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91-7045

To be argued by
FAY LEOUSSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SOUTHSIDE FAIR HOUSING COMMITTEE, LUCY RODRIGUEZ, MIGUEL DE LOS SANTOS, ISRAEL ROSARIO, CONRADO DIAZ, NORMA DIAZ TEJADA, BOLIVAR PASCUAL, CARMELO GONZALEZ, FRANCISCO PEGUERO, LUZ BAEZ, DIANA DAWSON, BLANCA RIVERA, IRMA MONTERO, CHARLES L. MERCADO, MARITZA ANDUJAR, REYNA GONZALEZ, IRIS PENA, LEROY BECKLES and GUSTAVO MUESES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

-against-

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Defendants-Appellees.

MUNICIPAL APPELLEES' BRIEF

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February 11, 1991

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Defendants-Appellees.

MUNICIPAL APPELLEES' BRIEF

PRELIMINARY STATEMENT

This appeal is taken from an order and a judgment of the District Court for the Eastern District of New York (NICKERSON, J.), both dated November 30, 1990, in which the Court denied plaintiffs' motion for preliminary injunction and dismissed plaintiffs' complaint, except the claim pertaining to Brooklyn Villas which has

been tentatively settled (A813-16).[1] Plaintiffs are an ad hoc organization of Hispanic housing activists and Hispanic and African-American individuals residing in Williamsburg, which is located in Brooklyn, New York.

Plaintiffs claim that the municipal-defendants-appellees' ("municipal appellees") sale to a Satmar Hasidic Jewish group, also residents of Williamsburg, for fair market value of various parcels of urban renewal land designated for institutional uses violated the First Amendment's prohibition against the government's establishment of religion, denied them of due process and equal protection of the laws as guaranteed by the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1982 and 1983, as well as 42 U.S.C. §§ 2000d et seq. (Title VI of the Civil Rights Act of 1964) and 42 U.S.C. §§ 3601 et seq. (Title VIII of the Civil Rights Act -- the Fair Housing Act).

After a hearing on the merits, the District Court made findings of fact and ruled that "plaintiffs have not met their burden of showing that the City invidiously discriminated against Hispanics and in favor of the Hasidim" and that municipal appellees' actions did not violate the establishment clause (A809; A789-95).

Plaintiffs had also asserted a pendent state claim upon which the District Court did not rule, presumably because it dismissed all the federal claims, except those pertaining to Brooklyn Villas.

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[1] Numbers in parentheses preceded by the letter "A" refer to pages in the Joint Appendix.

QUESTIONS PRESENTED

1. Since the sales at fair market value of the institutional sites by the City to the Academy for development as a synagogue, a yeshiva and faculty housing, were made for the legitimate, secular purpose of urban renewal and no minority organization ever proposed to purchase those sites for alternative uses, does the sale violate the establishment clause of the First Amendment?

2. In light of the facts that the sale at fair market value of Site 4 and certain other sites (1) were made in accordance with routine procedures for disposition of urban renewal property, (2) were repeatedly reviewed by the community and various government entities, (3) no other minority organization ever offered to purchase those sites for alternative use, and (4) the government took action to meet the needs of all ethnic groups, were the sales to the Satmar Hasidic sect discriminatory in violation of the equal protection clause of the Fourteenth Amendment?

PROCEDURAL HISTORY

In December 1989, after approximately fifteen years of planning, negotiation, and earlier repeated community and government reviews, ten years after the consummated sale at fair market value of Site 4C to Congregation Yetev Lev D'Satmar, ten years after the completion of the public review of the dispositions of Sites 4A and 4B to the Academy, two years after the final public review of the sales at fair market value of Sites 4A and 4B to the Academy, more than ten years after the sales at fair market value of sites 6 and 10 to the Academy and a non-Satmar Hasidic sect, respectively, and a year

after the sale at public auction of site 12, plaintiffs asserted this action as a class action, although they never obtained certification as such, to rescind the sales of Sites 4A, 4B, 4C and 12 (A11, A23).[2]

Plaintiffs allege that defendants have acted alone and in concert since the early 1960's to transform the area of Williamsburg, known as Williamsburg Urban Renewal Area I ("WURA I"), "into a white Hasidic Jewish enclave" (A1-2). They claim that (A8):

> The defendants have acted to accomplish this transformation through a series of public and private actions, including municipal clearance of much of the pre-existing housing and non-housing facilities in the Area; through the subsequent construction and tenanting of thousands of subsidized and non-subsidized housing units marketed pursuant to illegal racial and religious quotas; and through the sale of large amounts of City owned land in the Area for construction of facilities used or to be used exclusively for religious purposes and exclusively by members of the white Hasidic community.

According to plaintiffs, approximately 175 new market rate housing units, built by private developers in the early and late 1980's on two urban renewal parcels which had been sold at fair market value allegedly to private developers of the Satmar Hasidic faith, are occupied solely by Hasidic Jews ("Paz-Ross" and "Bedford Rehab"

---

[2] At trial, plaintiffs limited their requested relief to Site 4 (A521-22).

condominiums) (A15-17).[3] Plaintiffs do not allege that any government funds subsidized those units or that any of the appellees had any connection to the marketing of those units or that plaintiffs attempted to purchase units but were turned away. (A15-17).[4]

Plaintiffs then recite that three institutional sites (6, 10 and 12) were sold to the Academy on unspecified dates, for use as yeshivas (A24-25). Plaintiffs claim these parcels were not sold "through a public sale or auction", but were sold "through a privately negotiated agreement arranged by HPD" (A25). Plaintiffs go on to assert that "[f]undamental to the effort to convert the Area into a white Hasidic enclave" is the sale of Site 4 to the Satmar Hasidic sect for use as a school, faculty housing and a synagogue (A8).

Plaintiffs further claim that during the late 1970's and 1980's, "in an effort to reach agreement on the disposition of the undeveloped parcels of land within WURA I," "representatives of the Hasidic community' proposed to the municipal [appellees] plans for

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[3] There is nothing in the Record to support plaintiffs' claim that these residential sites were marketed by "UJO affiliates" as they state as a fact in their brief (Pl.-App. Br. at 11). Further, they do not and can not claim that either municipal appellees or the Academy had anything to do with the financing or marketing of those 175 units, which amount to only a small fraction of the approximately 2500 dwelling units in WURA I.

[4] Plaintiffs also discuss in their complaint the urban renewal parcels upon which the Brooklyn Villas Development is currently being built (A21-A24), but that dispute has been tentatively settled, is no longer part of this case, and was not considered by the District Court (A500, A813).

creation of a second urban renewal area in the predominantly Latino neighborhood immediately north of WURA I" (A18-19). Plaintiffs claim that "other" community groups opposed the creation of the new urban renewal area (A19). Plaintiffs go on to claim that the Cross-Subsidy Agreement between the City and representatives of the Hispanic and Jewish communities which was to enable sale money from the market rate purchase of sites in WURA I to be channelled directly to rehabilitation and construction of low income units in the newly-created Williamsburg Urban Renewal Area II ("WURA II") as opposed to going into the City's general treasury, was the result of "secret meetings" and had as a purpose to segregate Hispanics into WURA II (A18-21).

Plaintiffs claim that municipal appellees' actions have transformed a once "racially and religiously mixed neighborhood" into one that is "increasingly and substantially segregated on racial and religious grounds" (A8).

Plaintiffs then assert five causes of action. The first is that all of municipal appellees' actions taken with respect to the Williamsburg area "have the purpose and effect of establishing the South Williamsburg Area as a religiously based Hasidic enclave" in violation of the First and Fourteenth Amendments, 42 U.S.C. § 1983 and Article 1 § 3 of the New York State Constitution (A27). Based on the same acts, the second claim asserts violations of 42 U.S.C. §§ 1981, 1982, and 1983, the Federal Fair Housing Act (Title VIII), 42 U.S.C. §§ 3601, et seq., Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d, et seq., the Thirteenth and Fourteenth Amendments

to the U.S. Constitution and Article 1 § 11 of the N.Y.S. Constitution (A27-28).

The third cause of action alleges that the sales to the Hasidic Jews of urban renewal sites 4A, 4B, 4C, 6, 10, and 12, designated for institutional uses, violate the "federal and state law prohibiting racial and religious limitations on the use and occupancy of urban renewal parcels" (A28). The fourth claim challenges the alleged "policies, practices and actions of the Municipal Defendants in sanctioning, approving and executing the Cross Subsidy Agreement . . ., in giving control over municipal funds to religious organizations and sanctioning the division of land along racial and religious lines" as violative of the First and Fourteenth Amendments to the U.S. Constitution, 42 U.S.C. §§ 1981, 1982, and 1983, 42 U.S.C. §§ 3601 et seq., 42 U.S.C. §§ 2000d et seq., and the New York State Constitution (A28).

The fifth claim is a pendent state claim alleging that "the transferring and approval of transfers of Sites 4A, 4B and 4C to defendant UTA" violates the New York City Charter and N.Y. General Municipal Law §§ 500, et seq." (A29). Finally, the sixth claim relates to Brooklyn Villas, which is now tentatively settled (A29; A500; A813).[5]

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[5] On this appeal, plaintiffs have abandoned their claims under Title VIII of the Civil Rights Act of 1964 (Fair Housing Act), Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981, 1982 and 1983 and their state claims as they have not proffered in their brief any arguments in support of those claims.

Plaintiffs demand a "cancel[lation] of the sale and transfer of urban renewal Sites 4A, 4B, 4C and 12 in WURA I" and an order reconveying those parcels to municipal appellees (A29).[6] They also demand an order "[d]irecting Municipal Defendants to take such affirmative steps as may be necessary to remedy the effects of their discriminatory practices" and requiring District Court approval prior to any disposition or development of the above-mentioned sites (A29-30). Plaintiffs also demand that "those provisions of the Cross Subsidy Agreement which permit private religious organizations to control and dictate uses of public funds" must be voided (A29).

Contemporaneously with the filing of their complaint, plaintiffs moved for a preliminary injunction enjoining any further construction of the school, underway since 1988. The District Court promptly held a hearing on the preliminary injunction, on August 1, 2, 6 and 7, before defendants answered the complaint. In their post-hearing memoranda, the parties agreed that the Court should deem the evidence adduced a trial on the merits and decide the case accordingly. See Plaintiffs' Post-Trial Memorandum, dated August 20, 1990, at 9; Municipal Defendants' Post-Hearing Reply Memorandum, dated August 23, 1990, at 1-2; Defendant United Talmudic Academy, Torah V'Yirah, Inc.'s Memorandum of Law in Response to Plaintiff's Post-Trial Reply Memorandum, dated August 27, 1990, at 6.

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[6] At trial, plaintiffs narrowed their rescission request to site 4 (A521-22).

Municipal Appellees requested that the District Court deem the City's evidence at the hearing, together with their Pre- and Post-Hearing Memoranda as their substantive response to the factual allegations in the complaint. See Declaration of Thomas W. Bergdall, on behalf of Municipal Appellees, dated August 23, 1990; Municipal Appellees' Post-Hearing Reply Memo, supra, at 2 ftnt 2.

As will be fully set forth below in our statement of facts, our response controverts plaintiffs' unsupported allegations and demonstrates through documentary and oral evidence that the City -- acting through representative institutions and in the public forum -- has consistently acted to recognize the interests of both the Hispanic and Jewish communities in Williamsburg and to facilitate fair development to the benefit of both groups, and has favored neither. The evidence shows that the first buildings constructed on WURA I were 2,350 low and moderate income housing units, to replace the 1,400 deteriorated dwellings that existed prior to urban renewal. Those units were integrated when first built and continue to be integrated to date.

In disposing of the few institutional sites, which are the focus of this litigation, the City acted pursuant to legal, then-existing procedures for disposing of urban renewal sites. Those procedures included extensive advance consultation with community organizations, the local Community Board, the membership of which included both Hispanic and Hasidic members, and approval of the Board of Estimate after public hearing. As for Site 4, the central focus of this litigation, there is no significant dispute but that the

Academy was designated as the sponsor and developer for Site 4 in 1977, according to the proper designation procedures as they existed at that time. Two years later, pursuant to the City's Uniform Land Use Review Procedure ("ULURP"), the plans for the site were extensively reviewed by the community and public and approved without opposition by all entities that considered it. As the Academy's specific plans for the site changed, the Academy's designation was again reviewed through the ULURP process in 1984, as part of the Seventh Amended Plan for WURA I. The final terms of the sale of Site 4 at appraised fair market value were similarly approved by the City's Board of Estimate in July of 1988, with subsequent review and overwhelming approval by the local Community Board.

Significantly, at no time during the course of this public process were any significant objections to the disposition raised, nor were any alternative plans for institutional Site 4 or the other institutional sites ever offered either by plaintiffs or by any other minority group. It is further undisputed that similar sales have been made by the City to other religious institutions in urban renewal areas throughout the City.

The Williamsburg Cross-Subsidy Agreement of 1985, far from being the secretive and divisive document described by plaintiffs, was conceived by HPD as a means to achieve harmony and further integration between the Hispanic and Hasidic communities. The Cross-Subsidy Agreement has indeed generated over $3 million in

funding for 105 units of low income housing, already built or to be constructed in the community.

