 1194 (8th Cir. 1986) (considering a disparate impact case under ADEA
11 based on a decision to use performance ratings for single layoff decision).
12 Indeed, other circuits have described the distinction between a single isolated
13 decision and a practice as “analytically unmanageable – almost any repeated
14 course of conduct can be traced back to a single decision.” *Council 31*, 978 F.2d at
15 377.

16 Moreover, Plaintiffs also note that there are two methods of proving the
17 discriminatory effect of a zoning ordinance: (1) “adverse impact on a particular
18 minority group,” and (2) “harm to the community generally by the perpetuation

1 of segregation.” *Huntington Branch*, 844 F.2d at 937 (recognizing both forms of
2 disparate impact under FHA). Here, the district court concluded that “the R-T
3 zone’s restriction on the development of multi-family housing perpetuates
4 segregation generally because it decreases the availability of housing to
5 minorities in a municipality where minorities constitute approximately only 4.1%
6 of the overall population . . . and only 2.6% of the population living in
7 households.” Special App’x at 171.

8 For these reasons, we agree with the district court’s assessment that
9 plaintiffs more than established a prima facie case. We also agree that
10 Defendants identified legitimate, bona fide governmental interests, such as
11 increased traffic and strain on public schools. But for the reasons stated above,
12 we remand for consideration of whether Plaintiffs met their burden under
13 § 100.500(c)(3).

14 **V. Cross-Appeal**

15 The final issue in this case is the cross-appeal, in which Plaintiffs challenge
16 the district court’s dismissal of Nassau County at the summary judgment stage.
17 We review orders granting summary judgment de novo, focusing on whether the
18 district court properly concluded that there was no genuine dispute as to any

1 material fact and the moving party was entitled to judgment as a matter of law.
2 *See Dalberth v. Xerox Corp.*, 766 F.3d 172, 182 (2d Cir. 2014). We resolve all
3 ambiguities and draw all reasonable inferences in favor of the nonmoving party.
4 *See Nationwide Life Ins. Co. v. Bankers Leasing Ass’n, Inc.*, 182 F.3d 157, 160 (2d Cir.
5 1999). Summary judgment is appropriate “[w]here the record taken as a whole
6 could not lead a rational trier of fact to find for the non-moving party.”
7 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

8 **A. Nassau County’s Approval of Garden City’s Discrimination**

9 The district court dismissed Plaintiffs’ disparate treatment claims against
10 Nassau County at the summary judgment stage, concluding that they failed to
11 raise factual issues as to whether the County bore a sufficient causal relationship
12 to Garden City’s discriminatory shift in zoning. The district court concluded that
13 the County lacked legal power over the chosen zoning designation for the Social
14 Services Site. It further refused to hold the County liable for failing to combat,
15 either formally or informally, Garden City’s discrimination. The district court
16 dismissed the disparate impact and Equal Protection claims against the County
17 based on the rezoning on similar logic.

1 Plaintiffs contend that the district court erred in concluding that the
2 County did not bear responsibility for the shift to R-T zoning, arguing that they
3 raised genuine disputes as to material fact issues on this point. Plaintiffs'
4 argument has two prongs: (1) the County knew that opposition to R-M zoning
5 was racially animated, and (2) the County had legal responsibility for R-T
6 zoning.

7 As to the first issue, we agree with the district court that, at the summary
8 judgment stage, Plaintiffs raised a genuine issue of material fact as to whether
9 County officials understood the opposition to R-M zoning as race-based.

10 However, we also agree with the district court that Plaintiffs have not raised a
11 genuine issue of material fact on the second issue – whether the County had legal
12 responsibility for Garden City's adoption of R-T zoning. We do not find either of
13 Plaintiffs' arguments on this second point persuasive.

14 **1. Section 239-m**

15 First, Plaintiffs argue that under New York law, the Nassau County
16 Planning Commission was required to review Garden City's proposed R-T
17 zoning ordinance before it was enacted, and to "recommend approval,
18 modification, or disapproval, of the proposed action, or report that the proposed

1 action has no significant county-wide or inter-community impact.” N.Y. Gen.
2 Mun. Law § 239-m(4)(a). This law gives the Commission “an advisory veto
3 which the town or village legislative body can override by a vote of a majority
4 plus one of such body’s total membership.” *We’re Assocs. Co. v. Bear*, 317 N.Y.S.2d
5 59, 60 (N.Y. App. Div. 1970) (“[S]ection 239-m does not give the Planning
6 Commission an absolute veto power”). Here, rather than objecting to R-T
7 zoning under Section 239-m, the Commission issued a report approving the
8 zoning.

