NOTIFY

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 01-2034 C

MELISSA MENDONSA, & others[1]
Plaintiffs

V.

LOWELL HOUSING AUTHORITY, & others[2]
Defendants

RULINGS ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, PLAINTIFFS' MOTION TO STRIKE, AND DEFENDANTS' MOTION TO STRIKE

The plaintiffs, two classes defined first through residency in the former Julian D. Steele development and second through low-income families who are eligible for subsidized housing at the Lowell Housing Authority ("LHA"), together with the Massachusetts Union of Public Housing Tenants have brought an eight count complaint against the defendants, the LHA, the City of Lowell, and Jane Wallis-Gumble, in her capacity as Director of the Massachusetts Department of Housing and Community Development.[3] This court denied the plaintiffs' first

[1] Mendonsa represent two classes: first, "all families who lived or continue to live at the Julian D. Steele development in Lowell, MA (JDS) on or after August 7, 2000);" second, "all extremely-low income families who are applicants for public and subsidized housing at the Lowell Housing Authority." In addition, the Massachusetts Union of Public Housing Tenants is also a plaintiff.

[2] City of Lowell, and Jane Wallis-Gumble (Director of the Massachusetts Department of Housing and Community Development).

[3] The first four counts allege violations under the Massachusetts Constitution: a violation of 2000 Mass. Acts c. 193 (Count I); a violation of Amendment Article 62, § 4 of the Massachusetts Constitution (Count II); a violation by the Department of Housing and Community Development to promulgate regulations (Count III); a failure to properly relocate the JDS tenants (Count IV); and, as amended, a violation of Massachusetts relocation law (Count IV A). The last three counts allege violations of federal law: unlawful use of federal Community Development Block Grant funds (Count VI); violations of federal laws requiring one-for-one

partial motion for summary judgment, finding a dispute of material fact as to Count I. The plaintiffs subsequently abandoned Counts II, III, and VI. The plaintiffs now bring a motion for partial summary judgment on the remaining claims (Counts IV, V, VII, and VIII).[4] The defendants oppose this motion, and have moved to strike the affidavit of Nancy McArdle, plaintiffs' expert. In turn, the plaintiffs have moved to strike the affidavit of Craig Lawson Moore, defendants' expert.

For the reasons that follow, the plaintiffs' motion for summary judgment is **ALLOWED IN PART**, as to Count IV, and **DENIED IN PART**, as to Counts VII, and VIII. Pursuant to Rule 56(c), the court **ORDERS** that summary judgment enter on behalf of the defendants on Count VII. The plaintiffs' motion to strike is **DENIED**. The defendants' motion to strike is **DENIED**.

**Background**

This case commenced with the plaintiffs' complaint seeking to prevent the demolition of the Julian D. Steele public housing development in Lowell, Massachusetts ("JDS"). This court (Cratsley, J.) denied the initial relief sought by the plaintiffs, and JDS was demolished. Following that demolition, members of the plaintiff class relocated within Lowell, with the assistance of LHA. The plaintiffs now allege that the relocation practices of Lowell and LHA violated statutes governing relocation assistance (G. L. c. 79A § 7(III)(A)), "one-for-one" low-income housing replacement pursuant to 42 U.S.C. § 5304, and the Fair Housing Act (42 U.S.C.

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replacement of demolished low-income housing (Count VII); and, violations of civil rights (Count VIII). Finally, the plaintiffs request declaratory relief pursuant to G. L. c. 231A and injunctive relief (Count V).

[4] The plaintiffs do not currently move for summary judgment on Count IV A.

§ 3604).

**Ruling**

**I. Motions to Strike**

Both parties have moved to strike the expert witness affidavits accompanying the pleadings of the adverse party. A party may submit affidavits together with a motion for summary judgment. Under Mass. R. Civ. P. 56(e), "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." See *Stetson* v. *Board of Selectmen of Carlisle*, 369 Mass. 755 (1976). Nevertheless, courts have generally been reluctant to disqualify expert witnesses in connection with applications for summary judgment. *West Boylston Cinema Corporation* v. *Paramount Pictures Corporation*, Civil No. A 98-00252 (Worcester Super. Ct. September 21, 2000) (Toomey, J.), citing *Cortes Irizarry* v. *Corporacion Insular De Seguros*, 111 F.3d 184, 187-188 (1st Cir. 1997), *Den Norske Bank AS* v. *First National Bank of Boston*, 75 F.3d 49, 58 (1st Cir. 1996), *Noble* v. *Goodyear Tire & Rubber Company*, 34 Mass. App. Ct. 397, 402 (1993).

