

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

Civil Action No. 11-CV-608

v.

CITY OF NEW BERLIN,

Defendant.

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**BRIEF IN SUPPORT OF THE PLAINTIFF'S MOTION  
FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

The United States seeks a preliminary injunction that directs the City of New Berlin (“New Berlin”) to issue building permits to MSP Real Estate, Inc. (“MSP”) so that it may begin construction of an affordable housing project. The United States filed this action to enjoin New Berlin’s pattern or practice of violations of the Fair Housing Act (“FHA”), 42 U.S.C. 3601 *et seq.*<sup>1</sup> New Berlin approved MSP’s project in May 2010 but rescinded approval in July 2010, following substantial public opposition that the City has acknowledged was based on the race of the tenants expected to live there. If MSP does not receive the permits and expend 10% of its federal tax credits by November 1, 2011, it will lose the \$25 million in tax credits that are financing the project, and the project will not be built.

## FACTS<sup>2</sup>

New Berlin is located in Waukesha County, 15 miles from the City of Milwaukee, in the most segregated region in the United States.<sup>3</sup> Javier Decl, Ex. 11.<sup>4</sup> Of New Berlin’s nearly

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<sup>1</sup> The case was assigned to this Court as related to *MSP v. City of New Berlin*, 11-cv-281.

<sup>2</sup> Unless stated otherwise, all exhibits cited herein are attached to the Declaration of Sharon Jamison and will be cited as “Ex. \_\_\_.” All references to transcripts (“Tr.”) are to transcribed interviews of City officials by counsel for the United States in the presence of the City Attorney in connection with the United States’ investigation in this case. Interviews occurred in February and March, 2011.

<sup>3</sup> The U.S. respectfully requests the Court take judicial notice of Census data cited herein attached to the Declaration of Marieelena Javier. Such data satisfy Rule 201 of the Fed. Rules of Evidence. *General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1084 (7th Cir. 1997) (“taking judicial notice of 1990 census data is appropriate”) (citation omitted); *U.S. v. Bailey*, 97 F.3d 982, 985 (7th Cir. 1996) (taking judicial notice of data in Census Bureau’s Statistical Abstract of the United States).

<sup>4</sup> Ex.11 is a U.S. Census Bureau report, which finds that in 2000, the Milwaukee-Waukesha Primary Metropolitan Statistical Area (PMSA) had the highest overall segregation rating in the United States. The rating is based on five separate measures of segregation, one of which is the commonly used dissimilarity index. In 2000, the dissimilarity index was .82, meaning 82% of the population would have to change residences for each neighborhood to have

39,000 residents, 95% are white and fewer than 1% are black. *Id.*, Exs.1-2. By contrast, of Milwaukee’s nearly 603,000 residents, 49% are white and 38% are black. *Id.* An average household in New Berlin earns twice that of an average household in Milwaukee, \$77,000 and \$37,000, respectively. *Id.*

The economic backbone of New Berlin is an extensive industrial park complex, which supports 1,100 total businesses and more than half of its 22,200 jobs. Ex.1; Ex. 2 at 7:13, 13:1. Over 40% of employees who work in New Berlin commute from Milwaukee County. Ex. 73 at ¶ 12. New Berlin has acknowledged that it needs “workforce” housing (*i.e.*, affordable housing) for these commuters and for other low to moderate-income people in New Berlin. Ex. 2 at 7:13, 7:23; Ex. 3 (Kessler Tr. 141:10-24; 142:1-7); Ex. 4. There are no affordable housing developments for general occupancy or families in New Berlin. Javier Decl., Exs. 3-6; Ex. 12. MSP’s development would be the first. *Id.*

#### **A. MSP’s Proposal**

In 2000, New Berlin approved a Planned Unit Development (“PUD”) for an area known as the City Center (“City Center PUD”). Ex. 5. One of the stated purposes of the City Center PUD is to transform a commercially zoned area near the center of New Berlin into a mixed-use area that includes a variety of retail and residential uses. *Id.* The City Center PUD designates multi-family dwellings, including high-medium density residential ones, as a principal use. *Id.* In 2007, the Plan Commission adopted the City Center Guidelines, which set out the architecture, parking, and design requirements that apply to all developments in the City Center. Ex. 13. Today, the City Center contains a library, a medical office, four vacant retail buildings

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the same racial distribution as the metropolitan area overall. In 2010, if looking only at the dissimilarity index, the Milwaukee-Waukesha area is the second most segregated area in the country. Ex. 73.

and three residential projects, which contain some unfinished and vacant units, all approved and built after creation of the PUD. Ex. 6. There have been no development proposals or construction in City Center since 2007. Ex. 6; Ex. 7.

In March 2010, MSP submitted an application to construct 180 units of affordable housing on property it owns in the City Center area of New Berlin at 14901 West Library Lane. Ex. 8. Of these, 100 units were set aside for seniors and 80 units were set aside as general occupancy housing. *Id.* The project was to be financed with \$25 million in tax credits under the federal Low-Income Housing Tax Credit program (“LIHTC”),<sup>5</sup> allocated to MSP in a competitive process by the Wisconsin Housing and Economic Development Authority (WHEDA). Ex. 9. All 180 units were required to be reserved for households earning no more than 60% of the area median income.<sup>6</sup> Exs. 8, 10. MSP would also be required to offer monthly rents substantially below market rate and to accept Section 8 voucher holders, a federal program that supplements rent above 30% of a tenant’s gross income. 26 U.S.C. 42(h)(6)(B)(iv); Exs. 4, 8; MSP Br. at Ex. 3.

As part of its proposal, MSP requested two waivers from the City Center PUD parking requirements to reduce the size and the number of parking stalls.<sup>7</sup> Ex. 11. MSP’s parking plan

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<sup>5</sup> Created by the Tax Reform Act of 1986, the LIHTC program provides tax credits to housing developers as an incentive to build affordable housing. Pub.L. No. 99-514, sec. 252, 101 Stat. 2189, codified at 26 U.S.C. 42. For more information on the LIHTC program *see* HUD’s National LIHTC database, available at [www.huduser.org](http://www.huduser.org). MSP was awarded \$2.5 million in credits annually for a term of ten years, for a total value of \$25 million.

<sup>6</sup> Some units were reserved for persons earning less than 40% and 50% of the area median income as well. Ex. 10.

<sup>7</sup> These included a request to build stalls 9’ x 18’ rather than 9’ x 19’ and that it be allowed to provide 95 parking spaces for the senior housing and 135 spaces for the workforce housing, fewer than the PUD ratios require of 112 and 170 spaces, respectively. MSP also requested a third waiver, which related to placement of the driveway. Ex. 11.

complied with the requirements in the City Center Guidelines, which allow developers to provide fewer parking spaces and shorter stalls than the PUD requires. Ex.13 at 19.