9 Plaintiffs argue that despite knowing the law to be discriminatory, the
10 County did not exercise its advisory power to disapprove the zoning law.
11 Plaintiffs argue that the County’s failure to formally disapprove a shift it knew
12 was discriminatory implicates the County in Garden City’s discrimination. This
13 Court has previously held that, in the context of discrimination claims, “[l]iability
14 may be premised not only on action but on a refusal to act.” *United States v. City*
15 *of Yonkers (Yonkers II)*, 96 F.3d 600, 613 (2d Cir. 1996). In situations where an
16 official “ha[d] authority to intervene, and he knew about the discriminatory
17 practices . . . then he could be liable.” *Comer v. Cisneros*, 37 F.3d 775, 804 (2d Cir.

1 1994). However, Plaintiffs' argument that Nassau County could have prevented
2 Garden City's discriminatory zoning is premised on speculation.

3 Plaintiffs concede that Garden City could have adopted R-T zoning over
4 the County's veto with a majority plus one vote. And in this case, Garden City's
5 Board of Trustees adopted R-T zoning *unanimously*. This unanimous vote would
6 seem to obviate any causal role for Nassau County in the adoption of R-T zoning.
7 Since Garden City could have overridden any County disapproval, any advisory
8 disapproval by the County would likely have been ineffective.

9 Generally, "speculation by the party resisting the motion will not defeat
10 summary judgment." *Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir. 1996).

11 Here, Plaintiffs argue, without any evidence of past practice, that the Nassau
12 County Planning Commission could use the advisory veto contained in Section
13 239-m as a bully pulpit for the County to shame towns and villages in danger of
14 acquiescing to the race-based animus of their citizens. As an initial matter,
15 Plaintiffs provide no evidence that the County has previously exercised such
16 authority. Indeed, Nassau County points to evidence that the Planning
17 Commission's role was to act as a harmonizer between communities and not as a
18 super-agency tasked with keeping discriminating localities in line. App'x at 2833

1 ("The purpose of the Commission's review is to provide input on actions that
2 may have an impact across municipal boundaries, or that may be of area-wide
3 significance and therefore require coordination among municipalities."); *cf.*
4 *Yonkers II*, 96 F.3d at 618 (finding that the applicable statute placed a
5 "responsibility" on state officials "to take steps to achieve desegregation").

6 Moreover, even if disapproving potentially discriminatory actions by
7 municipalities does fall within the ambit of the Commission's authority, the
8 County's causal role in the ultimate decision is tenuous. In contrast to previous
9 cases, there is no clear power of override, nor is there evidence that the limited
10 power of non-binding disapproval carries any weight. *Cf. Yonkers II*, 96 F.3d at
11 618 ("[W]here the Commissioner and the Board of Regents find that racial
12 imbalance in the schools of a given community has made the schools
13 educationally inadequate, the Commissioner has *virtually unreviewable authority*
14 under the Education Law to order student transfers in order to eliminate the
15 imbalance." (emphasis added)). To be sure, an advisory veto constitutes some
16 power to intervene, and on a stronger evidentiary showing of past practice, such
17 failure to utilize the power of disapproval may provide a basis for liability.

1 However, on the present record, we agree with the district court that Plaintiffs'
2 claim against Nassau County is premised on speculation.

3 **2. Override for Public Use**

4 As an additional argument for the County's authority to override Garden
5 City's zoning, Plaintiffs argue that on the facts of this case, the County had the
6 obligation to exercise its authority to override local zoning control. Plaintiffs
7 concede that New York law vests authority over zoning with local governments.
8 However, Plaintiffs rely on a line of cases in which New York courts have
9 permitted counties to override town zoning ordinances for the county's own
10 land use where the county's interest in the non-conforming use is greater than
11 the town's interest in enforcing its land use regulations. *See Matter of Cty. of*
12 *Monroe (City of Rochester)*, 530 N.E.2d 202, 204–05 (N.Y. 1988). Plaintiffs contend
13 that Nassau County should have employed this limited authority to override
14 local zoning decisions here, in light of its knowledge of the R-T rezoning's
15 discriminatory basis. We disagree.