The municipal appellees also asked the District Court to deem certain defenses as part of their answer. Those are: (1) that plaintiffs' claims are barred by laches; (2) that plaintiffs lack standing to assert the claims set forth in the complaint; (3) that plaintiffs' pendent State law claims are barred by the statute of limitations; and (4) that the complaint further fails to state a cause of action upon which relief may be granted under both Titles VI and VIII of the Civil Rights Act of 1964. Bergdall Declaration, supra; Municipal Appellees' Post-Hearing Reply Memo, supra, at 2-3 ftnt. 2.

Defendant Academy moved to dismiss or for summary judgment on July 30, 1990. The municipal appellees' alternatively requested to join in defendant Academy's motion to dismiss. Bergdall Declaration, supra; Municipal Defendants' Reply Memo, supra, at 3 ftnt. 2.

The District Court subsequently consolidated the hearings on the preliminary injunction motion with the trial on the merits and ruled in defendants' favor (A776, A809).

At the hearing and in their post-hearing submissions, plaintiffs narrowed the scope of the charges stated in their complaint. First, although in their complaint plaintiffs allege that municipal appellees' plan to create a white Hasidic enclave dates back to the 1960's when the decision was made to create WURA I (A8; A13-14), plaintiffs, probably due to a paucity of evidence, modified their position to arguing that "since at least the mid 1970's City officials

have accepted and facilitated the increasing Hasidic dominance over the WURA I area" (Plaintiffs' Post-Trial Memo, supra, at 18).

Second, plaintiffs stated at the hearing that their claim "focussed" on only the six institutional urban renewal sites, 6, 10, 12 and 4A, 4B and 4C and centered upon sites 4A, 4B and 4C (A37-38). Indeed, plaintiffs' counsel conceded at the hearing that sites 4A, 4B and 4C are the only sites with respect to which they are asking for relief (A521-22).

The District Court heard testimony from a total of nine witnesses. A named plaintiff, Lucy Rodriguez, and Carmen Calderon, a leader of plaintiff Southside Fair Housing Committee (A211), testified with regard to their efforts to secure the development of low income housing and of the alleged harmful psychological effects upon them of the proposed synagogue on Site 4. In addition, testimony was offered by Catherine Herman, a housing activist and former employee of Brooklyn Catholic Charities, with regard to the history of low income housing efforts in Williamsburg, culminating in the Williamsburg Cross-Subsidy Agreement in 1985. Plaintiffs also called a Professor of Political Science, Jose R. Sanchez.

On behalf of the City, testimony was offered by Herbert Siegel, who has served as Director of Brooklyn Planning for the City's Department of Housing Preservation and Development ("HPD") for the past eleven years, describing the City's efforts to develop the Williamsburg Urban Renewal Area. Additional testimony was offered by Rubin Wolf, the former project manager for WURA I during the 1970's, with regard to the manner in which the Academy had been

designated as developer of Site 4. Former HPD Commissioner Anthony Gliedman finally testified with regard to the circumstances and purposes of the Williamsburg Cross-Subsidy Agreement, which was concluded in 1985.

For the defendant Academy, testimony was offered by Philip Klein, the Academy's Administrator, with regard to the history and commitments which had been made by that organization with regard to Site 4, and by Candace Damon, a former associate of the law firm of Webster & Sheffield, with regard to the negotiation of certain anti-discrimination covenants in the 1988 Land Disposition Agreements for Site 4.

In addition, all parties submitted a variety of documents. Below we state the facts, most of which are undisputed. We discuss the areas of contention last.

STATEMENT OF FACTS

1. History and ethnic composition of WURA I.

The 66-acre Williamsburg Urban Renewal Area I was created by the City of New York, in conjunction with the Federal and State governments in 1967, and consists of approximately nineteen city blocks in Williamsburg, Brooklyn, which are bounded by Division Avenue on the north, Bedford Avenue on the east, the Brooklyn-Queens Expressway on the south, and Kent Avenue on the west (A574; Mun.-App. Exhs. A & B). As in all urban renewal areas, the City used governmental funds to condemn and clear slum property with subsequent development guided by an approved Urban Renewal "Plan" which, in the case of WURA I, has now undergone a

total of seven approved amendments (A314-15; A761-62). The purpose of urban renewal laws is to give power to cities to clear blighted land and replace deteriorated structures with new ones. While subsidized housing has often been built on urban renewal land, no particular types of housing or other institutions are mandated and construction of religious institutions for religious use have been permitted (A242; A244-48).

It is undisputed that before clearance of WURA I, its population was substantially integrated, including both Hispanics and Orthodox and Hasidic Jews (A250-51; A417-18; A443; A777). While there is some dispute as to the precise boundaries of the larger community of which WURA I is a part, the evidence shows that the area lies at the crux of two larger ethnic communities in Williamsburg -- an Hispanic community which extends well to the north of the urban renewal area and a largely Jewish, Hasidic community which extends directly to the east of WURA I (A573; A317; A777).

Site 4 within WURA I -- an approximately single square block area bounded by Ross Street, Bedford Avenue, and two currently unmapped streets -- was, prior to its clearance for urban renewal, occupied by low-rise private housing, and some commercial establishments, at least two small synagogues, one of which, as well as a yeshiva and related facilities, was operated by the Academy, an organization which is affiliated with the Congregation Yetev Lev D'Satmar ("the Congregation") (A251-52; A397-98; A403-05; A651; A777). Like WURA I as a whole, the population on Site 4 was integrated prior to clearance, although Bedford Avenue was

predominantly populated by Orthodox and Hasidic Jews. (A250-51; A443; A777).

A principal purpose for the creation of WURA I was to replace the existing 1,458 units of deteriorated housing with 2,500 new apartments for low and middle income families (Mun.-App. Exh. A). That purpose was achieved early with the construction in the late 1960's and early 1970's of four large, high-rise subsidized housing developments, containing about 2,350 units -- Independence Houses (726 units); Taylor-Wythe Houses (532 units); Clemente Towers (532 units) and Bedford Gardens (581 units), which today constitute the overwhelming majority of all housing in WURA I (A13-14; A63-70; A778). 1,423 of those units are now occupied by white families and 935 are occupied by minorities (A13-14; A63-70; A778). Each of the housing developments has a large community center used for, among other things, weddings, other social gatherings, and community meetings (A465-66; A482-83).

During the 1980's, 173 additional units of market rate housing were privately developed with private funds, by someone other than the Academy or Congregation, on two sites in WURA I (Paz-Ross Houses and Bedford Rehabs) and were purchased almost exclusively by Hasidic and Orthodox Jews (A574; A53; A85; A88; A799). Thus, in WURA I, whites occupy a total of 1,596 housing units (63%) and minority members, 935 (37%).

To date, WURA I contains one Satmar Hasidic Yeshiva, a second yeshiva run by a different Satmar sect and no Satmar synagogues (A483-84; A574).

2. Procedures for Disposition of Urban Renewal Sites before 1980

The City's former Project Director for WURA I, Rubin Wolf, testified extensively with regard to the process by which sponsors and developers were selected for urban renewal area sites during the mid and late 1970's (A394-97). Although the City's Department of Housing Preservation and Development later adopted a more formal, competitive process for the selection of developers through written Requests for Proposals (A256-57; A538-39), this was not the case during the 1970's. Rather, developers were selected on a "sole source" basis as the result of and only after extensive consultation between HPD's staff and representatives of the local community including community groups, commercial tenants and, members of the local Community Board (A393-95). The Community Board is a group of private citizens who are appointed by the borough president in consultation with various City Council members (A237).

In order to make appropriate selections, HPD looked carefully for organizations that had strong ties to the community and had established "a track record" of successful developments of a like nature (A393-95). HPD also had a policy of favorably considering former urban renewal site occupants (A359; A395). Sales of urban renewal sites to religious institutions is a common practice (A245-47).

All designations were necessarily "tentative" and were reviewed by HPD's central office staff, by the local Community Board, and by the City Planning Commission. Final designations could only be made by the City's Board of Estimate after public hearing (A396-97; A399). In order to carry out this process, Mr. Wolf

testified that he met continuously with all affected groups in the community and with members of the Community Board approximately once a month (A393).

With respect to the available WURA I sites, Mr. Wolf testified that he had met preliminarily with, among others, both Hispanic and Jewish organizations (A393-94). He further discussed with Community Board #1 all proposed designations for sole source designations for development of urban renewal sites in WURA I (A399-400). The Community Board at that time had among its members both Hispanics and Hasidic Jews (A393-94).

3. Uniform Land Use Review Procedure ("ULURP") enacted in 1975 and its application to Dispositions of City-Owned Urban Renewal Property.

The purpose of ULURP is to guarantee the community a forum in which to express its views and to make non-binding recommendations with respect to certain specifically enumerated land use proposals, included among which are dispositions of city-owned property. Since its inception, that forum consisted of a three-tier public review process. 1975 N.Y.C. Charter § 197-c [hereinafter "N.Y.C. Ch.][7]. Initial land use proposals had to be submitted to the Department of City Planning. Upon the Department's determination that a ULURP application was complete, the proposed action was in turn forwarded for review to the Community Board in which the

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[7] References will be to sections of the then-effective 1975 Charter, since superseded by the 1989 Charter, which has substituted the City Council for the now-defunct Board of Estimate.

project or land is located. 1975 N.Y.C. Ch. § 197-c(b). The Community Board was entitled to review the "initial" action for up to 60 days, could have held a public hearing, and then could have issued its non-binding decision. 1975 N.Y.C. Ch. §§ 197-c(c)(d); 2800(d)(15). The City Planning Commission then reviewed the proposal, considered the Community Board's recommendation and, after a public hearing, adopted a resolution approving, modifying, or disapproving the proposal. 1975 N.Y.C. Ch. § 197-c(e). The Planning Commission's non-binding resolution was then forwarded to the Board of Estimate which had to hold a public hearing and then take final action on the proposal. The Board was empowered to approve, disapprove or modify the proposal. Ch. § 197-c(f) (See also A236-37).

However, since the Board of Estimate had "final authority respecting the use, development and improvement of City land" [1975 N.Y.C. Ch. § 67[4]), it could have rejected the Community Board or Planning Commission's suggestions or made further and different modifications. 1975 N.Y.C. Ch. § 197-c(f). Thus the N.Y. Appellate Division for the First and Second Departments held that the Board of Estimate had power to make minor or "substantial" project changes without resubmitting a proposal to ULURP. See Starburst v. City of New York, 125 AD2d 148, 156-57, 512 NYS2d 60 (1st Dept.), mot for lv to app. den., 70 NY2d 605, 519 NYS2d 1028, 513 NE2d

1308 (1987); Little Neck Coalition v. Sexton, 145 AD2d 480, 535 NYS2d 634 (2d Dept., 1988).[8]

In accord with these laws, if the proposed initial action was one to sell City-owned urban renewal property, it was submitted to ULURP review as a proposed sale of property -- not as a proposal for a particular use of that property. Thus, there was no legal requirement for the proposed disposition of urban renewal land to be re-submitted to ULURP subsequently when the Board approved the

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[8] Plaintiffs' citation to Lower East Side Joint Planning Council v. New York City Board of Estimate, 83 AD2d 526, 527, 441 NYS2d 453 (1st Dept., 1981), aff'd, 56 NY2d 717, 451 NYS2d 727, 436 NE2d 1329 (1982) (Pl.-App. Br. at 29-30) is unavailing. That case says nothing contrary to the Starburst holding. As the Appellate Division's decision and the appellate briefs in that case clarify, the major/minor modification discussion had nothing to do with ULURP. The issue there was whether, pursuant to section 505(3) of the NY General Municipal law, the Board of Estimate had power to approve minor modifications, as defined in the urban renewal plan, that had not been previously considered by the Planning Commission. See 82 AD2d at 527; Petitioners-Appellants' Brief to the N.Y. Court of Appeals at 7-16, Lower East Side. Those petitioners' claim was that the City failed to provide them with a hearing pursuant to section 62(c) of the NY Charter, which requires a public hearing prior to a final vote of the Board of Estimate. Their claim was not predicated on ULURP or the argument that the alleged major nature of the change required a new hearing. Coalition for Responsible Planning, Inc. v. Koch, 148 AD2d 230, 543 NYS2d 653 (1st Dept, 1988), mot. for lv. to app. den., 75 NY2d 704, 552 NYS2d 927, 552 NE2d 175 (1990), also cited by plaintiffs (Pl.-App. Br. at 30), is equally as inapposite. There, the court was presented with whether a re-ULURP was required for a proposed project (not an urban renewal land disposition) where the project was changed after the ULURP process to reflect the community suggestions made during public review. In any event, municipal appellees argued there, as they do here, that Starburst held that the Board of Estimate had authority to approve a proposal containing substantially different terms from those found in the original proposal that was the subject of ULURP review, without resubmitting the proposal for ULURP review. See Respondents-Appellants' Brief at 38-42, Coalition, supra 148 AD 2d 230.

formality of the land disposition agreement, as long as the use approved was within the uses stated in the urban renewal plan. That, in fact, was the practice of HPD in seeking approval of dispositions of urban renewal land. The dispositions were submitted for ULURP review, but the final formality of approval of the land disposition agreements were submitted only to the Board of Estimate, even if there was a change of use -- as long as the use was within the terms of the urban renewal plan (A253-54; A262; A356).