### **B. New Berlin's Initial Approval of MSP's Project: May 2010**

Before submitting its application in March 2010, MSP met with City officials on several occasions to ensure its application would meet the “use, site and architectural” requirements necessary for zoning approval. Municipal Code 275-24. On January 4, 2010, MSP attended a “concept review” before the Plan Commission.<sup>8</sup> Ex. 14 at 6. During the review, Commission members identified no concerns about the “use, site or architectural” aspects of the workforce housing but did express concerns about its prospective tenants.<sup>9</sup> *Id.* at 8, 11. Commissioner Sisson stated during the review that “generally the expression on the elderly [housing] is fine” but that “I think the most significant thing that you ought to hear tonight is that . . . an affordable housing project in New Berlin is not a priority. It definitely, . . . is not a priority for City Center.” *Id.* at 11. Mayor Chiovero stated: “I would like to see you provide staff with the demographics of the type of individuals that you are looking for as far as income levels, etc. I want to make sure that this will fit into the City Center area.” *Id.*

On March 1, 2010, MSP presented its proposal to the Plan Commission for a second “concept review.” Ex. 15. Again, Commission members expressed no concerns about use, site and architecture, and the Mayor encouraged MSP to submit a formal application. *Id.* On April 29, the Department of Community Development (“DCD”) staff released its report recommending

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<sup>8</sup> The Plan Commission is chaired by the Mayor, and consists of one Alderman and five citizen members appointed by the Mayor and approved by the Common Council. New Berlin Municipal Code 275.15. During the events at issue, the Plan Commissioners were Dave Ament (also an Alderman), Marta Broge, Mayor Jack Chiovero, Bill Christel, Brian Felda, Jenalyn Groeschel, and Lee Sisson. Ex. 16.

<sup>9</sup> The Commission identified a concern about parking for the senior building but it was agreed that MSP and DCD staff would work together to address it. Ex. 14.

approval of the “use, site and architectur[al]” aspects of MSP’s project, including approval of the parking waivers. Ex. 16. The report acknowledged that MSP’s proposal complied with the reduced parking requirements in the City Center Guidelines and that the “detailed market information” MSP had provided on parking justified the waivers from the PUD. *Id.*

On May 3, 2010, the Plan Commission adopted the DCD staff report and approved MSP’s 180-unit project by a vote of 4-3,<sup>10</sup> including approval of the parking waivers.<sup>11</sup> Ex. 17. The approval was conditioned on MSP’s satisfaction of 15 sets of conditions pertaining to permitting, architecture, landscaping, and engineering matters, which were recommended by DCD in its staff report. Ex. 17. The DCD and the Plan Commission’s customary practice is to attach “ten to fifteen conditions” to development applications. Ex. 3 (Kessler Tr. 33-34).

### **C. Race-Based Public Opposition After the May 3 Plan Commission Vote**

After the May 3 vote, hundreds of citizens called and wrote to Plan Commissioners, the Mayor, and DCD staff opposing the approval. Ex. 3 (Kessler Tr. 66:12-17); Ex. 18 (Chiovatero Tr. 18:13-25). The City has admitted that officials were “aware [that some of the opposition] . . . was based on issues of race.” Def. Ans. ¶ 19. Mr. Kessler, Director of the DCD, later described to DOJ the calls and emails as follows:

Q: Is it fair to say that planning staff were bombarded with calls or emails from the public following the May 3<sup>rd</sup> planning commission approval of this project?

A: Yes.

\*

\*

\*

Q: And how would you categorize the content of those communications?

A: Very, very negative. Very very negative.

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<sup>10</sup> In favor of the proposal were Commissioners Felda, Christel, Groeschel and Mayor Chiovatero. Voting against were Lee Sisson, Marta Broge, and Dave Ament. Ex. 17.

<sup>11</sup> The Plan Commission has previously approved parking waivers for residential and commercial development applications. Ex. 3 (Kessler Tr. 17:16-25; 18:1-13); Ex. 19 (Groeschel Tr. 7:6-24); Ex. 20 (Ament Tr. 6:7-25, 7:1-4); Ex. 21 (Christel Tr. 25:4-17).

Q: In what way?

A: Basically attacking staff and/or the plan commission or the City as to how we could ever let, quote a low income project be approved in this city \* \* \* And then obviously, very very derogatory racial terms used.

Q: Can you tell me a little bit more about the racial terms and the derogatory comments?

A: I personally, my own value system, I don't really want to repeat those words because I don't agree with those. But I think you can use your imagination as to what probably was said.

Q: I'm sure I can, and I know this puts you in a difficult position, but if you're able, please describe them from your memory.

A: The "N" word was used, those people, you know families with ten, 15 kids, things of – in those lines. \* \* \* I remember one email coming in and somebody said they lived adjacent to City Center, now they've got to buy a gun to protect their house, things like that.

\* \* \* \* \*

Q: Do you think part of the community opposition was based on fear of the race of the people who might live in the affordable housing project?

A: Absolutely.

Q: And why do you think that?

A: They would say that.

Ex. 3 (Kessler Tr. 66-68). Alderman Moore stated to DOJ that the opposition was based on “fear or something akin to hatred” that was in part “racial” and that residents mentioned “white flight,” and were worried that “people from [the] inner city would come out.” Ex. 70 (Moore Tr. 29:3-25, 30:1-5; 95:17-25, 96:1-8).

The Mayor stated to DOJ that people “expressed to me that they were afraid that this was going to destroy their neighborhood . . . [T]hat it was going to bring in gangs.” Ex. 18 (Chiovero Tr. 12:5-17). He stated that “people used examples of areas within the Milwaukee region that were not successful,” including “apartments that were on Highway 100 in West Allis” and a subsidized development in “Northridge.” Ex. 18 (Chiovero Tr. 12-13, 159-160). He said “many of them said I moved out of Milwaukee to have a better life for my family.” Ex. 18 (Chiovero Tr. 159: 20-21). The Mayor stated that he believed the comments were racial and that they referred to black and other non-white tenants. Ex. 18 (Chiovero Tr. 27:1-21).

Plan Commissioners Felda, and Groeschel also stated to DOJ that people were angry and spoke of the “low income demographic,” “crime,” “drugs,” “slums,” more “police calls,” of “people they don’t want living there,” “gangs,” and the “influx of people from Milwaukee” among other “stereotypes.” Ex. 21 (Christel Tr. 27-30), Ex. 22 (Felda Tr. 49:13-25, 52:13-25, 56:3-25), Ex. 19 (Groeschel Tr. 54-58). Commissioner Groeschel stated that “90% of people’s concerns” were based on the “low income and problems associated with the demographic. . . .” Ex. 71. Typical of the communications city officials received from New Berlin residents in the days after the May 3 vote are the following four emails (Ex. 23):

- Adding workforce housing projects targeted at people earning \$35,000 or less a year will invite a[n] element that is unbecoming of the city. . . . I challenge you to name one suburban community in southeast Wisconsin where low income housing has benefited the greater community. In other words, did not create white flight, increase crime, and lower the bar on public education.
- Last month, hundreds of us showed up at City Hall to express our opposition to this project. We will be there again on July 12. These new plans are still unacceptable. Low income housing ALWAYS brings down the property values of all the surrounding homeowners. I moved to New Berlin to get away from the poor people. You face a recall if this goes through.
- This is horrible. . . I can’t believe the Mayor and others would do this. . . . I don’t mean to sound negative against low –income families but I have seen how a once very nice apartment complex in South Milwaukee [] turn[ed] into a real circus . . . . Just because there is a Wal Mart here, it doesn’t mean that we need to move people out of their element to live next to the store. They will not have anything to offer this community, other than needing housing assistance.
- I did not move to New Berlin to have it turn into the next north side of Milwaukee. How can you do this to our beautiful community? . . . Stop this housing project before ‘your city’ ends up in ruins – and the tax paying people move out in droves – or drive you out of office.