The present motions concern the affidavits of witnesses providing expert testimony. "Faced with a proffer of expert scientific testimony . . . the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 592-593 (1993) ("the trial judge must

ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable"). In *Commonwealth* v. *Lanigan*, 419 Mass. 15, 24 (1994), the Supreme Judicial Court adopted the ruling of *Daubert*, but noted that "[t]he ultimate test, however, is the reliability of the theory or process underlying the expert's testimony." To that end, the Court noted that the rule was a flexible one: "[A] proponent of scientific opinion evidence may demonstrate the reliability or validity of the underlying scientific theory or process by some other means, that is, without establishing general acceptance." *Commonwealth* v. *Lanigan*, 419 Mass. at 26 (noting past exceptions where methodology was "so logically reliable" that they did not require typical showings); see generally *Commonwealth* v. *Cifizzari*, 397 Mass. 572, 572 (1986) ("What must be established is the reliability of the procedures involved. . . ."); *Commonwealth* v. *Gilbert*, 366 Mass. 18 (1974); *Commonwealth* v. *Devlin*, 365 Mass. 149, 152 (1974) ("The admission of expert testimony lies largely in the discretion of the trial judge.").[5]

The defendants move to strike McArdle's testimony, arguing that her methodology is unreliable and in violation of the standard enunciated in *Lanigan*.[6] The primary focus of their challenge is McArdle's use of the inverse of an "80% Rule" enunciated by the Equal Employment Opportunity Commission ("EEOC"). In 29 C.F.R. § 1607.4(D), the EEOC stated that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or

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[5] In *Adoption of Hugo*, 428 Mass. 219, 234 (1998), the Court responded to a characterization of *Lanigan* as requiring proof of reliability through one of five limited means: "(1) by proving it is generally accepted in the community; (2) by testing; (3) by peer review and publication; (4) by showing that the analytical process has established validity; or (5) by the use of an accepted, standard methodology." The Court held that "[t]here is no such requirement . . . There is adequate support in the record for the judges conclusion that [the] testimony was based on reliable methodology." *Adoption of Hugo*, 428 Mass. at 234.

[6] The defendants do not challenge McArdle's qualifications or knowledge.

eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as *evidence of adverse impact*." (Emphasis added).[7] The defendants suggest that McArdle's employment of this test, in paragraphs 23, 45, 46, and 59 (of 61 paragraphs), was improper.

The plaintiffs, for their part, have moved to strike the affidavit of Craig Lawson Moore. The plaintiffs argue that Moore was unqualified to testify concerning fair housing law, and used improper methodology. In particular, the plaintiffs allege that Moore failed to distinguish evidence of civil rights violations by the perpetuation of segregation from evidence of civil rights violations through disparate impact in the treatment of the classes of plaintiffs in this suit.

In this case, McArdle's methodology is sufficiently reliable to withstand a motion to strike. McArdle adopts a standard which has been issued by the EEOC, standing solely for the principle that it is evidence of discrimination. Satisfaction of the "80% Rule" does not entitle a party to a ruling as a matter of law, it merely is a method employed by the EEOC to demonstrate evidence of discrimination. Here, McArdle uses the inverse of that rule in a minor portion of her statements solely to reinforce her other conclusions. Furthermore, the mathematical concept of the inverse is both well established, and "logically reliable." See *Commonwealth* v. *Lanigan*, 419 Mass. at 26. That this testimony may be admissible, of course, does not deprive the defendants the ability to impeach McArdle's testimony should she testify at trial.

Similarly, the plaintiffs' challenges against Moore are unavailing. First, Moore is a

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[7] This court does note that, in *Langlois* v. *Abington Housing Authority*, 207 F.3d 43, 50 (1st Cir. 2000), the Court noted the prior use of the "80% Rule" in the employment context and did not disturb the trial court's adoption of the rule in a disparate impact case as evidence of discrimination.

recognized economist, statistician, and experienced expert witness. In addition, he is accomplished in the use of statistical evidence in discrimination cases. He therefore qualifies to present expert testimony in this case. Second, Moore's affidavit uses reliable methodology to provide a rebuttal to McArdle's affidavit regarding disparate impact.[8] As above, the plaintiffs are free to impeach Moore's testimony should he testify at trial.