4. Disposition of Institutional Sites 4, 6, 10 and 12.

Sites 6 and 10 were sold by the City to the Academy, and a non-Satmar Hasidic sect, respectively, in the late 1970's on a sole source basis for development of yeshivas which are now in place. The only testimony with regard to the circumstances of either of these dispositions was Mr. Wolf's observation that all dispositions followed the general consultation and community and Board of Estimate review processes described in his testimony (A393-95; see supra, at 16-17). Mr. Wolf also testified that the sale of Site 6 to the Academy was intended as a replacement for their yeshiva destroyed by urban renewal (A409).

Mr. Wolf further testified that the final institutional site within WURA I, Site 12, had originally been designated for use by an Hispanic Pentecostal Church which had previously existed within the area. This designation, which had similarly been made on a sole source basis, was abandoned by the Pentecostal Congregation in the late 1970's, apparently due to their satisfaction with their relocated facility which was on South Fourth Street in Williamsburg (A401-02).

The site thereafter remained vacant until December of 1989, at which time it was sold at public auction by the City's Division of Real Property (A299-300). The auction was advertised through the distribution of 10,000 brochures to individuals and organizations on an established mailing list, through the City Record, and through notice to the Community Board. The only bidder at the auction was a purchaser affiliated with the Academy (A340-42). The City had received no other bids or expression of interest in this property. (A300).

The disposition of institutional Site 4, which is the central focus of this litigation, followed the above-described usual procedures for sales of urban renewal property. Site 4 had been originally designated for use as a park and, later, at least considered for use as a public school, but both plans had been abandoned by the early 1970's (Mun.-App. Exh. A; A407). Planning and discussions with regard to the site thereafter focused upon "institutional" uses, defined in the urban renewal plan to include community facilities such as synagogues, churches, day care centers, nursing homes, medical centers and related facilities, public parks, and schools (Mun.-App. Exh. JJ -- 5th Amended WURA I Plan at 4). The Academy approached HPD at some time in the early 1970's and, in accordance with these plans, proposed to develop Site 4 for use as a nursing home, yeshiva, and health related facility (A398).

After due consideration of these proposals, Site 4 was to be divided into three lots and the Academy was designated tentative developer of Sites 4A and 4B (A666). Congregation Yetev Lev

D'Satmar was designated as the developer of Site 4C in 1977 (A666; A768-69). Chief among the reasons for the Academy's and Congregation's designations were the facts that the Academy had occupied a facility on Site 4 prior to urban renewal and had an established "track record" of successfully completing similar developments (A400).

In May of 1978, HPD submitted proposals for development of these sites to the Department of City Planning and, in August, submitted corresponding proposed amendments to the Urban Renewal Plan which would formally change the designated use of Site 4 from park to "institutional" use. In explanation of the proposed dispositions and changes to the Plan, the supporting documentation fully explained both the proposed uses and the specific designation of the Academy and the Congregation as developer of Site 4 (A670-77; A255).

These were the first proposed amendments and dispositions relevant to the Williamsburg Urban Renewal Area that HPD had been required to submit for review under the then newly-adopted ULURP, described above. In accord with the statutory mandates, the Department of City Planning certified the proposed amendments and proposed dispositions and referred them to Community Board #1, which held public hearings on December 19, 1978 (A667; A673; A676). On January 9, 1979, after a public hearing, the Community Board overwhelmingly approved the proposed amendments to the plan and the dispositions of Sites 4A and 4B to the Academy. It tabled the

vote on Site 4C pending receipt of additional information for that site (A667; A673; A676).

On March 13, 1979, the Community Board overwhelmingly approved the disposition of Site 4C to Congregation Yetev Lev D'Satmar, ("the Congregation") and the proposed use was a girl's yeshiva (A672). In the meantime, the City Planning Commission held its public hearing on February 28, 1979 and issued its approval of the proposed amendments and site dispositions on March 28, 1979 (A672; A675; A677). The Board of Estimate subsequently held a hearing and approved the proposed amendments and dispositions on May 24, 1979 (A678-81).

As approved, the Fifth Amended Urban Renewal Plan provided that the property would be designated for "institutional" uses; permitted uses for Site 4A were listed as "Institutional (Health Related Facility); for Site 4(B), "Institutional (Med. Center);" and for Site 4C, "Institutional (School);" (Mun.-App. Exh. JJ at pp. 4; 6).

In late 1979, the Congregation asked to be allowed to build on Site 4C a residence for the new Grand Rabbi, who serves as the Chancellor for the entire Satmar religious school system (A450-51). Robert Wagner, then Chairman of the Planning Commission, found the proposed change within the 5th Amendment to the urban renewal plan since 75% of the residence was to be devoted to institutional use (A262-63; A650). In accord with standard practice, in February 1980, HPD, without re-submitting the disposition to ULURP, submitted the proposed Land Disposition Agreement for Site 4C to the Board of

Estimate for formal approval of the transfer of the site to the Congregation (A681-83; A261). The purchase price, based on a fair market appraised value, was $150,000 (A683; Mun.-App. Exh. L). The agreement also expressly specified that the site should be used for a girls' yeshiva and school chancellor's rabbinic residence containing community and school offices (A682-83). After a public hearing, the Board unanimously approved the Agreement without any opposition on April 24, 1980 (A682-83).

After issuance of the deed in October 1980, the building containing the Rabbinic residence and community offices was completed in 1981 (A699; A263; A451). In the early 1980's, in large part because of cutbacks in State funding, the Academy had to abandon its plan to build a nursing home and health related facility on Sites 4A and 4B (A448). Additionally, because there was an immediate and acute shortage of school space for girls, the Academy had successfully purchased at auction in the early 1980's, the old Eastern District High School (A448). Accordingly, the Academy desired to change the proposed girls' yeshiva on Site 4C to a boys' school (A448) and to use the balance of the sites for faculty housing and a synagogue (A264-65; A324; A449).

During this period of flux in the early 1980's, the Academy was continuously involved with discussions with HPD about its changing needs and funding constraints (A264). During this period, the Congregation allowed a letter of credit securing further development on Site 4C to lapse, leading Mr. Herbert Siegel, Director of Planning in the Development Department to recommend that they be

held in default and disqualified from further developments in the area (A298-99; A604-05). Mr. Siegel was instructed by his superiors at HPD to continue to work with the Congregation and the Academy despite this default, however, and eventually a letter of credit was posted a few years later after further discussions (A299; A339; A463). Both Mr. Siegel and Commissioner Gliedman testified that these actions reflected HPD's general policy to continue to work with designated developers who are acting in good faith, and to work through periods of changing plans and possible defaults so long as the designated community organization continued to act in good faith and in accordance with the urban renewal plan (A357-58; A539).

In 1984, HPD proposed a Seventh Amended Urban Renewal Plan which would change the approved uses of Sites 4A, 4B, and 4C from restricted institutional to any enumerated "institutional" use, the definition of which would be expanded to include "dormitory facilities affiliated with religious institutions" and as mentioned above that definition already included synagogues, churches and schools (A763; A297). Contemporaneously, HPD also proposed to create a new urban renewal area directly to the north of WURA I, to be called Williamsburg Urban Renewal Area II ("WURA II"). This area was historically and still is primarily Hispanic (A138-39).

This Seventh Amended Plan was again subjected to the public hearing and reviews pursuant to the ULURP process. Over 500 people attended the Community Board #1 hearing held at Clemente Plaza in WURA I on February 28, 1984, including Carmen Calderon, one of the three heads of plaintiff Southside Fair Housing Committee

(A627; A632; A267-68; A220). At the hearing, Mr. Siegel expressly discussed the new proposed uses for sites 4A and 4B (A268; A367-68).[9] Mr. Siegel also described the creation of a new urban renewal area directly to the north of WURA I, to be known as WURA II and the innovative plan to channel moneys from the market value sales of vacant land in both renewal areas to construct low income housing in the renewal areas (A367-68). This plan, labeled the Cross-Subsidy Agreement, had been proposed by HPD Commissioner Gliedman in the early 1980's and was the subject of many community discussions prior to this meeting (A530-31; A111; A270-71).

Mr. Siegel did not recall any opposition to the Academy's new proposed plans for Site 4 (A268-69). Ms. Calderon spoke at the meeting in support of the amendments and urged that "[a]ll sales monies, including institutional Site 4 should go into cross subsidy" (A632). The Community Board voted to approve both the amendment and the creation of WURA II (A719). The City Planning Commission and Board of Estimate, after their public hearings, also voted to

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9 Notwithstanding Mr. Siegel's express testimony that he explained the plans for Site 4 at this hearing (A368), plaintiffs assert that the new institutional uses for Site 4 were "never publicly disclosed" during the 1984 ULURP process on the 7th proposed amendments to the Urban Renewal Plan (Pl-App. Br. at 7, 27). They say that Carmen Calderon's testimony on pages A218-21 of the Joint Appendix, in which Ms. Calderon never says she was not told about the uses for Site 4, "supports" their assertion (Pl. App. Br. at 28). They go on to make the bold assertion that the District Court entered a "clearly erroneous" ruling when it stated that Ms. Calderon "learned that faculty housing would be built on site 4" at that 1984 meeting (Pl. App. Br. at 27). But the District Court's ruling was grounded firmly in the express testimony of Mr. Siegel on page A368 of the Joint Appendix.

approve the amendments and creation of WURA II on April 9, 1984 and May 24, 1984, respectively (A719).

In the City Planning Commission's resolution approving the amendments, the Commission quotes a letter written to it by HPD in March 1984, in response to inquiries by the Commission (A714). HPD told the Commission, inter alia, that "[t]he Community Board shall have the opportunity to review development plans for [Site 4] prior to disposition through the ULURP process which still must be approved" (A714).

The final stage of the disposition process for institutional Sites 4A and 4B was reached in early 1988 when HPD's Office of Development appraised Sites 4A and 4B at their highest and best use, concluding that the fair market value of the property was $680,000, $558,000 more than the 1980 appraised value (Compare Mun.-App. Exh. L with A720; A285). Land Disposition Agreements were then prepared and submitted to the Board of Estimate transferring Sites 4A and 4B to the Academy at the established price. Mr. Siegel testified that he had originally believed that these Agreements needed to be preceded by the ULURP review of a "disposition" of the property, but that this assumption had proven to be mistaken as both he and his staff had apparently simply forgotten that the "disposition" for these sites had previously undergone a ULURP review in 1979 (A287-89).[10] This error was called to Mr. Siegel's attention by

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[10] There is a 1987 letter in the Record from Kathleen Dunn, Mr. (Footnote Continued)

counsel for the Academy, who provided Mr. Siegel with a copy of the earlier 1979 approval (A288-89). Mr. Siegel, in turn, transmitted these documents to HPD's legal division, which subsequently prepared the Land Disposition Agreements for approval by the Board of Estimate without further ULURP review (A357).

The Board of Estimate hearing with respect to the Agreements was scheduled for July 14, 1988. Prior to the hearing, a Community Vice Chairman of Community Board #1 asked that the matter be laid over for 30 days pending Community Board Review (A741). The Community Board recognized that an approval of a Land Disposition Agreement is "not technically a ULURP item" but argued that a different Charter section mandates that the Community Board be informed of plans for public land (A734). The Board further asserted that HPD had assured them during the 1984 ULURP process that the Community Board would be permitted to review the final Land Disposition Agreements for Sites 4A and 4B (A733).

Upon learning at the hearing that a 30-day delay would impose substantial financial penalties on the sponsor, the Board of Estimate agreed to approve the Land Disposition Agreements, but determined to submit them to the Community Board for comments and a recommendation before title passed (A741; A326).[11] The HPD

(Footnote Continued)
Siegel's supervisor, to Mark Willis, opining that Sites 4A and 4B should be put through the ULURP process before final approval of the Land Disposition Agreements (A597).

[11] The District Court properly found this as a fact (A802) based
(Footnote Continued)

representative at the Board of Estimate hearing agreed to submit the Land Disposition Agreements for Sites 4A and 4B to Community Board #1's review (A294-95; A326; A387-88).

Mr. Siegel subsequently contacted the Community Board and the Board asked him to appear on July 25, 1988 before what turned out to be the ULURP Committee of Community Board #1 (A388; A771). In addition to the ULURP committee members, Mr. Siegel, and Academy representatives, between 30 and 50 people attended the meeting (A739; A328; A428; A429). The Committee had notified other members of Community Board #1 and the tenant associations of Clemente Plaza, Taylor Wythe, Bedford Gardens and Independence Houses (A741-42). The Committee reported that (A742): "At that time, this proposal was discussed in great detail, and the consensus of the attendees concluded that it merited approval."

The Committee recommended approval of the Land Disposition Agreements for Sites 4A and 4B because (1) all three proposed uses -- a 6000-seat synagogue, a school, and faculty housing -- would serve "clearly understood institutional purposes as reflected in the urban renewal plan"; (2) the $680,000 purchase price is based upon an appraisal "which calculated value upon the most economically desirable use of the land" and is not unreasonable; (3) the construction of the facilities would not undermine the integrity of

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(Footnote Continued)
upon statements in the Community Board's letter and Mr. Siegel's testimony (A741; A326). Plaintiffs' contention that this finding is clearly erroneous (Pl.-App. Br. at 30) is thus frivolous.

the surrounding community in that the 6000-seat synagogue will rise only 70 feet above street level at its highest point and because there would be no substantial increase in traffic since the religious doctrine of those attending the synagogue require them to come on foot; and (4) the housing would be restricted to faculty (A742-44).