#### **D. Pressure to Reverse the May 3 Vote**

In addition to pressure from residents, some on the Common Council and Plan Commission expressed opposition to the MSP project. Exs. 24-32. Alderman Ament sent emails to the Mayor objecting to the project because it involved “federal assistance.” Ex. 24. He

stated that he was searching for a way that the “[Common] [C]ouncil could override the Plan Commission” and that he was going to “work with the City Attorney” to do that.<sup>12</sup> Ex. 25. Commissioner Sisson called the project “a wrongheaded, colossal blunder.” Ex. 26. Alderman Ament, Harenda and Wysocki sent emails to Commissioners and members of the public criticizing the May 3 decision and encouraging residents to voice their opposition. Exs. 27-32.

On May 25, the Concerned Citizens of New Berlin (“CCNB”), a citizen group established by Laura Karvala (now an Alderman), appealed the Commission’s decision to the Board of Appeals. Ex. 33. A few days later, CCNB threatened to initiate a petition to recall the Mayor and began another petition to WHEDA requesting they deny tax credits to MSP.<sup>13</sup> Ex. 34; Declaration of Janice Popowich (“Popowich Decl.”), Ex. 4. Some Commissioners and Aldermen took steps in support of these actions, including signing CCNB’s petition and communicating the concerns of CCNB and other groups to the Mayor and planning staff. Exs. 19 (Groeschel Tr. 78:3-9); 31, 36, 37; MSP Br., Ex. 7. The May 3 vote became the subject of talk shows, news outlets, and some blogs. Popowich Decl. 4, Exs. 1-11.

The community opposition placed extraordinary pressure on the Mayor and the three Plan Commissioners who had voted in favor of the MSP project to change their vote. Exs. 3, 18-22. The Mayor explained the pressure to DOJ (Ex. 18, Tr. 164-165):

That was being not able to go out of my house. That was going to the grocery store to pick up a prescription for my mother and getting stuck there being yelled at and being called liars . . . . It was just – [I] don’t know what to do, you know. My kids, you know, my daughter moved out of the house and having my house vandalized and my wife is telling me that she’s never

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<sup>12</sup> In an email dated May 7, Alderman Ament recognized that the Municipal Code does not give the Common Council authority to override the Plan Commission or review its zoning decisions. Ex. 35.

<sup>13</sup> CCNB was established on May 26, 2010, in response to the MSP vote. *See* [www.ccnb.us](http://www.ccnb.us); Popowich Decl., Exs.2-3. CCNB formally filed its recall petition on June 23 and within weeks had collected 2,000 of the 4,280 signatures needed to recall. *Id.*, Ex. 9.

going to move [back] and just ... Like I said, like I told Milo, this project has ruined by life. I'm hated by this community now. . . . I mean, I've grown thick skin. But this is in – I mean this is outside [that].

Commissioners Christel, Felda, and Groeschel also stated to DOJ that they felt pressure from members of the community. Ex. 19 (Groeschel Tr. 58:23-25, 59), Ex. 21 (Christel Tr. 38-39), Ex. 22 (Felda Tr. 50:22-25, 51:1-15, 53-54).

### **E. Mayor's Request to Reconsider His May 3 Approval**

On May 14, the Mayor moved to reconsider his May 3 approval and to rescind the parking waivers (Ex. 38), one of the few times, if not the first, a Plan Commissioner has moved to reconsider approval of a development application. Ex. 18 (Chiovatero Tr. 35:18-25, 36:1-16); Ex. 21 (Christel Tr.40-41); Ex. 22 (Felda Tr. 59:1-10). The Mayor explained in the many emails to constituents that he “requested a reconsideration of [his] vote” because he had “heard from hundreds of citizens personally, by phone and email on the subject” and it was “loud and clear from the community that this is not the right project for City Center . . .” Ex. 39; MSP Br., Ex. 14.

On May 25, he wrote of his reasons in a candid email to a friend (Ex. 40):

I am a prisoner in my own home. I have spent several hours a day last week listening and replying to concerned citizens. \* \* \* I was asked NOT to attend two functions this weekend for fear it would distract and cause havoc by my presence. Our City is filled with prejudice and bigoted people who with very few facts are making this project into something evil and degrading. \* \* \* New Berlin is not ready, nor may never be, for a project like this. Unfortunately, I will be doing whatever is in my power to end this project, it will result in lawsuits and making New Berlin a community of bigots.

That same day, “nigger-lover” was spray-painted on a campaign sign that was placed upside down on the Mayor's lawn. Ex. 41 (Police Report). On June 2, “BIGOT” was spray-painted in the Mayor's driveway and “LEAVE OR \_ \_ \_ ” was written on his fence. *Id.* Residents opposed to the development called and visited his home, some

angry and threatening. *Id.*, Exs. 18; (Chiovatero Tr. 29: 21-24, 153: 2-4). The Mayor described the effect of these events on him in an interview with DOJ:

My family couldn't go out of the house. My kids were hounded by their friends' parents to tell your dad to change his mind. They were – I myself was accosted at the stores when I went to the store. I had to stop going to church because I was inundated at church. I've had my house vandalized, I've had my tires flattened, and I've had the windows shot out of the car.

\* \* \*

I've been pounded and pounded and pounded, we elected you, you have to stick up for us, you have to stop this project. \* \* \* The whole gorilla was put on my back. . . . They said I was the swing vote. In the blogs, they're saying I was getting paid off. . . . They were actually coming in and pulling my personal records out of the city, not personnel, but personal records, what I own, what I have; . . .

Ex. 18 (Chiovatero Tr. 25:5-12, 163:16-25, 164:1-3).

On or around May 28, 2010, the City Attorney and the Mayor offered to withdraw the request for reconsideration of the MSP vote if, among other terms, MSP agreed to remove all workforce housing and build only senior housing. MSP's Br., at 10-11. MSP refused. *Id.*

On June 7, 2010, about 300 New Berlin residents attended a standing-room only Plan Commission meeting to consider the Mayor's request to rescind the parking waivers and zoning approval. Popowich Decl. 4, Ex. 5. Petitions and signs about the MSP project circulated outside City Hall. *Id.* Nearly three-dozen individuals spoke, most against the proposal. *Id.*; Javier Decl.,

Ex.12. Typical of public comments were the following (Javier Decl., Ex. 12):

- This is an issue for the residents of New Berlin. . . Or for anybody who lives outside New Berlin. . . . I grew up in the City of Milwaukee. As many of the residents here in New Berlin did. . . . You couldn't pay me to live in the City of Milwaukee now. And the City of Milwaukee knows that. . . . It's not about being a bigot or being a racist. It's about doing what's best for the citizens of New Berlin.
- We'll have to take care of these people with regard to taxes, the police department, our schools.

After public comments, the Plan Commission voted unanimously, without discussion, to rescind the parking waivers but provided MSP the opportunity to submit revised plans without the waivers by June 18 for consideration at the July 12 meeting. Ex. 42.

Later that evening, the Mayor stated that he had changed his mind because of the public opposition: “[o]bviously, I would like to see the workforce housing disappear. From the speakers today, workforce housing is the issue.” Popowich Decl. 4, Ex. 5. Plan Commissioner Groeschel also wrote later that day (Ex. 43):

I am very conflicted when it comes to the vote today. . . . All the facts that Staff have given us is: yes, the land is zoned high density multi-family residential, and yes, the building meets the up-scale architectural design that we require. The waivers that were given have since been rescinded by the developer and they will not be requesting any reductions in parking. It has been made clear to me by New Berlin’s legal counsel that our role is to vote only for “zoning and architecture” and NOT “what I want.” Legally, we cannot reject the project on any basis of the demographics based on the Fair and Equal Housing Act. I have reached out to many . . . and no one has given me a reason that I should knowingly vote in a way that it is against the law.