**II. Plaintiffs' Motion for Summary Judgment**

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso* v. *Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community National Bank* v. *Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles it to judgment as a matter of law. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner* v. *Technical Communications Corporation*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *General Motors Corporation*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a genuine issue of material fact. *Pederson* v. *Time, Inc.*, 404 Mass.

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[8] As the plaintiffs point out, some of Moore's contentions in his affidavit involve comments as to governing law which are questionable. Despite these flaws, his opinion testimony which disputes certain of McArdle's conclusions on discrimination is not inadmissible.

at 17. The nonmoving party cannot defeat a motion for summary judgment by resting on his pleadings and on mere assertions of disputed facts. *LaLonde* v. *Eissner*, 405 Mass. 207, 209 (1989). In deciding a motion for summary judgment, the court may consider pleadings, depositions, answers to interrogatories, admissions on file and affidavits. *Community National Bank* v. *Dawes*, 369 Mass. at 553.

**A. Count IV: Relocation Assistance**

The plaintiffs assert that the relocation practices of LHA prior to the demolition of JDS were contrary to Massachusetts laws and regulations. Section 7(III)(A) of G. L. c. 79A provides for relocation assistance for individuals displaced by the demolition of low-income housing. Section 7(III)(A) allows for the distribution of up to four thousand dollars over a period of four years to accommodate any increase in cost to lease or rent.[9] This law is additionally governed by 760 Code Mass. Regs. § 27.06(3), which reads in part: "If they qualify, displaced homeowners and tenants shall be eligible for additional payments for costs relative to obtaining replacement housing. These payments shall be determined in the manner prescribed by federal regulations at

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[9] Section 7(III) of G. L. c. 79A provides:

> [P]ayment shall be made to any displaced person . . . who actually and lawfully occupied the dwelling from which he is displaced for not less than ninety days prior to the initiation of negotiations for acquisition of such dwelling. Such payment shall assist the displaced person:
> (A) To pay any increase in cost required to lease or rent for a period of four years, a decent, safe, and sanitary comparable replacement dwelling of standards adequate to accommodate such person in an area similar with regard to economic rents to the area of displacement, but not generally less desirable in regard to public utilities and public and commercial facilities, and reasonably accessible to the displaced person's place of employment, but not to exceed four thousand dollars.

49 C.F.R. § 24.401, 24.402, 24.403, and 24.404 (as amended and as they may be amended)." The cited Federal regulations define eligibility of applicants, manner of distributions, and other rules including the vesting of the amount of assistance.

Following a challenge to LHA's failure to provide for increased rent by one JDS tenant, Laura McDermott, the Massachusetts Department of Housing and Community Development ("DHCD") issued the following ruling: "[T]he Bureau of Relocation finds that the federal regulations appearing at 49 CFR. 24.401-404 apply to replacement payment administered under G. L. c.79A. Replacement housing costs should be calculated in accordance with 49 CFR 24.402 up to a maximum limit of $4000, and the benefit vests immediately, in accordance with 49 CFR 24.402 (3)." DHCD Ruling, December 16, 2004, pg. 4. The plaintiffs urge this court to give deference to the DHCD ruling and allow the motion for summary judgment based on LHA's failure to provide relocation assistance to the JDA tenants. See *Franklin W. Olin College of Engineering* v. *Department of Telecommunications & Energy*, 439 Mass. 857, 861 (2003) ("We afford substantial deference to an agency's interpretation of a statute that it is charged with administering."); *City Council of Agawam* v. *Energy Facilities Siting Board*, 437 Mass. 812, 828 (2002) ("This deference has included approving agency regulations that, while technically enlarging the meaning of a statute, are consistent with its intent.").