16 The New York Court of Appeals has recognized that counties may ignore
17 local zoning when necessary for public use. In determining when such an
18 override is permitted, New York courts balance a number of factors including

1 “the nature and scope of the instrumentality seeking immunity, the kind of
2 function or land use involved, the extent of the public interest to be served
3 thereby, the effect local land use regulation would have upon the enterprise
4 concerned and the impact upon legitimate local interests.” *Id.* at 204 (internal
5 quotation marks omitted). For example, in *County of Monroe*, Monroe County’s
6 interest in the expansion of an airport outweighed the City of Rochester’s
7 interests in land use regulation. *Id.* at 205 (“The airport terminal, parking
8 facilities, and air freight facility are embraced within the immunity from the
9 requirements of the City’s land use laws because they constitute accessory uses
10 customarily incidental to an airport operation.”). The New York Court of
11 Appeals has applied this same balancing test in cases where private actors
12 performing public functions on government land seek an exemption from local
13 zoning laws. See *Matter of Crown Commc’n N.Y., Inc. v. Dep’t of Transp. of N.Y.*, 824
14 N.E.2d 934, 935–36 (N.Y. 2005). In *Crown*, the New York Court of Appeals
15 concluded that “the installation of private antennae on two state-owned
16 telecommunications towers [was] exempt from local zoning regulation” because
17 such private antennae served a number of significant public interests. *Id.* at 935,
18 938. The court concluded that “such equipment is therefore embraced within the

1 immunity already afforded to the state-owned towers pursuant to the balancing
2 test.” *Id.* at 940; *see also Westhab, Inc. v. Vill. of Elmsford*, 574 N.Y.S.2d 888, 891
3 (N.Y. App. Div. 1991) (finding under balancing test that homeless shelter, as
4 tenant on land leased from County, was exempt from local zoning).

5 Based on these cases, Plaintiffs argue that Nassau County had an
6 obligation to override Garden City’s R-T zoning on their behalf, since they
7 proposed to buy the Site and build affordable housing. Plaintiffs contend that
8 there is a strong public interest in building affordable housing and that the
9 County should have taken steps to protect developers who planned to further
10 this interest by explicitly adopting resolutions overriding Garden City’s zoning.
11 However, there is a crucial difference between the cases cited and the present
12 one. As the district court recognized, these cases are distinguishable because they
13 did not involve situations such as this, where a private developer is merely
14 purchasing land from the county to pursue its own endeavor. Rather, the cases
15 cited all involve exemptions for uses where the state or county continued to own
16 the land during the public use. Although private entities were not precluded
17 from joining in the state or a county’s immunity against local zoning, in these
18 cases, the private party was still a tenant on government-owned land. In this

1 case, even if the County were to achieve an override of Garden City's zoning for
2 itself, the Site would eventually be sold to a private developer. Although New
3 York cases provide for zoning immunity by private actors when working with
4 the government on state or county land, they say nothing about whether a state
5 or county may transfer this immunity to a private developer as part of a property
6 sale. Indeed, Plaintiffs have not cited, and we are not aware of, New York cases
7 applying the public interest balancing test in situations where a private
8 developer is purchasing land from a county to pursue its own project.⁷ Absent
9 further guidance from the New York Court of Appeals, we decline to extend
10 these cases to find that Nassau County had the legal authority and responsibility
11 to override Garden City's zoning on behalf of a potential private buyer.

12 **B. Nassau County's Steering of Affordable Housing**

13 In addition to their claims relating specifically to the R-T rezoning,
14 Plaintiffs also bring claims against Nassau County more generally, accusing the
15 County of steering affordable housing to its low-income, majority-minority

⁷ We note that as part of their initial protest proposal, Plaintiffs proposed a lease agreement with Nassau County, which could have potentially created a public-private partnership on land that would still be owned by the County. However, Plaintiffs' directly competitive bid to purchase the Social Services property, not their lease proposal, is the basis for their standing in this case. Assuming Plaintiffs' bid would have been successful, they would have owned the property, not Nassau County.

1 communities. Plaintiffs claim that Nassau County has an explicit policy of
2 steering affordable housing to low-income, majority-minority communities. On
3 this point, they note statements in documents submitted to HUD between 1995
4 and 2010 in which Nassau County states, “Nassau County currently targets its
5 comprehensive community development efforts in a number of lower income
6 and minority areas such as Roosevelt, Inwood, Hempstead Village, New Cassel,
7 and Freeport.” *See, e.g.*, App’x at 2575, 2616, 2651, 2854. In other portions of these
8 filings, Nassau County states “[f]or three decades, Nassau County has provided .
9 . . funds to local governments and non-profits to acquire sites exclusively in low
10 and moderate-income census tracts.” App’x at 2598. Further Plaintiffs’ expert
11 testified that County-subsidized affordable housing aimed at families and first-
12 time buyers is steered toward majority-minority communities, while affordable
13 housing for the elderly is placed in majority-white communities.