#### **F. The City’s Additional Actions to Derail MSP’s Project**

The next day, on June 8, 2010, the City officials unanimously adopted a 90-day moratorium on all future development applications and zoning permits in the City Center, exclusive of the MSP proposal. Exs. 44-45. Alderman Harenda explained that he had proposed the moratorium in part because he was against “[w]orkforce Housing for the City Center.” Ex. 32. The moratorium remains in effect. Ex. 45. On or around June 10, 2010, the Mayor wrote to WHEDA withdrawing his support for an award of tax credits for the MSP project in response to multiple requests by residents in New Berlin to do so. Ex. 46.

For weeks prior to the July 12 vote, Common Council members pressured DCD staff to find a way to recommend denial of the MSP project for the July 12 Plan Commission meeting. Exs. 3, 47-50. The Mayor sent DCD Director Kessler “an email that . . . in one sentence [said]

we need to look for a way to deny this.” Ex. 3 (Kessler Tr. 74:8-15). Aldermen Ament, Wysocki and Harenda emailed Mr. Kessler demanding to know whether he had originally considered issues such as school capacity, parking ordinances, tax scenarios. Exs. 47-50. Mr. Wysocki stated that the MSP project had “substantially change[d] the original City Center PUD” and wrote to Mr. Kessler “now that the workforce housing has been approved in our City Center – what is next? What plan(s) are you and staff recommending to accommodate this change in our original concept of the City Center.” Ex. 50.

On June 18, 2010, MSP submitted revised site plans and a detailed explanation of how it had met all 15 conditions of the May 3 approval and had satisfied the PUD parking requirements without needing waivers. Ex. 51. On July 2, 2010, DCD recommended that the Plan Commission deny the MSP project, citing nine reasons. Ex. 52. On July 8, 2010, MSP sent a letter and met with DCD staff and other City officials to explain how it had already resolved or could resolve each of the nine reasons for denial in the staff report. Ex. 53. MSP requested that officials “table” rather than deny its proposal at the July 12 Commission meeting. Ex. 54. The City refused. Ex. 55.

#### **G. July 12, 2010 Plan Commission Denial of MSP’s Project**

On July 12, 2010, the Plan Commission voted unanimously to deny zoning approval. Ex. 55. Approximately 200 people attended the meeting and more than a dozen spoke against MSP’s project prior to the vote. Ex. 55; Javier Decl., Ex.13; Popowich Decl. 4, Ex. 9. Those who spoke stated that they feared the MSP project would lead to “children of single parent tenants . . . free to roam the neighborhoods or visting National Avenue looking for something to do,” “crime,” “lower property values,” “businesses that will look at the demographic and go elsewhere,” “public housing,” “tenements,” and “strain on the schools.” Javier Decl., Ex. 13. One resident stated that “for the people who have called us racist, bigots -- if us being concerned about our

neighborhoods, our community makes us racists or bigots, that’s what we are. . . . [T]his is about our community and what we want for our community.” *Id.* Another resident stated “we don’t want to establish a plantation here. And that’s what they are talking about. If these people who want to be good Samaritans [MSP], are honest about their intentions, then go to the City of Milwaukee and clean up the public schools so people can move here with their own effort.” *Id.*

In support of its denial, the Commission cited ten reasons, nine of which were adopted verbatim from the staff report.<sup>14</sup> Ex. 55. Six of these had been “conditions of approval” on May 3 (*infra* n. 14, #1, #4-#8). Ex. 17. City officials have admitted to DOJ that nine of the reasons (all except the certified survey map) could have been “conditions of approval” on July 12 or could have supported “tabling” rather than denial because they were minor or resolvable with further discussions between MSP and DCD staff. Ex. 3 (Kessler Tr. 35:18-25, 36:1-5, 39:1-14, 78:4-13); Ex.18 (Chiovatero Tr. 85:5-13, 87:4-11, 98:5-7, 100:12-14, 101:13-25); Ex. 19 (Groeschel Tr. 12:1-3, 49:16-25); Ex. 21 (Christel Tr. 32:13-16, 77:7-15, 81:19-23, 84:5-24); Ex. 22 (Felda Tr. 111-118). The certified survey map is not a requirement for Plan Commission approval and was also a condition of approval on May 3.<sup>15</sup>

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<sup>14</sup> The Commission’s ten reasons were: (1) failure of MSP to record the amended certified survey map; (2) the plans show “a carport being used” to address parking in the senior building; (3) failure to meet the PUD parking requirements for workforce and senior housing; (4) failure to make the changes that were of concern to the Architectural Review Committee; (5) plans do not indicate whether or how the façade of the Phase I south elevation of the senior building would be finished in the event Phase II is not built; (6) “additional brick and/or stone” should be added to the senior and workforce building; (7) “on site landscaping” is not adequate; (8) there are “no real defined public spaces identified on the plans”; (9) an updated storm water management plan is needed in light of changes to parking; and (10) the MSP project would not generate as much tax revenue for the City as would condos or market rate apartments. Ex. 55.

<sup>15</sup> Municipal Code 275-24 (CSM not listed among requirements). Ex. 22 (Felda Tr. 111:3-9) (CSM required *after* use, site and architectural approval); Ex. 21 (Christel Tr. 48:5-25, 49:1-7) (recordation of CSM required prior to pulling of permit rather than at use, site and architectural approval). By statute, MSP had until the middle of 2011 (or 24 months after the City Council approved the land division) to record the CSM. Wisc. Stat. 236.34(2). Under

In statements made prior to the July 12 vote, the Mayor and Commissioners stated that the project had met all zoning requirements. Exs 57-59. The Mayor emailed a resident that MSP's project "met every code, ordinance, and PUD requirement that pertains to the City Center" and that it was "100% conforming to all zoning in place." Ex. 57. Commissioner Christel emailed others on the Commission that "my current opinion is that the site, use and architectural guidelines have been met," (Ex. 58), and Commissioner Groeschel emailed constituents stating that the MSP project satisfied the zoning requirements (Ex. 59):

I personally share many of your concerns, but the plan commission has been instructed by the City Attorney, that based on the Fair Housing Act, we cannot deny the project on the low income basis or the problems many associate with that demographic. Use and architecture are the only things we are allowed to vote on and the project meets the city's requirements for high density multi-family residential zoning and the upscale architectural design. If there is a legal way to oppose this project, I would welcome that.

On July 14, 2010, the Mayor sent a letter to residents stating that "in support of the residents" he had "researched a means to halt the project" (Ex. 56):

In 2010, when the Section 42 Workforce housing came to public attention, it was clear that the nearby residents did not want this project to go forward. In support of the residents, I have since researched a means to halt the project. \* \* \* The City staff and I have found justification for discontinuing the project and will now be focusing on alternatives.