On August 10, 1988, the Chairman of the Community Board and the Chairman of the ULURP Review Committee jointly wrote a letter to former Mayor Koch supporting the Land Disposition Agreements (A745). Those agreements contain the proposed uses for the sites (Mun.-App. Exh. BB; A293-94).

The deeds were executed on October 6, 1988 and the Academy held a groundbreaking for the construction of the school on Site 4 that same month, which was attended by approximately 2000 people (Mun.-App. Exh. CC; A284; A459). The Academy also erected a large sign in October 1988 with a picture of the proposed new school (A458-59). Construction of the foundations for the school was subsequently begun on Site 4A (A460), although further development on the property had been stayed pursuant to Stipulation of the parties here, entered into on March 15, 1990. The Academy has spent a substantial amount of money to date to develop Sites 4A, 4B and 4C (A489; A495). Since October 1988, the Academy has raised about $3 million and has about $6 million in commitments (A464).

5. **Development and implementation of the Williamsburg Cross-Subsidy Agreement.**

Considerable testimony and other evidence was introduced at the hearing with regard to the 1985 Williamsburg "Cross-Subsidy Agreement".[12]

Commissioner Gliedman testified that he proposed the concept of a Cross-Subsidy Agreement in Williamsburg in the early 1980's after having been involved in mediating a dispute between Hispanic and Hasidic residents of Clemente Plaza over the management of that building (A531). It was his belief as a result of this experience that the two groups could be "brought together" in order to facilitate further development of housing in Williamsburg which, based upon his observations, was then at a "standstill" due to the lack of a political consensus on the nature of acceptable projects and further due to the total halt of any significant federal or state funding for the construction or rehabilitation of subsidized low-income housing (A531-32; A537; A559-60; A277).

Accordingly, the concept of a Cross-Subsidy Agreement and Fund was proposed by HPD to various members of the local Williamsburg community and Community Board #1 in the early 1980's

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[12] Although we agree with the District Court that plaintiffs have failed to articulate a coherent claim with respect to the Cross-Subsidy Agreement (A793-94), we nevertheless recite the facts pertinent to the Agreement because they bolster our position that the City has acted without ethnic or racial bias with regard to its decisions concerning the sale to the Satmar Hasidic sect of institutional and residential sites in WURA I and the creation of WURA II and because plaintiffs rely on the Agreement as evidence of bias (e.g., Pl.-App. Br. at 15-16; 33-34; 44-46).

(A111; A270). Community Board #1 appointed the Southside Study Committee to consider the concept and Carmen Calderon, a leader of plaintiff Southside organization, was on that Committee (A112).

In a nutshell, the proposal was to sell at profit certain vacant City-owned urban renewal parcels (which were largely located within WURA I) for market rate housing development and then to commit the resulting funds to a dedicated account to be utilized exclusively to subsidize construction and rehabilitation of low and moderate income units on property (which was chiefly located in WURA II) within the same community. To the extent feasible, disposition of the Cross-Subsidy Fund would be influenced by representatives of both the Hispanic and Hasidic groups pursuant to the agreed-upon general plan (A536). Both ethnic groups would market all the developments because, according to Mr. Gliedman, "one of the things we really sought to do . . . was to have everybody eligible for the various types of housing that was being built" (A536; A566).

HPD of course, would make final decisions about all projects (A124; A581; A582).

After announcement of the concept, HPD began intensive discussions in 1983 and 1984 with Community Board #1 and representatives of all established ethnic organizations. The general outlines of the Cross-Subsidy concept were specifically included in the Seventh Amended Urban Renewal Plan for WURA I, and were extensively discussed in the community and public review process

which led to approval of that Plan (Mun.-App. Exh. DD at 14; A270-71; A309).

Mr. Siegel testified that immediately after approval of the Seventh Amended Plan, HPD began intensive discussions with representatives of several community groups in Williamsburg in order to reach an agreement to specifically implement the Cross-Subsidy idea, including meetings with the Southside Review Committee (A272; A112-13; A209). These deliberations eventually led to a deadlock, in which no final agreement was reached (A99; A113; A209).

The testimony indicated that at some point in the fall of 1984 representatives of the United Jewish Organization -- an umbrella organization representing various Jewish groups, including the Satmar Congregation in Williamsburg -- and representatives of the Epiphany Church (which is a Hispanic Church located within WURA II [A115; A274-75], working with Catholic Charities of Brooklyn, began meeting together to specifically develop a final Cross-Subsidy Agreement.[13]

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[13] It is unclear exactly how these organizations arrived at this process. Miss Herman testified that she believed Epiphany Church and Catholic Charities had been asked by the City to become parties to the Agreement, although she admitted in a deposition that she had not known precisely how these groups were selected (A113). Mr. Siegel testified that, to the best of his knowledge, the two groups had elected on their own to proceed with the outlines of a Cross-Subsidy Agreement, which was then presented to HPD (A273). Thus, plaintiffs' claim that HPD "designated" Epiphany and the United Jewish Organization (Pl.-App. Br. at 16) is without support in the record.

Plaintiffs claim that "Siegel admitted to being aware of Father Foley's [of Epiphany] tendency to cut Hispanic representatives out of the negotiation process" (Pl-App. Br. at 16 ftnt 14). Their citation (Footnote Continued)

Representatives of these groups had several meetings throughout the Fall and Spring and finally came to an agreement in or about April, 1985, at which time the final Cross-Subsidy Agreement was published with the approval of HPD (A575-95). The City announced the fact and terms of the Agreement at a City Hall press conference which was widely reported at the same time (A120; A278; A535). The Agreement encountered no significant opposition and was subsequently referred to in numerous public documents relating to development in the Williamsburg area.

In sum, the final Cross-Subsidy Agreement provided that certain "donor sites" would be sold at a profit, with the proceeds then to be placed into a "Cross-Subsidy Fund" which may only subsidize low-income housing to be developed on certain "recipient sites" (A575-95; A581; A278; A532). As former Commissioner Gliedman observed, most donor sites are within WURA I because that is where most adequately-sized vacant tracts of land are located and he was reluctant to destroy existing buildings in WURA II to create vacant sites (A553). The amount of the anticipated proceeds were specified in the Agreement and it was further stipulated that specific projects on the "donor sites" would be selected by HPD upon recommendation of the United Jewish Organization, while developments

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(Footnote Continued)
to page A352 of the Joint Appendix does not support that statement. In response to a question by plaintiffs' counsel as to whether Mr. Siegel had "a sense whether Father Foley was excluding people", Mr. Siegel answered "I know there was a [Hispanic] housing group that was not totally included in the negotiations" (A352). This statement plainly does not say what plaintiffs say it does.

on the "recipient sites" would be developed upon recommendations from Epiphany and Catholic Charities (A582). All three organizations were logical choices as representatives of the two ethnic groups since they had all worked on housing issues in the area, were fair representatives of the community, and had extensive experience in actually developing housing proposals (A534).

The Agreement specified that the sales or rentals of units built or rehabilitated on these sites would be done by a joint marketing committee comprised of representatives of both ethnic groups and the New York City Housing Partnership (the "Partnership") (A584). Mr. Gliedman insisted on the Partnership's participation to avoid any overreaching on the part of the United Jewish Organization (A553-54). The Agreement further provided that certain developments would be constructed by the Partnership, a not-for-profit organization which had been deeply involved in the construction of moderate income housing throughout the City (A584).

HPD approval was required for all final decisions about projects (A581; A582).

As was stated in the testimony of several witnesses, the Cross-Subsidy Agreement has been modified in certain respects since its execution. For example, the anticipated close participation of the United Jewish Organization, Epiphany, and the Partnership in selecting specific developers for recommended projects was eliminated after a 1986 report of the HPD Inspector General found that such participation, devoid of public controls, raised a significant potential for corruption (A621-26). As a result, HPD selected a developer for

"market rate" housing projects to be developed on certain of the donor sites located in both WURA I and WURA II through a public Request for Proposals ("RFP") process based upon the appraised fair market value of the land. This change also had the attendant effect of increasing the contribution to the Cross-Subsidy Fund resulting from the increased sale price from an anticipated $1.7 to $3.5 million which, the parties agreed, would be dedicated to future projects solely recommended by Epiphany (A122; A283-84). Apart from these changes, however, HPD has not approved any final modifications to the Cross-Subsidy Agreement.[14] Indeed, the testimony indicated, HPD expressly refused to recognize the informal agreement of the other parties to the agreement that the purchase price of Site 4 should be reduced (A125).

It is undisputed that development of housing has actually proceeded in accordance with the basic terms of the Cross-Subsidy Agreement. The "donor sites" have been sold at appraised fair market value, and the resulting housing is now being developed. In addition, Epiphany and Catholic Charities have developed approximately 105 units of low-income housing which are either completed or are now in construction, which have received a total of

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[14] Although not reflected in the record in this case, the City would concede that the joint marketing committee procedure set forth in the Cross-Subsidy Agreement was not strictly followed four years later, after Commissioner Gliedman's departure, when units in Brooklyn Villas -- the specific "market rate" housing developed on the donor sites -- were marketed by the developer for that site. The marketing of Brooklyn Villas was the subject of a dispute in this case which has now been tentatively settled.

approximately $2.7 million from the Cross-Subsidy Fund (A127; A282-83).[15] Those units are mostly located on the available "infill" vacant sites in WURA II (A282; A579).

6. Evidence pertaining to whether any Hispanic or other ethnic group or individual ever proposed alternative uses for the institutional sites in WURA I.

All plaintiffs' witnesses corroborated municipal appellees' witnesses' testimony that no Hispanic person or Hispanic organization or other ethnic group came forward in the more than 20 years since WURA I was created with proposed alternative projects for the institutional sites, including and especially, site 4 (compare A133-34; A184; A222; with A361; A399).

Mr. Siegel testified that no other institution ever submitted written plans for the development of Site 4, but that from time to time "individuals," such as "real estate speculators, developers, builders", "would inquire as to the availability of the land" (A360, A361). He unequivocally stated that (A361): "I don't recall any Hispanic institution calling".[16]

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[15] The testimony further indicated that the parties had contemplated the development of a 150-unit project by the New York City Housing Authority to be constructed on a site within WURA II. This project has been finally planned and funded, although it has been delayed as the result of environmental studies which have showed a toxic problem with the soil on the site. The development of this project by the Housing Authority has proceeded in consultation with Epiphany and Catholic Charities (A277; A314; A127-28).

[16] Plaintiffs misquote Mr. Siegel in their brief when they repeatedly assert that "real estate developers and builders had inquired about developing Site 4" (Pl. App. Br. at 6; 32). Their further contention that the District Court's finding, that no other developers came

(Footnote Continued)

Moreover, both Ms. Herman and Ms. Calderon testified that they knew by the mid-1980's that sites 4A, 4B, and 4C would be sold to the Satmar Hasidic sect for institutional use (A136; A221-22). Nevertheless, both Ms. Calderon and plaintiff Lucy Rodriguez claimed they did not know Site 4 was being developed until late 1989 (A176; A214), notwithstanding the picture of the new school on the large sign erected on the site in October 1988, the ground breaking ceremony held on the site in late October 1988 attended by 2000 people, and the continuous excavation of the foundation on the site.

7. Disputed evidence regarding intent to discriminate and whether municipal appellees' actions have the primary effect of establishing religion.

Plaintiffs' witness, Cathy Herman, testified that she had been told that WURA II was created upon the suggestion of Rabbis to "City Hall" to enable the City to "raze" that area (A84, A85, A133). However, her cross-examination revealed that at an earlier deposition, Ms. Herman had admitted that she did not know who was "behind" the efforts to clear and develop parcels within WURA II and stated that perhaps the suggestion to raze the area was made by a group of landlords, United Neighborhood Development (A131-32). She further acknowledged that WURA II was never razed (A144). Ms. Calderon

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(Footnote Continued)
forward with proposals to develop the land is "clearly erroneous" (Pl. App. Br. at 32, ftnt 21), is plainly not borne out by the record. The District Court accurately heard Mr. Siegel and each of plaintiffs' witnesses who testified that neither they nor any organization of which they knew had proposed alternative plans for Site 4.

testified that Mr. Siegel had referred to WURA I during a meeting as "the Hasidic Triangle", but on cross-examination admitted that she did not recall the context in which the statement was used (A206-07, A217).[17]

Another of plaintiffs' witnesses, Dr. Jose Sanchez, a Professor of Political and Social Science at S.U.N.Y. at Old Westbury (A145), after a week and a half of research at the municipal library and reading newspaper clippings (A512; A516), opined: "there was some intent to displace the minority community from that lower portion, WURA I, and to push them as far north as possible, ..." (A507). Although he admitted that neither he nor anyone he knew had conducted research concerning the psychological effects of a synagogue on non-Jews (A156), Mr. Sanchez also opined that the construction of a synagogue on Site 4 will result in Latinos feeling like economic, political and cultural outcasts (A151). Plaintiffs also elicited statements on cross-examination from Messrs. Wolf and Siegel that neither had investigated the religious practices of the Satmar Hasidic sect nor had investigated whether the Satmar had violated any of the covenants against discrimination in their use of other

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[17] Plaintiffs recite this hearsay testimony of Ms. Herman and Ms. Calderon elicited on direct examination, ignoring the statements those witnesses made on cross-examination (Pl.-App. Br. at 17). Plaintiffs further improperly rely on this same hearsay testimony of their witnesses when they later assert as an uncontroverted fact that "HPD officials, including Siegel and former Commissioner Reiss, consistently made statements indicating that the Hasidim had the political contacts at City Hall and the inside track in the struggle for land" (Pl. App. Br. at 43-44).

institutional sites sold to the Academy prior to the final approval of the dispositions of Sites 4A and 4B (A344-45; A347; A413).