14 The district court considered these allegations under 42 U.S.C. § 3608
15 (Section 808 of the FHA), and concluded that Section 808 does not provide a
16 private right of action. Plaintiffs do not challenge the district court’s conclusion
17 with respect to Section 808 on appeal. However, they argue that the district court
18 failed to consider the relevance of these same factual allegations to Plaintiffs’

1 claims under 42 U.S.C. § 3604(a) (Section 804(a) of the FHA) and Title VI of the
2 Civil Rights Act of 1964, 42 U.S.C. § 2000d. As discussed previously, Section
3 804(a) of the FHA provides for discriminatory intent and disparate impact
4 liability under the FHA. Title VI provides for discriminatory intent liability
5 against entities that receive federal funding.

6 The County does not contest that Plaintiffs raised Section 804(a) and Title
7 VI claims relating to Nassau County's steering of affordable housing, or that the
8 district court failed to consider these allegations in ruling on these claims. Thus,
9 rather than pass on these factually-intensive claims for the first time on appeal,
10 we follow our typical practice, and remand for the district court to address these
11 claims. *See Dardana Ltd. v. Yuganskneftegaz*, 317 F.3d 202, 208 (2d Cir. 2003) ("It is
12 this Court's usual practice to allow the district court to address arguments in the
13 first instance.").

14 CONCLUSION

15 In conclusion, we hold as follows:

- 16 (1) Plaintiffs have Article III standing. Due to the inherent uncertainties in
17 the housing market, plaintiffs filing claims under the FHA need not
18 show with absolute certainty that their project would succeed absent

1 the challenged action. We find no clear error in the district court's
2 findings to this effect, and thus are satisfied that Plaintiffs have met the
3 elements of standing. Therefore, we **AFFIRM** the relevant portions of
4 the judgment of the district court insofar as it found Plaintiffs have
5 standing.

6 (2) Plaintiffs' claims are also not moot. Under the voluntary cessation
7 doctrine, a party may not evade judicial review by temporarily altering
8 its behavior. Under this doctrine, Defendants did not meet their
9 stringent and formidable burden of showing that it is absolutely clear
10 that it will not permit the challenged conduct to resume. Thus, we
11 **AFFIRM** the relevant portions of the judgment of the district court
12 insofar as it found Plaintiffs' claims are not moot.

13 (3) We further hold that the district court did not commit clear error in
14 finding that Garden City's decision to abandon R-M zoning in favor of
15 R-T zoning was made with discriminatory intent, and that Defendants
16 failed to demonstrate they would have made the same decision absent
17 discriminatory considerations. Thus, we **AFFIRM** the judgment of the
18 district court insofar as it found Plaintiffs had established liability

1 under 42 U.S.C. § 3604(a) of the FHA based on a theory of disparate
2 treatment.

3 (4) We further hold that 24 C.F.R. § 100.500(c) abrogated our prior
4 precedent as to the burden-shifting framework of proving a disparate
5 impact claim. Accordingly, we **VACATE** the district court's judgment
6 insofar as it found liability under a disparate impact theory, and
7 **REMAND** for further proceedings to determine, in accordance with
8 § 100.500(c)(3), whether plaintiffs have met their burden of proving that
9 the "substantial legitimate, nondiscriminatory interests supporting the
10 challenged practice could be served by another practice that has a less
11 discriminatory effect."

12 (5) Finally, we hold that the district court properly dismissed Plaintiffs'
13 disparate treatment claims against Nassau County at the summary
14 judgment stage. While we agree that Plaintiffs raised a genuine issue of
15 material fact as to whether County officials understood the opposition
16 to R-M zoning was race-based, we agree with the district court that
17 Plaintiffs have not raised a genuine issue of material fact as to whether
18 the County had legal responsibility for Garden City's adoption of R-T

1 zoning. Therefore, we **AFFIRM** the district court's judgment dismissing
2 Plaintiffs' disparate treatment claims against Nassau County at the
3 summary judgment stage. But with respect to Plaintiffs' claims under
4 Section 804(a) and Title VI relating to Nassau County's "steering" of
5 affordable housing, we **REMAND** for the district court to address these
6 claims.

7 For the foregoing reasons, we **AFFIRM** the judgment of the district court in part,
8 **VACATE** in part, and **REMAND** for further proceedings in accordance with this
9 opinion.