#### **H. City Refuses to Comply with Prior Zoning Approvals and Issue Permits: January 2011**

In the fall of 2010, MSP worked with New Berlin officials on an alternative plan to develop low-income housing on the same site. MSP Br. at 13-14. In October 2010, MSP gained ownership rights in a Limited Liability Partnership Deer Creek Homes ("Deer Creek"). *Id.* MSP proposed to use Deer Creek's existing zoning permit and developer's agreement secured in 2004

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Municipal Code, MSP has one year to satisfy any conditions attached to use, site and architecture approval.

and 2005 for the construction of 152 condominiums on the same Library Lane site that was never completed. *Id.* MSP intended to build the approved condominium units and rent them with the same income restrictions and monthly rents in its original proposal. *Id.*

By January 2011, MSP and City officials agreed to amendments to the original developer's agreement that would permit MSP to begin construction. MSP Brief at 13-14; Exs. 26-27. The amendments concerned the building of public infrastructure, such as roads and utilities, which were added for the protection of the City. *Id.* On January 17, 2011, the Board of Public Works, the municipal board that reviews developer's agreements, voted unanimously to recommend approval of these amendments. Ex. 60.

On January 25, 2011, following statements by residents opposed to the project, the Common Council voted 5-1 to deny the amendments to the developer's agreement. Ex. 61. The lone dissent, Alderman Moore, later stated that he believed the comments prior to the vote were responsible for the denial and that the comments appeared to be based in "fear" of "people not like them," part of which he believed to be "based on race." Ex. 70 (Moore Tr. 77:2-24). Prior to the vote, more than a dozen residents spoke, and some referred to the project as a "tenement," "carpetbagger proposal," and a "low-income" project that would "instantly, and literally, destroy the value that . . . [we] have in our homes." Javier Decl., Ex. 14. Alderman Moore stated that the MSP vote was the first time in his six years on the Council he had witnessed its members vote against the advice of the City Attorney and deny approval of a developer's agreement. Ex. 70 (Tr: 71-72).

Shortly after the vote, MSP informed the City that it still wanted to proceed to develop affordable housing at its site as condominiums under the existing zoning permit and unamended 2005 developer's agreement and asked the City to issue building permits so that it could begin construction. MSP Br. at 14. On February 10, 2011, the City Attorney notified MSP that the

City would not issue permits because – contrary to the City Attorney’s previous position -- it considered the developer’s agreement inoperative. MSP Br., Ex. 28.

### **I. City Proposes to Rezone City Center to Block Affordable Housing**

The City completed its year-long 2020 Comprehensive Planning process in November 2009. Ex. 2. On June 8, 2010, seven months later, the Common Council directed the Plan Commission and DCD staff to review and recommend changes to the Comprehensive Plan for the City Center and for the City Center PUD. Exs. 44-45. City officials acknowledged these actions were taken because of the MSP proposal and the public opposition to it. Ex. 5 (Kessler Tr. 123:18-25; 124:1-7); Ex. 70 (Moore Tr. 38, 42); Ex. 32.

The recommended changes include reducing maximum building heights from 50 to 40 feet, removing “high-medium density” uses from the City Center PUD, capping the number of allowable units in each building at 16 (where no cap previously existed), reducing the number of multi-family units permitted in the City Center to 372, and changing the City Center land-use designations in the Comprehensive Plan. Exs. 62-63.

Commissioner Groeschel explained that the purpose of the zoning changes was to bar “proposals like [MSP’s] in the future” (Ex. 64):

I just want to clarify that we will not be sued because of the reversal of the vote, we would have been sued if the first vote would have been no as well. I am encouraging you to remain involved as we review the city center master plans because if the height restrictions could be reduced, the high density be removed, and the property ownership guidelines be challenged for the multi-family zoned areas, we might be able to avoid proposals like this in the future. With the rules that are in play right now, it puts the Plan Commission in a very difficult place to fight these projects that the community is so vocally against.

Commissioner Ament stated he wanted to make changes in order to “eliminate any additional residential housing” other than single-family. Exs. 65-66. He told DOJ that he is “always leery of rentals” because of the “transient” population. Ex. 20 (Ament Tr.28:1-23, 54:13-24).

Commissioner Broge made similar statements at the March 7, 2011, Commission meeting discussing the proposals. Ex. 66. On May 2, 2011, the Plan Commission approved the zoning changes and a public hearing was held the same day. Exs. 62, 67.

## **ARGUMENT**

The United States may obtain a preliminary injunction by showing that: (1) it is “likely to succeed on the merits”; (2) it is “likely to suffer irreparable harm without the injunction”; (3) that the harm to it would be “greater than the harm that the preliminary injunction would inflict on the defendant[]”; and (4) “that the injunction is in the public interest.” *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010).

### **I. THE UNITED STATES IS LIKELY TO SUCCEED ON THE MERITS**

The United States asserts violations of Sections 3604(a) and 3617 of the FHA and is highly likely to succeed on both claims at trial.

#### **A. There is Strong Evidence That the City of New Berlin Violated Section 3604(a) of the FHA**

Section 3604(a) provides that:

[I]t shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of race, national origin, [or] color (emphasis added).

Zoning decisions that block construction of affordable housing on the basis of race may violate section 3604(a). *Metro. Hous. Dev. Corp. v. Village of Arlington Heights* (“*Arlington Heights II*”), 558 F.2d 1283, 1290-94 (7th Cir. 1977). Proof of that violation can be shown under either a “disparate treatment” or “disparate impact” theory. *See Bloch v. Frischholz*, 587 F.3d 771, 784 (7th Cir. 2009) (citing *Arlington Heights II*, 558 F.2d at 1290).

## **B. Disparate Treatment**

With respect to disparate treatment claims, plaintiffs may rely on direct evidence, such as open statements evincing animus, or, as is more likely, circumstantial evidence, because “municipal officials . . . seldom, if ever, announce on the record that they are pursuing a course of action . . . to discriminate.” *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064 (4th Cir. 1982). The Supreme Court has established a framework to show discriminatory intent circumstantially through analysis of the following six factors: (1) impact of the City’s actions; (2) the historical background of the decision; (3) the sequence of events preceding the decision; (4) departures from the normal procedural sequence associated with the type of decision; (5) substantive departures; and (6) legislative history, including statements by the decision-makers. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977); accord *Contreras v. City of Chicago*, 119 F.3d 1286, 1292 (7th Cir. 1997) (applying *Arlington Heights* factors).

A plaintiff prevails if it shows that a discriminatory purpose caused defendant’s actions. *Zellner v. Herrick*, 639 F.3d 371 (7th Cir. 2011) (“plaintiff bears the burden of proving ‘but for’ causation”) (Section 1983); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010) (ADA). A plaintiff need not show, however, that “the challenged action rested solely on racially discriminatory purposes” because “rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one.” *Arlington Heights*, 429 U.S. at 265-266.

In addition, it is no defense for “a governmental body [that] . . . its discriminatory action was undertaken in response to the desires of a majority of its citizens.” *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181,1224 (2d Cir. 1987). This is so “even where individual members of

government are found not to be biased themselves” but nevertheless took “governmental actions . . . in response to significant community bias.” *Cnty. Hous. Trust v. Dep.’t of Consumer and Regulatory Affairs*, 257 F. Supp. 2d 208, 227 (D.D.C. 2003); *Town of Clarkton*, 682 F.2d at 1066 (there is “no doubt that the defendants knew that a significant portion of the public opposition was racially inspired, and their public acts were a direct response to that opposition”).