Witnesses for the municipal appellees testified that the purpose of the original urban renewal plan was to replace deteriorated housing with modern units for all prior residents and others, regardless of race or ethnicity (A360; A408). Former Commissioner Gliedman stated his intent in proposing the cross-subsidy concept and the creation of WURA II was to create much-needed affordable housing for both Hispanics and Hasidic Jews and that he believed all would have equal access to both the market rate and subsidized housing being created (A536; A556; A566).

Finally, Philip Klein, executive director of the Academy, testified that the Academy has in the past and intends to continue to comply with the covenants in the Land Disposition Agreements barring discrimination (A497).

Mr. Klein stated that some non-Jews have observed Jewish religious services in synagogues located in WURA I (A470). He also stated that the lunchroom of the yeshiva located on Site 6 was open for public use, as long as the sect's dietary laws were followed (A467). Mr. Klein further testified that no minority person has ever applied to one of its schools, but if such a person did apply, he or she would be permitted to attend provided they agree to comply with the religious rules by which the schools are governed (A469; A479). He acknowledged that he did not think it was likely that any members of minority groups would apply for admission (A499).

Mr. Klein also testified to the astronomic growth in the Satmar Hasidic population since the early 1950's. For example, in 1949 there were 20 children in the Academy school system, whereas today there are over 6,000 children and it is anticipated that number will grow to 10,000 in the 1990's (A438-39).

There was also considerable dispute over the boundaries of the "community" at issue in this litigation. Plaintiffs, through Cathy Herman and Jose Sanchez, asserted that the "community" was WURA I and WURA II (A77; A129; A502). However, in cross-examining Philip Klein as to the number of Satmar synagogues and Satmar yeshivas in the "community" they asked him about areas surrounding WURA I and WURA II and did not limit their questioning to WURA I and WURA II, which currently contain no Satmar synagogues, and only one Satmar yeshiva, situated in WURA I (A483-86; 483-84).[18]

Municipal appellees urged that the more expansive boundaries of the greater Williamsburg area defined the appropriate "community" (A302-03; Mun.-App. Exh. HH). If the greater Williamsburg area, which is essentially co-extensive with the boundaries of Community Board #1, are examined, Mr. Siegel testified that the City has developed in recent years over 2300 low-income housing units in areas adjacent to WURA I and WURA II which are

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[18] Plaintiffs thus seek to misrepresent the relevant facts when they state in their brief that there are already "11 UTA yeshivas and numerous Satmar synagogues" south of Division Avenue (Pl. App. Br. at 12, 13). Plaintiffs know full well that, as Mr. Klein testified, the majority of Satmar synagogues and yeshivas are located in areas outside of WURA I (A484-86).

overwhelmingly occupied by minorities (A305-14; see also Mun.-App. Exh. HH; A764-765a).

The Court, on the other hand, did not believe any of the parties had adequately defined the boundaries of the "community" (A375).

OPINION BELOW

(1)

In a comprehensive decision of 37 pages, the District Court set forth in detail the City's procedures for selling urban renewal land, the 13-year history of the negotiations and the many community and government reviews preceding the sale in 1980 of institutional Site 4C to the Congregation and final approval of the dispositions of institutional sites 4A and 4B to the Academy in 1988 (A774-89). The Court then addressed plaintiffs' establishment claim under the well-accepted 3-point analysis set forth by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The Court ruled that municipal appellees' action did not violate the first prong -- "secular purpose". The Court held that it advanced the secular purpose of urban renewal to sell urban renewal land to religious groups for religious use, as religious institutions are properly part of a new integrated and well balanced community (A789-92).

In determining whether municipal appellees' acts had the "primary effect" of advancing religion, the Court first rejected plaintiffs' repeated refrain that appellees "handed over" the sites to the Academy (A793). The Court noted that municipal appellees sold the sites at fair market value and, consequently, the Academy

received no greater benefit than any other individual or organization with sufficient funds to purchase land from the City at market value (A793). The District Court noted plaintiffs' argument, that the "cumulative effect" of the sale of the WURA I sites to the Academy and private citizens, who happened to be Hasidic, amounted to establishment of the Hasidic Jewish religion, but discussed it in its analysis of the Fourteenth Amendment claim (A792). There, the Court concluded after a lengthy discussion (A806-09), that it could not fairly draw the inference, from the mere fact of various fair market value sales of WURA I sites to the Hasidim, of an intent to favor the Hasidim (A806).

The Court also rejected plaintiffs' claim that the sales resulted in an unlawful "entanglement" between municipal appellees and the Academy, ruling (A795): "The completed sale of Site 4 does not constitute an on-going relationship between the City and the Academy." The Court finally found that the "continuing political strife" between the Hispanic and Hasidic communities in Williamsburg has been longstanding and will be unaffected by any ruling in this case (A794-95).

The Court then turned to the Equal Protection claim. The Court first set forth the applicable legal standard for such a claim, i.e., a plaintiff must show the government had a discriminatory intent (A796). Relying upon the definition in Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979), the District Court stated that to show discriminatory purpose, the plaintiff must show " 'the decisionmaker selected or affirmed a particular course of action at

least in part 'because of', not merely 'in spite of' its adverse effects upon an identifiable group' " (A797-98).

The Court specifically stated it would only consider admissible evidence and would not consider "inadmissible hearsay and rumors" (A796). The Court concluded (A796): "There is no admissible direct evidence that the City decisionmakers had such [a discriminatory] intent" (A796). The Court then outlined the circumstantial indicia of intent as articulated by the Supreme Court in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) and proceeded to analyze the circumstantial evidence herein.

The Court carefully outlined its findings of fact, which in short, were that in selling the sites to the Academy, the City acted openly, in accord with established procedures, without bias, and with sensitivity to the needs of the Hispanic community (A801-10). Of particular significance to the Court were the facts that during all the years of community and government review, neither plaintiffs nor any other Hispanic group or individual voiced any opposition to the proposed sales to the Academy and that no Hispanic organization proposed to buy any site for alternative uses (A800, A803, A806, A807-08). The Court explicitly noted that (A800): "The Constitution does not require the City to restrict the types of housing in the area to subsidized housing .... Nor does the Constitution require the City to leave institutional parcels vacant because a non-Hasidic organization[] cannot be found to develop them". The Court concluded that "plaintiffs have not met their burden of showing that

the city invidiously discriminated against Hispanics and in favor of the Hasidim" (A809).

(2)

Subsequent to that decision, dated November 2, 1990, Judge Nickerson issued an order dated November 30, 1990 (A811-815). In the order, the Judge noted that there were two major areas of dispute in this case -- 1) claims pertaining to the Brooklyn Villas housing development and 2) claims pertaining to "Site 4 of [WURA I] and alleged discrimination in violation of the Fourteenth Amendment and a violation of the establishment clause of the First Amendment ...." (A813). The Court severed the Brooklyn Villas claim, which has been tentatively settled (A813) and ruled pursuant to Fed. R. Civ. P. 54(b) to permit the appeal of the "Site 4 claims" to proceed (A813-15). A judgment was then entered incorporating this determination (A816).

In denying plaintiffs' motion for an injunction pending appeal, the District Court reaffirmed its finding that (A814): "The court has found no [Hasidic] enclave has been created."

We read this order to mean that all claims pertaining to the requested relief of rescission of the sale of Site 4 are dismissed and are now on appeal. Plaintiffs' Title VI claim was properly dismissed as it requires the same finding of discriminatory intent expressly not found here. Plaintiffs failed to state a claim under Title VIII, the Fair Housing Act, in that they did not prove that municipal appellees discriminated against them in providing housing. The 42 U.S.C. §§1981, 1982 and 1983 claims were properly dismissed because the

Court found as facts that municipal appellees engaged in only lawful acts in conjunction with the sale. Finally, the state law claims were also properly dismissed because plaintiffs did not make any conclusive legal showing of a ULURP violation.

POINT I

MUNICIPAL APPELLEES DID NOT VIOLATE THE ESTABLISHMENT CLAUSE BY THEIR NEUTRAL ACT OF SELLING TO THE ACADEMY AT FAIR MARKET VALUE CERTAIN URBAN RENEWAL SITES DESIGNATED FOR INSTITUTIONAL USE FOR DEVELOPMENT OF A SYNAGOGUE AND A YESHIVA BECAUSE THE SALES WERE MADE FOR THE LEGITIMATE SECULAR PURPOSE OF URBAN RENEWAL AND NO MINORITY ORGANIZATION EVER PROPOSED TO PURCHASE THOSE SITES FOR ALTERNATIVE USES.

(1)

Plaintiffs' First Amendment argument is that the "cumulative effect of WURA I land transfers showed favoritism toward Hasidim by appearing to make adherence to the Hasidic Jewish faith relevant to a person's standing in the community" (Pl.-App. Br. at 23; 26-27). Plaintiffs go on to charge that the District Court erred by not discussing their "cumulative effect" claim in the First Amendment section of the decision (Pl.-App. Br. at 26).

However, the District Court did address plaintiffs' "cumulative effect" argument, but did so in its analysis of the Fourteenth Amendment claim (A806-09). There, the Court concluded after a lengthy discussion (A806-09), that it could not fairly draw the inference from the mere fact of various fair market value sales of

WURA I sites to the Hasidim, of an intent to favor the Hasidim (A806-09). That finding of an absence of favoritism is binding upon plaintiffs in their First Amendment claim.

We believe, however, that plaintiffs' "cumulative effect" claim has no place in the First Amemdment analysis, given the facts presented here. Particularly lacking in plaintiffs' argument is any cogent articulation of exactly how the government is supposed to ascertain which sale among a number of fair market value sales is the one that causes advancement of religion. Additionally, plaintiffs are just wrong to include in their First Amendment argument the sales of residential sites 3B and 8 to private developers for unsubsidized market rate housing units (e.g., Pl.-App. Br. at 27). The government's sale of urban renewal land for the construction of housing, to a private citizen who happens to be of the Jewish faith, is no more the endorsement of Judaism than the sale of urban renewal parcels to Catholic Charities or Epiphany Church for development of low-income housing is the promotion of Catholicism. The construction of faculty housing on site 4B similarly in no way advances religious beliefs.

The only sales which may be pertinent to a First Amendment analysis are the sales of Sites 4A, 4C, 6, 10, and 12 to be used as a synagogue and parochial schools. However, there is nothing "cumulative" in these sales, two of which occurred in the 1970's (Sites 6 and 10), one of which was finalized in 1980 (Site 4C), one of which was finalized in 1988 (Site 4A), and one of which was sold at public auction after extensive advertising in 1989 (Site 12).

Moreover, in light of the fact that no other minority organization or religious entity ever proposed to purchase any of the sites, if the City had refused to sell any of the sites, particularly site 12 which had been bid upon at a publicly-advertised auction, to the Academy or to a private Hasidic Jew, on the ground that the Jewish religion was beginning to dominate Williamsburg, the City would certainly be afoul of the First Amendment's free exercise clause and of the Supreme Court's directive that governments must not be hostile to religion. See Zorach v. Clauson, 343 U.S. 306, 312 (1952). Finally, there is no law mandating the City to leave its urban renewal sites undeveloped because the only actively interested developer is a religious organization to which the City has sold parcels in the past. The City would be remiss in its public duty if it did not act upon the only proposals to purchase and to develop urban renewal sites.

Plaintiffs' real complaints are that the Hasidic population has grown at an explosive rate and that the Hasidim generally have more money than the Hispanics enabling them to afford to purchase public land available to anyone, but until purchased by the defendant Academy, not sought by anyone else. The City played no role in creating these two situations and should not be found in violation of the Constitution as endorsing the Satmar Hasidic Jewish religion because it followed routine procedures for sale at fair market value of urban renewal sites and because the defendant Academy happened to be the only entity interested in developing those sites.

(2)

The First Amendment provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, ..." There has always been a tension between the establishment clause and free exercise clause because to demand strict compliance with the first would result in violation of the second. See Walz v. Tax Commission, 397 U.S. 664, 670-71 (1970); Zorach v. Clauson, supra, 343 U.S. at 312-14. The line between the two has always been difficult to ascertain. As the Supreme Court has stated:

> The general principle deducible from the First Amendment and all that has been said by this Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Walz v. Tax Commission, supra, 397 U.S. at 669.