As explained below, the evidence is strong on all six of the *Arlington Heights* factors and supports a finding that New Berlin intentionally discriminated in violation of Section 3604(a).

a. Impact of New Berlin’s Action

The “impact of [New Berlin’s] official action -- whether it bears more heavily on one race than another,” -- is substantial in this case. *Arlington Heights*, 429 U.S. at 266. The evidence shows that New Berlin’s actions “perpetuate segregation” in the New Berlin housing market and “have a greater adverse impact” on African-American than white households. *Arlington Heights II*, 558 F.2d at 1290. *See infra* at 23-27 (discussion on disparate impact).

b. Historical Background

The “historical background of the decision” is another factor, “particularly if it reveals a series of official actions.” *Arlington Heights*, 429 U.S. at 267. Since 1980, New Berlin has been one of the most segregated metropolitan areas in the country. *See supra* n. 4; Javier Decl. Ex. 11. New Berlin is less than 1% black, and MSP’s project would have been the City’s first multi-family affordable housing development. Javier Decl., Exs. 3-6. Planning documents indicate public opposition to multifamily housing and that “multi-family housing is considered to be a controversial land use in New Berlin,” which does not “contribute to the tax base.” Jamison Decl., Ex. 2 at 2:31, Ex.62.

c. Sequence of Events

The “specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes.” *Arlington Heights*, 429 U.S. at 267. MSP’s proposal was approved on May 3, reconsidered on June 7, and denied on July 12. The City’s reversal and its subsequent actions to block MSP’s project occurred in response to the race-based public opposition following the May 3 approval. *See supra* at 5-17. The City has acknowledged that much of the opposition, which included hundreds of calls and emails, was based on race (Answer ¶19), and city officials admitted the same to DOJ. *See supra* at 5-9.

By referring to “gangs,” “families with 10 or 15 kids,” the “influx of people from Milwaukee,” among other expressions, residents used the same type of code words or phrases that courts have held are evidence of discriminatory intent. *See, e.g., Town of Clarkton*, 682 F.2d at 1066 (references to “undesirables” and concerns about “new” people and “dilut[ion]” of schools are “camouflaged racial expressions” and evidence against municipality); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 571-572 (E.D. La. 2009) (concern about people from “Village Square” indicates race as area understood to be predominantly minority).

Moreover, that the elderly portion of the MSP project was not a concern for residents but the workforce housing was, is further evidence that the public opposition was based on race. *Atkins v. Robinson*, 545 F. Supp. 852, 874 (E.D. Va. 1982) (it was a “veiled reference to race” when Board member stated that he did not want to give people “something for nothing” and stated that with the elderly housing it was a “different story”).

#### d. Procedural Departures

New Berlin’s actions reveal numerous “departures from the normal procedural sequence” of decision-making, further evidence of discriminatory intent. *Arlington Heights*, 429 U.S. at 267. *See supra* at 9-16. Among these are: (1) the Mayor’s motion for reconsideration (pp. 9-

11); (2) the Mayor and City Attorney’s offer to bypass the Plan Commission and withdraw the motion for reconsideration if MSP agreed to eliminate all workforce housing units (pp. 10-11); (3) the June 8 Moratorium on multi-family development (pp. 11-12); (4) the June 8 Common Council resolution requiring that the City commence a study of the City Center area and recommend changes to the City Center PUD and 2020 Comprehensive Plan (pp. 11-12, 16-17); (5) the Mayor’s withdrawal of support of WHEDA tax credits (p. 8); and (6) the Common Council’s attempt to “override the Plan Commission” (pp.7-8).

e. Substantive Departures – New Berlin’s Reasons are Pretext

There is also ample evidence of “substantive departures,” where “factors usually considered important by the [City] strongly favor a decision contrary to the one reached.” *Arlington Heights*, 429 U.S. at 267. The Plan Commission’s denial of zoning approval for the MSP project on July 12 was the first in the City Center’s ten-year history.<sup>16</sup> Ex. 3 (Kessler Tr. 6:10-25, 7:1-2; 32:23-25, 33:1). The MSP proposal was, if not the single most scrutinized project in the Commission’s history, one of a handful. Ex. 3 (Kessler Tr: 72:20-25; 73:), Ex. 18 (Chiovatero Tr.72: 9-25), Ex. 21 (Christel Tr. 38:5-14).

In addition, denial was not at all required and the stated reasons were *post-hoc* and pre-textual.<sup>17</sup> With the possible exception of the certified survey map (“CSM”), City officials acknowledged to DOJ that the Commission’s reasons either minor, could have been resolved with further discussions between the City and MSP, or could have been listed as conditions of approval (or reasons to table), rather than bases for denial. *Supra* at 13-14.

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<sup>16</sup> The Plan Commission has approved condominium projects and market-rate apartments in the City Center. Ex. 6.

<sup>17</sup> The Commission typically denies a project only when it appears “impossible.” Ex. 21 (Christel Tr. 45-46). Otherwise a project should be tabled or, if a “resolution is possible, then you make it a condition” of approval. *Id.*

Indeed, six of the reasons for denial were “conditions of approval” on May 3, including the CSM (#1, #4-#8). *Supra* at 13-14. The remaining four reasons (carport and number of parking stalls,<sup>18</sup> tax projections,<sup>19</sup> and an updated storm-water management plans) are either not valid or could have been resolved with additional discussion with staff. *Id.* Even the CSM requirement is pretext. *Supra* at 13, n. 15. Filing of a CSM was a “condition of approval” on May 3; is not a requirement for use, site and architectural approval under municipal ordinance; has been listed as a condition of approval in at least three other development applications in 2010-2011; and would have been resolved with more time.<sup>20</sup> *Id.*; *see also* MSP Br. at 25-26.

Moreover, the Common Council’s January 25, 2011, vote to deny amendments to the developer’s agreement was the first time the Council has voted to deny a developer’s agreement.

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<sup>18</sup> With respect to parking, Mr. Kessler acknowledged that MSP’s revised plans met the ratios for the workforce buildings and Phase I of the senior building. Ex. 3 (Kessler Tr. 100: 16-25). The only concern related to Phase II of the senior building, to be built later depending on demand. *Id.*; Ex. 21 (Christel Tr. 85:21-24). Phase II consisted of 24 units, which, required 24 additional stalls. Ex. 52. Mr. Kessler acknowledged that the additional stalls could have been added by reconfiguring the lot or adding underground spaces while Phase I was constructed. Ex. 3 (Kessler Tr. 90, 103). Another option was to assign some of the planned underground workforce spaces to Phase II of the senior building MSP had provided extra underground stalls than were required for the workforce buildings. Ex. 3 (Kessler Tr. 89: 25, 90: 1-16); Ex. 52 (Phase I).

<sup>19</sup> The City Assessor compared the tax revenue generated by the MSP project with that of two hypothetical development scenarios – market rate apartments and condominiums -- and concluded that market rate apartments and condos would generate more revenue. Exs. 68-69. However, City officials acknowledged that there have been no market rate or condominium proposals for City Center since 2007, and they were not aware of any that might be expected in the near future. Ex. 6; Ex. 68.

<sup>20</sup> *See* n. 15. City officials interviewed could not point to an example where a failure to record a CSM had been the basis for denial. Exs. 3 (Kessler Tr.78); Ex. 18 (Chiovatero Tr. 78: 14-17, 83: 17-25, 84:21-25), Ex. 21 (Christel Tr. 48:23-25). Recordation of a CSM has been listed as a “condition of approval” in three other zoning approvals in 2010 and 2011. Ex. 73. In addition, the City Council has approved the CSM at issue; what remained was recording it to reflect removal of the existing condominium parcel from MSP’s site with the condominium owners’ approvals. *See* MSP Br. at 25-26.

The Council’s vote contravened the express advice of the City Attorney, the Board of Public Works and DCD staff. Ex. 60, Ex. 70 (Moore Tr: 70-72). *See supra* at 14-16; MSP Br. at 25-26.

f. Legislative and Administrative History

Finally, contemporary “statements by members of the decision-making body” support an inference of discrimination. *Arlington Heights*, 429 U.S. at 268. As described above (pp. 5-17), the record is replete with dozens of emails and other statements by city officials that indicate that they responded to race-based community opposition. Thus, in light of the foregoing evidence on the six *Arlington Heights* factors, the United States is very likely to succeed in showing that New Berlin’s actions were intentionally discriminatory and violated Section 3604.

**C. Disparate Impact**

The evidence is also very strong that New Berlin’s “facially neutral policy or decision ha[d] a discriminatory effect [that] . . . ‘actually or predictably results’ in racial discrimination.” *United States v. City of Black Jack, Mo.* 508 F.2d 1179, 1184-85 (8th Cir. 1974); *Gatlin v. Delux Entertainment, LLC*. No. 09-C-0961, 2010 U.S. Dist. LEXIS 55352, at \* 9-10 (E.D.Wis. May 10, 2010) (same). Courts have concluded that unlawful disparate impact may result when, as here, a municipality enforces its zoning laws in a manner that denies affordable housing. *See, e.g., Arlington Heights II*, 558 F.2d at 1288 (disparate effect where “village’s refusal to permit MDHC to construct the project had a greater impact on black people than on white people”); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988) (discriminatory effect, where City’s “refusal to permit construction of the [96 unit] project had a greater adverse impact on minorities”); *Town of Clarkton*, 682 F.2d at 1065 (“black population of Bladen County was adversely affected by the termination of the [50 unit] housing project”).

The Seventh Circuit has identified “four critical factors” for assessing whether a neutral “policy or decision” violates the FHA under a disparate impact theory: “(1) how strong is the

plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, . . .; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.” *Arlington Heights II*, 558 F.2d at 1290. Analysis of each of these factors supports a finding that New Berlin has implemented its facially neutral zoning policies in ways that bar MSP’s affordable housing project and that result in a disparate racial impact in violation of Section 3604(a).

a. Strength of Disparate Effect

The Seventh Circuit recognizes “two kinds of racially discriminatory effects” that flow from a “facially neutral decision about housing,” namely where municipal action imposes a “greater adverse impact” on minorities than white residents and where it “perpetuates segregation” in the housing market. *Arlington Heights II*, 558 F.2d at 1290.

i. Adverse Impact

New Berlin’s actions disproportionately affect black households. Black households are two to three times more likely to qualify for affordable housing like MSP’s based on their income than are white families in Waukesha and Milwaukee counties. Ex. 73 ¶ 18. For example, whereas 61 % of black families in those counties would be income-qualified for MSP’s project, only 26% of white households would. Ex. 73 ¶ 18. Courts have found like disparities to be evidence of unlawful adverse impact. *Huntington Branch, NAACP v. Town of Huntington*, N.Y., 844 F.2d 926, 938 (2d Cir. 1988) (evidence of disparate impact where 28% of minorities but only 11% of whites were eligible for subsidized housing).<sup>21</sup>

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<sup>21</sup> See also *Keith v. Volpe*, 858 F.2d at 484 (“of the persons who would benefit from the state-assisted housing because they are low-income displacees, two-thirds are minorities. The

Black households in the New Berlin market area also have a substantively greater need for affordable housing than do white families, which also may be evidence of adverse impact. *Huntington Branch*, 844 F.2d at 938 (7% of all Huntington families but 24% of black families needed subsidized housing); *Town of Clarkton*, 682 F.2d at 1065 (“[black] population most in need of new construction to replace substandard housing”). In this case, black families are two to three times more likely to be “extremely cost-burdened,” which means they pay 50% or more of their income toward housing. Ex. 73 ¶ 20. Black households are also over twice as likely to rent rather than own, and even among renters, are much more likely to be cost burdened. Ex. 73 ¶¶ 21, 25. Black households also constitute a far greater percentage of those currently occupying subsidized rental projects in the relevant market areas compared to their representative percentage in the population. Ex. 73 ¶ 13; Javier Decl., Ex. 10. For example, 4%, 9%, and 63% of all households in HUD-subsidized housing in New Berlin, Waukesha County, and Milwaukee County, respectively, are black households, but only 1%, 1%, and 25% in these areas, respectively, are black households. Javier Decl., Ex.10. *See, e.g., Huntington Branch*, 844 F.2d at 938 (“minorities constitute a far greater percentage of those currently occupying subsidized rental projects compared to their percentage in the Town’s population”); *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 566 (N.D. Tex. 2000) (“noticeable disproportion between the percentage of African-Americans needing housing assistance and the percentage of African-Americans living in the County”).

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failure to build the projects had twice the adverse impact on minorities as it had on whites”); *Town of Clarkton*, 682 F.2d at 1065 (“the undisputed statistical picture leaves no doubt that the black population . . . was adversely affected by the termination of the housing project, as it is . . . the one with the highest percentage of presumptively eligible applicants”); *see also Hispanics United of DuPage County v. Village of Addison, Ill.*, 988 F. Supp. 1130, 1155 (N.D. Ill. 1997) (“Village’s . . . activities produced a discriminatory effect on its Hispanic residents. Over 49% of the TIF district residents are Hispanic, while their Village-wide population is just 13.4%”).

At the same time, there is a significant shortage of affordable housing in both New Berlin and the entire market area. Although there are three affordable housing developments for seniors in New Berlin, there are no affordable housing units for general occupancy in the City. Javier Decl., Exs. 3-6. Waiting lists for HUD-subsidized housing in Milwaukee and Waukesha County contain thousands of families and require waits of 2.5 to 4 years. Javier Decl., Ex.10; Ex. 73 ¶ 13. *See, e.g., Huntington Branch*, 844 F.2d at 937 (“shortage of rental housing affordable for low and moderate-income households. . . and a disproportionately large number of minorities are on the waiting lists for subsidized housing and existing Section 8 certificates”).

Thus, the evidence shows that New Berlin’s actions adversely impact black households.

ii. Perpetuation of Segregation

The evidence also shows that New Berlin’s actions perpetuate residential segregation. Courts have found that a municipality may perpetuate segregation where it excludes much-needed affordable housing in highly segregated or overwhelmingly white communities. *See, e.g., Black Jack*, 508 F.2d at 1186 (“the exclusion of the townhouses. . . would contribute to the perpetuation of segregation in a community which was 99 percent white”); *Huntington Branch*, 844 F.2d at 937-938 (“Huntington’s refusal to . . . permit privately-built multi-family housing outside the urban renewal area significantly perpetuated segregation” because it “would begin desegregating a neighborhood which is currently 98% white”); *cf. United States v. Town of Cicero, Ill.*, No. 93-C-1805, 1997 U.S. Dist. LEXIS 8714, at \* 12 (N.D. Ill. June 10, 1997) (perpetuation of segregation found “where the proposed sites. . . were overwhelmingly white communities and where construction of low cost housing was effectively precluded . . .”) (citing cases).