In support of "benevolent neutrality," the Supreme Court has consistently recognized the role of religion in this country and has repeatedly issued rulings permitting government accommodation of religion even where the religious group has derived indirect benefits from such accommodation. See Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) (statute providing tuition assistance to disabled persons for vocational education held not violation of establishment clause where funds went to sight-impaired

person studying to become pastor); Tilton v. Richardson, 403 U.S. 672 (1971) (federal construction grants to church colleges for secular buildings not violation of establishment clause); Walz v. Tax Commission, supra 397 U.S. 664 (tax exemptions to religious institutions for real property used for religious purpose not violative of establishment clause); Board of Education v. Allen, 392 U.S. 236 (1968) (government provision of secular textbooks to parochial schools not violative of establishment clause); Zorach v. Clauson, 343 U.S. 306 (1952) (permitting early release of public school children to attend religious instruction off school premises held to be only accommodation, not establishment, of religion); Everson v. Board of Education, 330 U.S. 1 (1947) (state payment of costs of bus transportation for parents of parochial school students held not establishment of religion).

As plaintiffs recognize (Pl.-App. Br. at 25), the three evils that the establishment clause seeks to prevent are government sponsorship of, financial support of, and active involvement in, religious activity. See Tilton v. Richardson, supra, 403 U.S. at 677; Walz v. Tax Commission, 397 U.S. at 668. The Supreme Court has set forth a three-prong test as a framework in which to analyze the particular facts of each case while recognizing the three considerations as only "helpful signposts" in this murky area of constitutional adjudication. See Hunt v. McNair, 413 U.S. 734, 741 (1973); Tilton v. Richardson supra, 403 U.S. at 678; Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The test, as articulated in Lemon v. Kurtzman, supra, 403 U.S. at 612-13, requires courts to

consider 1) whether the challenged action has a "secular purpose;" 2) whether "its principal or primary effect" is one that either advances or hinders religion; and finally 3) whether the action will foster "an excessive government entanglement with religion."

As we will demonstrate below, the fair market value sales of the urban renewal sites for use as a synagogue and parochial schools, where the conclusive evidence showed that no competing religious or other institutional groups had ever offered to purchase the sites for alternative uses, had the secular purpose of urban renewal, did not involve any financial support, does not create an endorsement of Judaism, and does not result in any ongoing future entangling relationships with the Hasidic Jewish sect.

1. **The fair market value sales of urban renewal parcels to the Academy for use as a synagogue and a yeshiva, where no Hispanic organization ever proposed to purchase those sites for alternative uses, had the secular purpose of developing the urban renewal area.**

The secular purpose implemented by the City of New York in this and all urban renewal areas was to fairly develop a new community which fully and appropriately serves the needs of the people who live there.

Unless government can properly dispose of property to religious institutions for religious use, all urban renewal areas would be devoid of churches, synagogues, parochial schools and other institutions generally considered both appropriate and necessary to the free exercise of religion. Thus when the urban renewal program was first being developed, Justice Douglas considered the permissible purposes of one planned project in Washington, D.C., and found it

easy to opine in dicta that Congress had reasonably concluded that "[t]he entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers." Berman v. Parker, 348 U.S. 26, 34-35 (1954); see 64th Street Residents Inc. v. City of New York, 4 N.Y.2d 268, 174 NYS2d 1, 150 NE2d 396 (1958) (in holding that a religious corporation cannot be excluded from bidding on the sale of urban renewal property, the New York Court of Appeals found that Fordham University had received no unconstitutional "aid to religion" in its purchase of urban renewal property at Lincoln Center since the sale did not confer any financial benefit unavailable to other purchasers of land in the project, even though the system of bidding was expressly designed to lessen the likelihood of competing bids); Fishman v. City of Stamford, 267 A.2d 443 (Conn.), cert. den., 399 U.S. 905 (1970) (Connecticut Supreme Court found no violation of the Establishment Clause where private land was condemned for religious use by a church [which had previously existed and been retained in an urban renewal area], provided that the church receive no financial subsidy or benefit unavailable to other residents of the urban renewal area). See generally Cornell University v. Bagnardi, 68 N.Y.2d 583, 592-94, 510 NYS2d 861, 503 NE2d 509 (1986) (noting the "inherently beneficial nature of churches and schools"); Holy Spirit Association for the Unification of World Christianity v. Rosenfeld, 91 A.D.2d 190, 197, 458 NYS2d 920 (2d Dept. 1983), lv. to app. den., 63 N.Y.2d 603,

480 NYS2d 1025, 469 NE2d 103 (1984) (noting that every effort must be made to accommodate a religious use within zoning restrictions).

As the District Court found (A790-92), the record is clear that the City's disposition of the institutional sites for the development of the yeshiva and synagogue is by no means unusual. In fact, Mr. Siegel testified that the City has disposed of urban renewal property to churches on at least five other occasions with which he is personally familiar (A245-47). In these instances, the dispositions were made with the express understanding that the purchasers would develop houses of worship, related parking, housing for the clergy, and in one case, a parochial school. In each instance, the disposition of the property was made on a "sole source" basis without competitive bidding, although at market rates (A245-46) Likewise, in each instance, the underlying secular purpose of the disposition was clear: to fairly allow for the redevelopment of the community to include necessary religious institutions.

There is nothing about the particular circumstances of the disposition of Sites 4A and 4C which would indicate any additional or contrary purpose. To the contrary, the record plainly supports the conclusion that the City was in no manner seeking to further the propagation of the Satmar religion, but was rather recognizing the needs of the community before and, as it continued to exist, after urban renewal. Indeed, the record indicates without dispute that Site 4 included both a yeshiva and two synagogues prior to its clearance for urban renewal and that, to date, there are no Satmar synagogues in WURA I and only one Satmar yeshiva there

(A251-52;A397-98; A403-05; A483-84). Moreover, given the explosive growth in the Hasidic population and number of Satmar Hasidic school-age children over the past 10 years (A438-39), there can be no serious inference of any improper purpose in selling Site 4 for the construction of an additional yeshiva and a synagogue.

If there were any doubt but that the disposition of Site 4 to the Academy was made for a secular purpose, such doubt should be thoroughly eradicated by the history of development of Site 12 within the same Williamsburg Urban Renewal Area I. In the 1970's, Site 12 was designated, on a sole source basis, for development by an Hispanic Pentecostal Church of approximately 500 members which had previously existed within WURA I (A401-02). The only reason that this Christian church was not accommodated in the same area was because the church itself elected to abandon its plans for Site 12, and relocate to another site in the immediate surrounding community (A401-02).

Site 12 remained vacant until such time as it was sold at an extensively advertised public auction in accordance with City procedures in 1989. The Academy was the sole bidder and plans to develop the site for use as a yeshiva. It is impossible to attribute any improper purpose to the City for the advertised sale at public auction of Site 12.

Sites 6 and 10 within WURA I were also sold for the development of a Satmar Hasidic yeshiva and a yeshiva under the auspices of a different Hasidic sect. Both properties were disposed of over 10 years ago, however, and were, by law, subjected to the

same public and legal reviews as the disposition of any other urban renewal site. There is not a scintilla of evidence that they were sold in furtherance of favoritism toward the Hasidic sect or because of racial or ethnic animus. Indeed, the Satmar yeshiva built on Site 6 was intended as a replacement of a Satmar yeshiva run by the Academy and destroyed by the urban renewal (A409). To date, it is the only Satmar yeshiva in WURA I (A483).

Plaintiffs shift their position on appeal and argue that "[t]here can be no secular purpose for repeatedly disposing of public land in a manner which leaves a community's citizens feeling segregated by religion" (Compare A789-90 with Pl-App. Br. at 40). Assuming the legal validity of selling urban renewal land for religious purposes, which plaintiffs concede (Pl.-App. Br. at 23), plaintiffs' argument simply makes no sense. The law does not place a limit on the number of sales for religious use that are otherwise permissible. On the contrary, the Supreme Court has ruled that the government should let each religious group "flourish according to the zeal of its adherents and the appeal of its dogma". Zorach, supra, 343 U.S. at 313. It would be a violation of the Free Exercise Clause for the City to deny the requests of the Satmar Hasidim to purchase, at fair market value, available sites in WURA I for religious uses solely on the basis that they would begin to dominate the neighborhood. Indeed, the Hispanic community in Williamsburg itself railed against the setting of such ethnic and racial quotas which they claimed were established for the purpose of preventing the area from "tipping" toward Hispanic dominance. See Williamsburg Fair Housing Committee

v. New York City Housing Authority, 450 F.Supp. 602 (S.D.N.Y. 1978).

Moreover, the "community", as defined by plaintiffs as comprised of WURA I and WURA II (A77; A129; A502), currently contains only one Satmar yeshiva and no Satmar synagogues (A484-84). We are at a loss to understand how the construction of an additional yeshiva and a synagogue in the "community" should cause the community's citizens to feel "segregated by religion" (Pl.-App. Br. at 40).

2. The neutral government act of selling at fair market value certain urban renewal sites to the Academy, in the absence of a finding by the District Court of any government favoritism toward the Satmar Hasidic Jewish sect, compels the conclusion that the sales did not advance Satmar Hasidic Judaism.

The Supreme Court has recently explained that advancement of religion means endorsement, favoritism, or promotion of a particular faith. County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, __U.S.__, 109 S.Ct. 3086, 3100-01 (1989); See also, School District of the City of Grand Rapids v. Ball, 473 U.S. 373, 389 (1985); Lynch v. Donnelly, 465 U.S. 668, 692 (1984). In Allegheny, in evaluating governmental use of religious symbols, the majority of the Supreme Court adopted Justice O'Connor's analytic framework for analyzing advancement, or endorsement as she calls it. 109 S.Ct. at 3102. In discussing her analysis, Justice O'Connor states that whether a challenged governmental practice conveys a message of endorsement of religion is to be evaluated objectively, as by a "reasonable observer." 109

S.Ct. 3117, 3121; see also Widmar v. Vincent, 454 U.S. 263, 274 ftnt 14 (1981).

Plaintiffs advocate a subjective evaluation (Pl.-App. Br. at 27, 31, 34), but that is not the test the Supreme Court has adopted. Thus, Ms. Calderon's testimony that she feels excluded by the growth of the Hasidic community and would feel excluded by the presence of a synagogue on Site 4 (A215), Ms. Rodriguez's statement that she would find it "spiritually depressing" to see a synagogue on Site 4 (A179) and Dr. Sanchez's opinion that the synagogue would be economically, politically and culturally detrimental to the Latino community (A151) (see also Pl.-App. Br. at 34-35), are irrelevant to the resolution of the establishment claim. Obviously, any plaintiff who commences a lawsuit challenging government action as violative of the establishment clause finds the action personally offensive. But the Supreme Court has not rested its decisions on such subjective feelings, but has instead made determinations based upon what "a reasonable observer" would perceive.

The neutral act of selling at fair market value urban renewal land to a particular religious group for religious uses in no way endorses that religion where sales to religious groups are legal, commonplace, and without favoritism. As the District Court found (A793): "The Academy has received no greater benefit than any other individual or organization with sufficient funds to purchase land from the City at market value." A "reasonable observer" passing a synagogue or church built on urban renewal land would have no way of associating that institution with the government. A sale at fair

market value to a religious institution could not reasonably be construed as government support of religion. See Hunt v. McNair, 413 U.S. 734, 445-46 ftnt 6 (1973) (in upholding the constitutionality of a State Authority's issuance of revenue bonds for secular use to benefit a religious college which would permit a buyer upon foreclosure to put the property to any use including religious use, the Supreme Court said: "Even in such an event, [i.e. the subsequent purchase by a religious institution], the acquiring religious institution presumably would have had to pay the then fair value of the property."); Walz v. Tax Commissioner, supra, 397 U.S. at 675 (in upholding tax exemptions to property owned by religious institutions for religious use, the Supreme Court said: "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."). Finally, to the extent that the construction of a synagogue on land purchased at fair market value can be said to be an endorsement of that religion, the Supreme Court has said over and over, as already set forth above, that incidental benefits to religion from government action accommodating religious institutions do not amount to a violation of the establishment clause.

If the real property tax exemptions for religious institutions in Walz v. Tax Commission, supra, 397 U.S. 664 and the financial aid enabling a disabled person to become a pastor in Witters v. Washington Dept. of Services for the Blind, supra, 474 U.S. 481, which both provided indirect financial support to religious

institutions, have been held not to advance or endorse religion, then the sales at fair market value of urban renewal property to Satmar Hasidim for religious purposes are equally as attenuated and do not advance or endorse that religion. The sales here create no more of a "symbolic link" between government and religion as do the tax exemptions or financial support of religious education.

Plaintiffs' argument to the contrary is predicated upon cases with vastly different facts (Pl.-App. Br. at 26). In School District of the City of Grand Rapids v. Ball, supra, 473 U.S. 373, publicly-paid teachers went onto the premises of parochial elementary schools to teach secular courses. Because the parochial students would go between religious and public schools classes in their parochial schools, the Court found that a symbolic union between the government and their religion could form in the students' minds. In Parents' Association of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir., 1986), this Court ruled that the separation in a public school of nine classrooms by swinging doors to provide remedial education to Hasidic girls, who pursuant to their faith must be segregated from males and the general public, and the provision of only female teachers who are bilingual in Yiddish and English would create in the minds of the primarily Hispanic elementary school students attending the school a symbolic link between the City and the Hasidim. It is evident that the sales here, not open to public view--particularly not by impressionable elementary school students--bear no resemblance to the facts of Grand Rapids or Parents' Association.

Plaintiffs argue that the "WURA I land transfers" "committed to the Hasidim" are sufficient alone to establish, as a matter of law, favoritism within the meaning of the First Amendment (Pl.-App. Br. at 26, 31). However, as the District Court found (A800-09), the sales of the institutional sites spanned over ten years, were the product of impartial, routine government practices, and no Hispanic or other non-Hasidic organization ever offered to buy or develop those sites. Additionally, the sales of Sites 4A, 4B and 4C to defendant Academy and the Congregation were reviewed and approved by the Community Board (comprised of both Hispanic and Hasidic members), the City Planning Commission, and the Board of Estimate at various intervals spanning eight years, during which no Hispanic organization came forward with alternative proposals and no entity voiced opposition. It is hard to imagine who would have been able to persuade so many different community members and government officials at so many different times to favor the Hasidim.

Plaintiffs then argue that the only inference to be drawn from (1) the decision to keep the Academy as a sponsor after it defaulted on its promise to keep a letter of credit, (2) the execution of the Cross-Subsidy Agreement and (3) the decision not to re-ULURP the dispositions of sites 4A and 4B which had already been ULURPed in 1979, is that municipal appellees intended to favor the Satmar Hasidic religion (Pl.-App. Br. at 27-33). First, this argument has nothing to do with favoring one religion over another -- it applies to favoring one ethnic group over the Hispanic and African-American plaintiffs.

Second, plaintiffs' inference is not the only reasonable inference that could be drawn from those facts and the District Court found otherwise (A800-09). There is ample evidence in the Record to support municipal appellees' claim that it was HPD policy to continue to work with sponsors, even those in default of various terms of their agreements (A357-58; A539). The District Court found as a fact, amply supported by evidence, that Commissioner Gliedman conceived the cross-subsidy idea not to discriminate against Hispanics but as a practical way to help them achieve the housing they sought (A805; A531-32; A537; A559-60). As for ULURP, as we explained above (see Statement of Facts, supra at 17-20), a re-ULURP was not legally mandated prior to the final Board of Estimate approval of the land disposition agreements for sites 4A, 4B and 4C. The District Court found, based upon the testimony, that it was standard policy for land disposition agreements relating to urban renewal property not to be submitted to ULURP where the disposition had already been ULURPed (A802), and Williamsburg Community Board #1 itself admitted that the approval of land disposition agreements was "not technically a ULURP item." (A734). That issue was at least a subject of debate in 1988 when HPD made the decision not to re-ULURP the dispositions of sites 4A and 4B (see Statement of Facts, supra at 17-20). Significantly, Community Board #1 did review the land disposition agreements for Sites 4A and 4B prior to title passing and overwhelmingly supported the proposed uses for a synagogue, boys' yeshiva and faculty housing (A742-44).

In any event, even assuming a conscious choice to avoid a re-ULURP was made, that does not inexorably lead to the conclusion that HPD intended to advance the Hasidic Jewish religion, nor does it suffice to prove a violation of the establishment clause. Thus, even assuming the District Court's finding that a re-ULURP was not required was clearly erroneous, it in no way affects the Court's legal conclusion that the fair market value sales of the institutional sites to the Academy for religious use by Satmar Hasidim did not have the primary effect of advancing Judaism, as practiced by the Satmar Hasidim.

3. There is no unlawful government entanglement with religion because the land sales at fair market value to the Academy resulted in only minimal involvement concerning details of the sales and there is no further relationship required between municipal appellees and the Academy.

In analyzing whether the government has become unlawfully entangled with religion, the principal considerations are whether the involvement is excessive and whether the involvement is ongoing. Lynch v. Donnelly, supra, 465 U.S. at 684; Tilton v. Richardson, supra, 403 U.S. at 688; Walz v. Tax Commissioner, supra, 397 U.S. at 674. The sales at fair market value to the Academy result in only minimal involvement concerning the details of the sale. The relationship concludes after transfer of title. There is no entanglement here within the meaning of the First Amendment. See Tilton v. Richardson, supra, 403 U.S. at 688.

Plaintiffs argue that " '[e]xcessive entanglement' is guaranteed because the land transfer on its face violates unambiguous restrictive covenants designed to insure that the facilities built on the

land will be open to persons of all religions" (Pl.-App. Br. at 35; 1). Plaintiffs' argument ignores the First Amendment's directive not to discriminate against any particular religious group and that there is a legal right to sell urban renewal land to religious entities for religious use.

The right to sell land to religious institutions for religious use requires the common sense application of the non-discrimination covenants. See Fishman v. City of Stamford, supra, 267 A.2d at 448. Most religious institutions owning property for religious use discriminate on some level. For example, a convent is restricted to women and a monastery to men, and both bar the public; Catholicism and Greek Orthodox churches discriminate against women by refusing to permit them to be members of the clergy. Those churches also discriminate against Jews and Moslems because a prerequisite to becoming a priest or marrying into the faith is a covenant that a person believes in Christ. The Catholic Church does not permit women to exercise their constitutional rights to use birth control or obtain abortions; and Catholic doctrine disapproves of homosexuality.

The Connecticut Supreme Court held, when confronted with an argument identical to that made by plaintiffs, the only reasonable construction which could be placed upon the anti-discrimination covenants in a deed for urban renewal property was to forbid the purchaser [which in that case was a Catholic church], to discriminate in actions which are "above and beyond" those ordinarily and necessarily associated with the operation of the church itself, such as discrimination in the hiring of lay personnel as maintenance

employees. 267 A.2d 448-49. Similarly, the Supreme Court has held that a religious organization is exempt from the requirements of Title VII of the Civil Rights Act of 1964, even when it is involved in avowedly "secular" activities, and that this exemption does not violate any provision of the Establishment Clause. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987). Finally, Title VIII of the Civil Rights Act, the Fair Housing Act, permits a religious organization to limit to members of that particular religion the sale, rental or occupancy of a dwelling which it operates. 42 U.S.C. §3607(a).

Plaintiffs also claim that since the anti-discrimination clauses vest HPD with discretion to institute an action for specific performance and damages upon violation of the clauses (e.g. A.685), HPD will necessarily be compelled to sue because the religious practices of the Satmar Hasidim are discriminatory (Pl.-App. Br. at 35-38). However, since it is within HPD's discretion to sue, the alleged entanglement is merely speculative. See Hunt v. McNair, supra, 413 U.S. at 744 ftnt 6 (possible future purchase by a religious institution at a foreclosure sale of property funded through state-sponsored bond issue is only a speculative possibility and will not suffice to defeat constitutionality of issuance of bonds).

Finally, plaintiffs claim "the extraordinary divisiveness of the site 4 land sales .. is a strong warning of the inevitable excessive entanglement that will occur" (Pl.-App. Br. at 38, 39). First, the Supreme Court has ruled that political divisiveness alone cannot serve to invalidate otherwise permissible conduct. E.g. Lynch

v. Donnelly, supra, 465 U.S. at 684; Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 797-98 (1973). Second, when political divisiveness has been found as a further factor demonstrating entanglement, it has been in situations where the government-religion relationship is continuous and on-going. E.g., Committee for Public Education & Religious Liberty v. Nyquist, supra, 413 U.S. at 796-98; Lemon v. Kurtzman, supra, 403 U.S. 623 (both cases involved ongoing financial aid for payment of parochial school teachers' salaries, financial assistance for maintenance and repair of parochial schools, and for tuition assistance and tax relief to parents of parochial school students). Unlike those cases, transfer of title of the sites in question here terminates the government-religion relationship.

Moreover, as in Lynch v. Donnelly, supra, 465 U.S. at 684-85, there was no opposition voiced to any of these sales, going as far back as the late 1970's when the first sales of institutional sites occurred. At least some of the plaintiffs had actual notice of the dispositions of sites 4A, 4B, and 4C to the Academy, or should have known because of the mandatory public review conducted (twice with respect to sites 4A and 4B in 1979 and 1984) and the completed transfer of title of site 4C in 1980. Plaintiffs may not "by the very act of commencing [this] lawsuit,... create the appearance of divisiveness and then exploit it as evidence of entanglement." Lynch v. Donnelly, supra, 465 U.S. at 684-85. Moreover, as the District Court found (A794-95), the tension between the Hispanics and Hasidim had been going on for years before and during the

disposition process. The disposition of institutional Site 4 did not create the divisiveness.

POINT II

THE DISTRICT COURT PROPERLY FOUND AS A FACT THAT THE FAIR MARKET VALUE SALES OF THE URBAN RENEWAL SITES WERE MADE PURSUANT TO AN APPROPRIATE PUBLIC PROCESS AND FOR A LEGITIMATE PUBLIC PURPOSE IN A CONTEXT WHICH REFLECTS AN ACUTE SENSITIVITY BY THE CITY TO THE NEEDS OF ALL ETHNIC GROUPS; THOSE SALES ARE THUS IN NO MANNER DISCRIMINATORY IN VIOLATION OF THE FOURTEENTH AMENDMENT.

(1)

It is undisputed that requisite to a finding of an equal protection violation, a plaintiff has the burden of establishing a discriminatory intent on the part of the government as at least one motivating factor in the decisionmaking process. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); United States v. Yonkers Board of Education, 837 F2d 1181, 1216-17 (2d Cir., 1987), cert. den., 486 U.S. 1055 (1988).

A district court's finding concerning discriminatory intent is a finding of fact. See United States v. Yonkers Board of Education, supra 837 F2d at 1218. An appellate court's review of that finding is, therefore, circumscribed. Id; Fed.R.Civ.P. 52(a).

A district court's fact findings, whether based on oral or documentary evidence, may not be set aside unless clearly erroneous. United States v. Yonkers Board of Education, supra, 837 F2d at 1218; Fed.R.Civ.P. 52(a). If the testimony of a live witness is being

evaluated and the witness has told a "plausible story that is not contradicted by extrinsic evidence", that finding "can virtually never be clear error'". United States v. Yonkers Board of Education, supra, 837 F.2d at 1218, citing, Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985). "Even when the district court's findings of fact do not rest on credibility determinations but instead are based on documentary evidence or on inferences from other facts, the appellate court must accept those findings if they adopt a permissible view of the evidence; the appellate court may not conduct a de novo review." United States v. Yonkers Board of Education, supra, 837 F2d at 1218.

Plaintiffs ignore these principles in making their arguments. They claim that if the District Court had found the facts as plaintiffs believe them to be, it should have found discriminatory intent. However, in making its ultimate finding of fact that municipal appellees did not act with discriminatory intent in selling the sites to the Academy, the District Court, contrary to plaintiffs' unsupported allegations (Pl. Br. at 2, 43), thoroughly reviewed all the witnesses' testimony and documentary evidence and found facts different from those argued by plaintiffs. The District Court properly considered only the admissible evidence, not "inadmissible hearsay and rumors" (A796). The Court did state that it found no "admissible direct evidence" of discriminatory intent (A796). But, the Court then went on to list all the circumstantial indicia of discriminatory intent set forth by the Supreme Court in Arlington Heights, supra, 429 U.S. at 267-68, and to consider all the circumstantial evidence in this case

(A798; A800-09), notwithstanding plaintiffs' assertions to the contrary (Pl.-App. Br. at 2, 43).

Further, the District Court's reliance on the Supreme Court's discussion of the elements of "discriminatory purpose" in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979), was merely reliance upon established legal principles. The plaintiff in Feeney had argued that because the Legislature had enacted a statute granting absolute lifetime preferences for veterans on Civil Service promotional lists and most veterans are men, that the Legislature must have intended to exclude women because they, in fact, enacted the statute and the exclusion of women was plainly foreseeable (442 U.S. at 278). In response, the Supreme Court set forth the principle relied upon by the District Court (442 U.S. at 279):

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. See United Jewish Organizations v. Carey, 430 U.S. 144, 179 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group (footnotes omitted)

The District Court cited to Feeney because in the District Court plaintiffs made a materially identical argument to that made by

the plaintiff in Feeney.[19] As the District Court observed in its decision (A796): "Plaintiffs' main argument is that because City officials were aware of the segregationist tendencies of the all-white Hasidic community the court should infer that the City acted with discriminatory intent in selling the land". The District Court rejected that argument because the evidence failed to establish that the sales to the Academy, subject to public scrutiny by Hispanic and other community members and a multitude of government bodies many times over the past 10 years, were made "because of" municipal appellees' bias against Hispanics and favoritism of Hasidic Jews (798-A809).

On appeal, plaintiffs' main argument has not changed (see Pl.-App. Br. at 42). Plaintiffs now recite "facts" contrary to those found by the District Court from the oral and documentary evidence and claim that they "inexorably lead[] to a conclusion of municipal intent to segregate" (Pl.-App. Br. at 46). Plaintiffs have simply failed to carry their burden of showing that the testimony from their witnesses was, as a matter of law, correct and the City witnesses' testimony was false, or that the findings set forth in the District Court's comprehensive decision were unsupported by any permissible view of the evidence.