So too here. New Berlin is 95% white, less than 1% black, and located in what has historically been, and continues to be, one of the most segregated metropolitan areas in the

country. MSP's project would provide affordable family housing – housing disproportionately needed by black families – in New Berlin, which now has no affordable family housing units. Javier Decl., Exs. 3-6; MSP Br., Ex. 3. Market-rate apartments are too expensive for low-to-moderate income tenants. Ex. 4, MSP Br., Ex. 3. MSP's project would have been the City's first multi-family housing required to accept Section 8 voucher-holders, and MSP's rents are low enough to make the apartments available to them as a practical matter. Ex. 73 ¶ 14; MSP Br., Ex. 3. There are also few, if any, comparable undeveloped parcels of land in the City to locate multi-family housing.<sup>22</sup>

b. Other Arlington Heights II Factors

The remaining *Arlington Heights II* factors support a finding of unlawful disparate impact. As explained above, there is strong evidence of “intent” (pp. 18-23), the City's stated “interest in taking the action” is entirely pretext (pp. 21-22), and the United States seeks only to enjoin New Berlin from “interfering with” MSP's project, not to “affirmatively provide housing to members of minority groups” (p. 1). *Arlington Heights II*, 558 F.2d at 1290.

**D. New Berlin Violated Section 3617**

Section 3617 of the FHA provides that:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section [ ] 804 . .

It is well-settled that municipalities that prevent the construction of low-income housing in violation of Section 3604 and do so with discriminatory intent may also be held liable under

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<sup>22</sup> The other undeveloped parcel in the City Center is owned by the speculator Decade Development, LLC, carries a deed restriction, and requires construction of two public roads to be viable. Ex. 67. New Berlin permits multi-family in Rm-1 zones only, and according to planning documents, this land would support a maximum of 337 multi-family units, including those that have been approved. Municipal Code 275-33; Ex. 2 (7:32).

section 3617. *Bloch v. Frischholz*, 587 F.3d at 781 (“3617 and 3604 [are] coextensive” but “3617 claim might stand on its own”); *Arlington Heights II*, 558 F.2d at 1288 & n.5 (sections 3604 and 3617 violated if refusal to rezone was done with discriminatory intent).<sup>23</sup>

The United States is likely to succeed on the merits of its section 3617 claim by showing that the same pattern of conduct that constituted intentional discrimination in violation of Section 3604(a) described above (pp. 4-17) also intentionally interfered with equal housing opportunity in violation of section 3617. Specifically, New Berlin approved MSP’s project in May 2010 after considering relevant zoning and architectural criteria. Then it reversed itself in July 2010 in response to race-based community pressure. Similarly, in January 2011, the Board of Public Works, DCD staff, and the City Attorney recommended the City Council approve the amendments to the developer’s agreement that would allow MSP to begin construction. Following public opposition, the Council rejected the amendments. This is evidence that New Berlin acted with discriminatory intent and interfered with MSP’s construction of an affordable housing project.

## **II. THE UNITED STATES WILL SUFFER IRREPARABLE HARM**

If the City does not issue the building permits so that 10% of the credits can be expended by November 1, MSP’s \$25 million in tax credits will expire. MSP Br. at 3. Without the tax credits, MSP cannot build its project. New Berlin will remain a highly segregated community without a single affordable housing unit for general occupancy despite a great need, particularly

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<sup>23</sup> See also *United States v. City of Birmingham, Mich.*, 727 F.2d 560, 564 (6th Cir. 1984) (upholding district court injunction against City based in part on 3617 and concluding that the “city’s interference with the Baldwin House Plan to construct low-income family housing was in part racially-motivated”); *Black Jack*, 508 F.2d at 1186 (holding that zoning ordinance that limited construction of multi-family developments “interferes with the exercise of the right to equal housing opportunity” in violation of 3617).

by minority households. Without a preliminary injunction, the United States will suffer irreparable harm to its interests in effective enforcement of the FHA.

The FHA allows the United States to seek “preventive relief, including a permanent or temporary injunction, restraining order,” damages for “aggrieved persons” such as prospective minority tenants or MSP, and civil penalties up to \$55,000 per violation. 42 U.S.C. 3614(d). But such relief cannot redress the loss of housing to minority households that will result if the permits are not issued and the tax credits expire. Without the permits, the project will not be built, and local officials responding to race-based community opposition will have thwarted important national interests by blocking an affordable housing project through exclusionary zoning and land use decisions. Neither monetary relief nor prospective injunctive relief can remedy the harm to the interests of the United States and potential residents of MSP’s development that will result if this project is not built.

### **III. NEW BERLIN WILL NOT BE IRREPARABLY HARMED**

New Berlin will not be harmed at all – let alone irreparably – by a preliminary injunction that requires issuance of building permits. The City approved the zoning applications for MSP’s project in May 2010 after considering relevant use, site and architectural criteria. It only reversed itself in July 2010 because of race-based community pressure. Similarly, in January 2011, the Board of Public Works, DCD staff, and the City Attorney, after careful consideration of the City’s interests, recommended the City Council approve the amendments to the Developer’s Agreement that would allow MSP to begin construction of a condominium project. Notwithstanding these recommendations, the Common Council denied the amendments following public opposition. MSP is not asking the City to take any action other than to step-aside and permit MSP to begin construction on a project previously approved by the Plan Commission and the Board of Public Works. MSP, by contrast, bears all the risk in the interim.

#### **IV. THE PUBLIC INTEREST FAVORS AN INJUNCTION**

The central goals of the FHA – opening housing opportunities for minorities and promoting residential integration – are an “overriding societal priority.” *Meyer v. Holley*, 537 U.S. 280, 289-90 (2003). An injunction is necessary to protect the public interest and remedy New Berlin’s “exclusionary zoning decisions . . . which directly affect the availability of housing to minorities.” *Bloch v. Frischholz*, 587 F.3d at 777 (citing *Southend Neighborhood Improvement Assoc. v. County of St. Clair*, 743 F.2d 1207, 1209 & n.3 (7th Cir.1984)).

#### **V. BALANCING THE PRELIMINARY INJUNCTION FACTORS**

The United States has made a strong showing on all four factors, which counsels in favor of a preliminary injunction. The United States “has established an overwhelming probability of prevailing on the merits,” which alone could “entitle it to a preliminary injunction.” *United States v. Town of Cicero, Ill.*, 786 F.2d 331, 337 (7th Cir. 1986) (“as our cases suggest, the government need not show irreparable harm to get an injunction in a case such as this” (Title VII)) (Posner, J., concurring in part, dissenting in part); *Foodcomm Int’l v. Barry*, 328 F.3d 300, 303 (7th Cir. 2003) (“this balancing involves a sliding scale analysis: the greater [the] chances of success on the merits, the less strong a showing it must make that the balance of harm is in its favor”).

The threat of irreparable harm is also significant. Absent the injunction, MSP’s project cannot be built (unless the City voluntarily complies). Any harm to the City is *de minimus*. And the public interest in enforcement of the FHA is strong.

#### **CONCLUSION**

For the foregoing reasons, the United States respectfully requests that the Court issue an injunction to order the City to issue applicable building approvals and refrain from further actions aimed at blocking MSP’s project, pending the final resolution of the merits of this case.

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