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[19] Plaintiffs' attempt to distinguish <u>Feeney</u> on the ground that <u>Feeney</u> involved a neutral statute (Pl.-App. Br. at 46-47), fails for the simple fact that the <u>Feeney</u> analysis applied not to a "neutral" rule, but to a statute that by design was plainly not neutral. <u>See</u> 442 U.S. at 277.

(2)

As detailed in our Statement of Facts, supra, there is ample support in the record for the District Court's findings. Based on the testimony of Rubin Wolf, Herbert Siegel and Anthony Gliedman and the absence of any evidence to the contrary, the Court properly found that the "sole source" procedure for disposing of urban renewal sites was the norm in the 1970's and that sole source designations made during that period were honored subsequently, although a "request for proposals" mode of disposition was adopted in 1980 (A778-79; A393-97; A538-39). Far from being a "secretive" procedure as alleged by plaintiffs and amicus, the sole source procedure for disposition of WURA I sites, including Site 4, began with extensive preliminary discussions with both Hispanic and Jewish organizations (A393). Mr. Rubin testified that he also met with Community Board #1 regularly concerning all site dispositions and that Community Board #1 included both Hispanic and Jewish members (A393-94). Moreover, all designations were "tentative," and were reviewed by HPD's central office staff, by the local Community Board and by the City Planning Commission (A396-97). Final designations could only be made by the City's Board of Estimate after public hearing (A396). Significantly, it was undisputed that municipal appellees had "sole sourced" a site to a Hispanic Church formerly situated in WURA I, at the same time they had "sole sourced" Site 6 to the Academy for a yeshiva, which would replace their yeshiva destroyed by urban renewal (A401-02; A409).

After the Academy and Congregation approached HPD requesting to purchase Site 4 (A398), and after completion of the above extensive public and government review involved in designating developers, municipal appellees designated the Academy and Congregation as developers of Site 4 in 1977. Subsequently, as both the testimony of Mr. Siegel and the documentary evidence establish, the sale of Site 4 was thoroughly and publicly reviewed and approved at each stage of its development in accordance with the established City procedures as they existed during various times over the past fifteen years. The fact that the City "stuck with" the Academy as developer through eleven years of changing plans and at least one default was likewise, as the testimony indicated, in accordance with the City's general policies which were applied consistently throughout urban renewal areas (A357-58; A539).

As the documentary evidence catalogued, municipal appellees submitted the disposition of Site 4 to ULURP review once in 1979 and then in 1984 when the urban renewal plan was amended to permit general institutional uses on site 4 (A666-76; A709-19, Mun-App. Exhs. Q, S.). The District Court relied on Mr. Siegel's testimony that he informed the Community Board at the 1984 meeting of the new plans for Sites 4A and 4B and apparently discredited Ms. Calderon's testimony that she never was informed of the changed uses (Compare A268; A367-68, with A218-21; A783-84). The dispositions were again subjected to further Board of Estimate and Community Board review at the time that the land disposition agreements for Sites 4A and 4B were approved in 1988. As the District Court found (A783), at least

some of the plaintiffs actively participated in the Community Board hearings, which are an integral part of the ULURP process. As the uncontradicted documents showed, at all times, Community Board #1, which was composed of local community residents, including both Hispanics and Hasidic and Orthodox Jews, overwhelmingly approved the sales of Sites 4A, 4B and 4C to the Academy and Congregation. Such a process and result is hardly consistent with any intention to discriminate.

The District Court's finding that municipal appellees did not deviate from standard procedure by not submitting the land disposition agreements for Sites 4A and 4B to ULURP in 1988 prior to Board of Estimate approval (A802) is amply supported by Mr. Siegel's testimony (A253-54; A262; A356). In the District Court plaintiffs did not, because they could not, prove that HPD's actions were legally defective, although they unsuccessfully attempt to make that showing now for the first time on appeal (A802; compare Pl.-App. Br. at 29-30, with supra, pp. 17-20).

Former HPD Commissioner Gliedman testified at length as to the reasons for the creation of WURA II in conjunction with the formulation of the Cross-Subsidy Agreement (A527-39). The District Court opted to rely on former Commissioner Gliedman's testimony and reject Ms. Herman's and Ms. Calderon's hearsay testimony that the creation of WURA II and the Cross-Subsidy Agreement were the result of "Hasidim [having] the inside track at City Hall" (Pl.-App. Br. at 43-44), see supra pp. 38-39).

Mr. Gliedman's testimony amply supports the District Court's findings that the sole purpose for creating WURA II and the formulation of the Cross-Subsidy Agreement was to lessen tensions between Hispanics and Hasidic Jews in Williamsburg by selling off available vacant tracts in WURA I at fair market value and using those funds for sorely-needed low-income housing in WURA II, which had no large vacant tracts, at a time when federal and state financial assistance for such housing had all but halted (A531-32; A537; A559-60). As the District Court found, "[w]ith the drying up of federal and state funds, it seemed only good sense to earmark, for the subsidization of needed housing, money raised to purchase land at market rates" (A805).[20]

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[20] Plaintiffs now argue without support in the record or in the law that Commissioner Gliedman's testimony should be discounted (Pl.-App. Br. at 44-46). Plaintiffs also claim, citing to page A321 of the Joint Appendix, that Mr. Siegel "admitted he believed the market rate WURA I housing would be sold largely, if not exclusively, to whites" (Pl.-App. Br. at 46). However, in typical distortion of the record, they fail to accurately report the context of his statement. Plaintiffs' counsel's asked whether if housing units "are built without subsidy they are going to be largely, if not exclusively occupied, by whites." Mr. Siegel answered, "I would have reason to believe that" It is no secret that the Hispanic population is generally poorer than the Hasidic population and that more Hasidic Jews could afford market rates units than Hispanics.

To the extent plaintiffs argue that the City should have built low-income housing or anything else on the WURA I sites (See Pl.-App. Br. at 27, 42), it is well settled that municipal appellees have no constitutional or statutory duty to build permanent low income housing or any other type of project. Berman v. Parker, supra, 348 U.S. at 33, 35; Citizens Committee for Faraday Wood v. Lindsay, 507 F2d 1065, 1071 (2d Cir., 1974), cert. den., 421 U.S. 948 (1975); Housing Justice Campaign v. Koch, ___ AD2d ___, 1991 WL 5032 (1st Dept., 1991), NYLJ, January 29, 1991, at p. 21, 24 col. 3, 6.

Finally, the District Court's finding that no Hispanic or non-Hasidic organization ever approached HPD with alternative proposals (A800) is well grounded in plaintiffs' witnesses' own testimony and is further supported by Mr. Siegel's testimony (A133-34; A184; A222; A361; A399). The District Court, in reaching its conclusion that municipal appellees had no discriminatory intent concerning any of the sales, properly considered this fact and the fact that throughout the 15 years during which various parcels were being sold to the Academy no one voiced an objection to any of the sales of WURA I sites (A807-09).

Plaintiffs continue to improperly rely on other cases brought either many years ago or not involving these municipal appellees, as history of "the evolution of a Hasidic enclave in Williamsburg" (Pl.-App. Br. at 10, 11, 14-15, 31, 44). None of those cases indicates any history of discrimination by the City whatsoever. The decision of the Court in Williamsburg Fair Housing Committee v. New York City Housing Authority, 450 F.Supp. 602 (S.D.N.Y. 1978), for example, merely reflected Judge Tenney's approval of the settlement of that case alleging discriminatory quotas, with no finding or acknowledgement of liability by any party.[21] The Court's later

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[21] We note that while the Court did make the finding that quotas had been in use by the New York City Housing Authority, there was no finding regarding the circumstances under which such quotas had been adopted or the composition of the applicant pool, nor was there any finding that the quotas were illegal and improper. Indeed, we note that until the contrary holding of this Court in United States v. Starrett City, 840 F.2d 1096 (2d Cir. 1988), cert. den., 488 U.S. 946
(Footnote Continued)

decision in Williamsburg Fair Housing Committee v. New York City Housing Authority, 493 F.Supp. 1225 (S.D.N.Y. 1980), did find that the developer of the private Bedford Gardens project had made improper use of racial quotas, but specifically found that HPD had not instructed Bedford Gardens to rent pursuant to a quota. 493 F.Supp. at 1248. Neither Almonte v. Pierce, 666 F.Supp. 517 (S.D.N.Y. 1987) nor Parents' Association of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. 1986) involved municipal appellees. In P.S. 16, involving the N.Y.C. Board of Education, an independent body corporate, this Court acknowledged that the proposed plan at P.S. 16 to conduct remedial classes for female Hasidic elementary students attending parochial schools was an effort to comply with the recent restrictions imposed by Aguilar v. Felton, 473 U.S. 402 (1985). 803 F.2d at 1237. In Aguilar, the Supreme Court had ruled that public school teachers could no longer conduct on parochial school premises remedial education classes, to which parochial students were entitled.

Finally, there is absolutely no factual basis in this record for comparison to United States v. Yonkers Board of Education, supra, 837 F2d 1181, as plaintiffs contend (Pl.-App. Br. at 47). Yonkers historically located and continued to situate low-income housing in only one section of the City. Unlike that case, the 1,400

(Footnote Continued)
(1988), quotas were considered by many as an appropriate means to maintain integration in housing in accordance with the requirements of law. Compare Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973), and United States v. Starrett City, 840 F.2d at 1103-08 (Newman, J., dissenting).

deteriorated housing units in WURA I destroyed by urban renewal were replaced by some 2,350 low and moderate income units in the late 1960's and early 1970's. Those buildings were integrated when they first opened and are integrated now. If the City intended to displace the Hispanics from WURA I, it would have determined to build middle income or market rate housing.

The municipal appellees have acted with sensitivity to the needs of all residents of WURA I and II and sought to meet the housing needs of all the ethnic groups here as best as they could given geographic and fiscal constraints. Municipal appellees' actions in the broader Williamsburg Community is further evidence of municipal appellees' concern about the welfare of all its poorer citizens, including those of whom are Hispanic. Pursuant to the City's extraordinary and unprecedented 10-year $5.1 billion housing program, the City has in recent years developed over 2300 additional units of low-income housing in the broader Williamsburg community and those units are overwhelmingly occupied by minorities (Exh HH, II, 8/2.274-83). See Housing Justice Campaign v. Koch, supra, NYLJ, January 29, 1991, for a detailed description of the City's plan, the first of its kind by any municipality, where 63% of the funds are allocated to rehabilitating every housing unit acquired by the City in foreclosure proceedings and creating housing for the homeless and low-income families. 23% of the funds are dedicated to rehabilitating and creating moderate income units and the balance is for middle-income housing.

The record overwhelmingly supports the District Court's finding that municipal appellees did not have discriminatory intent when they sold the WURA I sites to the Academy.

POINT III

PLAINTIFFS' CLAIMS ARE BARRED BY LACHES SINCE THE SALES OF SITES 6 AND 10 WERE COMPLETED OVER 10 YEARS AGO, THE SALE OF SITE 4C WAS FINALIZED 10 YEARS AGO, TITLE TO SITES 4A AND 4B PASSED TO THE ACADEMY TWO YEARS AGO AND THE SALE OF SITE 12 WAS COMPLETED A YEAR AGO AFTER AN EXTENSIVELY PUBLICIZED PUBLIC AUCTION.

We join with appellee Academy's argument on laches and add only that it would be grossly inequitable to permit the rescission of completed sales, the proposed disposition of which have been, or should have been, known to plaintiffs for 5 to 10 years.

The process designating the Academy and Congregation in 1977 as developers of Site 4 was a public one involving, among others, Community Board #1, whose membership included both Hispanics and Hasidim. The dispositions of Sites 4A, 4B and 4C in 1979 were also effectuated pursuant to a mandatory public review process, requiring Community Board #1's review. Further public notice and mandatory public review by Community Board #1 of the Academy's and Congregation's designations as developers of Site 4 occurred in 1984 when HPD submitted proposed amendments to the urban renewal plan to change the restricted institutional uses for Site 4 to unlimited institutional use and to include "dormitory facilities related to religious institutions" as a permitted institutional use. Mr.

Siegel asserted that he spoke at the mandatory hearing before Community Board #1 and advised the attendees of the plans intended for sites 4 (A268; A367-68). The yeshiva proposed for Site 4 in 1979 remained unchanged as a school. The community got yet an additional notification that the Academy was the designated developer of Site 4 and of the proposed uses at a 1988 meeting of the ULURP committee of Community Board #1. Prior to that meeting, the Community Board had notified residents of all the 2,350 housing units in the large apartment complexes in WURA I and reported that "[a]t that time, this proposal was discussed in great detail, and the consensus of the attendees concluded that it merited approval" (A741-42).

In 1988, construction began on the yeshiva, of which the community undisputedly has been on notice since 1979. At that time, a large sign depicting the proposed building was planted on Site 4 for all to see.

Plaintiffs waited until December 1989 to commence this lawsuit seeking to rescind the sale of Site 4, the purchaser of which they knew or should have known since 1979, or 1984, or at least 1988, and which their Community Board approved three times. During this entire 10-year period no minority organization or individual proposed to purchase Site 4 or any of the other institutional sites for any alternative use. Plaintiffs could have and should have acted sooner, before the Academy invested millions of dollars and before title passed to the Academy and Congregation.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED, WITH COSTS.

Respectfully submitted,

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