LHA does not contest the factual underpinnings of this claim, but suggests that the regulations cited are inconsistent with the statute and therefore are not binding on LHA.[10]

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[10] This challenge to 760 Code Mass. Regs. § 27.06(3) raises concerns. First, it is unclear whether LHA is estopped from bringing this challenge, having failed to bring an appeal directly from the DHCD opinion. Second, it is unclear whether the validity of 760 Code Mass. Regs. § 27.06(3) may even be considered by this court without an exhaustion of administrative remedies followed by an appeal under G. L. c. 30A. These issues, however, were not raised by the parties,

Specifically, LHA points to inconsistencies between the Massachusetts regulations, which limit assistance to $4,000.00 over forty-eight months, and the Federal regulations, which limit assistance to $5,250.00 over forty-two months. This court, however, gives due deference to the relevant agency, DHCD, in its ruling that the Federal regulations do apply to replacement payment. *City Council of Agawam* v. *Energy Facilities Siting Board*, 437 Mass. at 828. Furthermore, where the Federal regulations are not adopted wholesale, and instead are referred to as guidelines for the "manner" of distributions, the alleged inconsistencies are not of consequence. Finally, even if this court were to assume that 760 Code Mass. Regs. § 27.06(3) was invalid, General Laws c. 79A itself directs LHA "[t]o pay any increase in cost required to lease or rent for a period of four years . . . not to exceed four thousand dollars." LHA failed to make payments to the JDS tenants, and therefore LHA is in violation of c. 79A without reference to the regulations. For these reasons, the plaintiffs are entitled to summary judgment on this claim.

**B. Count VII: Replacement Requirement**

Count VII alleges that the City of Lowell used federal funds to demolish JDS and, therefore, the City is required to provide "one-for-one" replacement housing. Section 5304(d) of 42 U.S.C. provides that:

> (1) A grant under section 5306 or 5318 of this title may be made only if the grantee certifies that it is following a residential antidisplacement and relocation assistance plan. . . . (2) The residential antidisplacement and relocation assistance plan shall in connection with a development project assisted under section 5306 or 5318 of this title - (A) in the event of such displacement, provide that - (i) governmental agencies or private developers shall provide within the same community comparable replacement dwellings for the same number of occupants

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and it will be assumed that the challenge is properly before the court for resolution.

> as could have been housed in the occupied and vacant occupiable low and moderate income dwelling units demolished . . . and provide that such replacement housing may include existing housing assisted with project based assistance provided under section 1437f of this title. . . .

The corresponding regulations are 24 C.F.R. § 42.350, titled "Relocation Assistance for Displaced Persons," and 24 C.F.R. § 42.375, titled "One-for-One Replacement of Lower-Income Dwelling Units." Section 42.375(a) of 24 C.F.R. provides that "[a]ll occupied and vacant occupiable lower-income dwelling units that are demolished or converted to a use other than as lower-income dwelling units in connection with an assisted activity must be replaced with comparable lower-income dwelling units." In addition to these laws and regulations, 42 U.S.C. § 12705(b)(16) additionally states that "in any case of any such displacement in connection with any activity assisted with amounts provided under title II, requires the same actions and provides the same rights as required and provided under a residential antidisplacement and relocation assistance plan under [42 U.S.C. § 5304(d)] in the event of displacement in connection with a development project assisted under [42 U.S.C. § 5306 or 5318]." The parties do not dispute that the use of Community Development Block Grant ("CDBG") and HOME Investment Partnership ("HOME") funds implicate the one-for-one replacement housing where the funds are used "in connection with a development project." Instead, the parties dispute whether the funds were used in such a preliminary fashion as would not trigger the federal replacement requirements.

The funds involved in this controversy were paid to BC Stewart and Associates, Housing Partners, Inc. and Lowe Associates-Architects, to perform various duties.[11] In 1996, the original

[11] Out of roughly $10 million in CDBG and HOME funds which have been or will be used in the project, BC Stewart and Associates, Housing Partners, Inc. and Lowe Associates-Architects received only $182,747.50 in CDBG funds. Citing this small percentage of overall funding, Lowell argues that it would be "unreasonable" to find that this would trigger "one-for-

contract contemplated primarily land-use studies. By 1997, however, the contract was modified and funds were designated to begin the implementation of the studies.[12] This implementation included: site evaluation, property inspections, cost estimates, preparation of plans and designs, creation of schematics, financial pro formas, engineering, and architectural work. The plaintiffs argue first that this implementation, specifically the engineering and architectural work, triggers the "one-for-one" requirement. Additionally, the plaintiffs argue that "in connection with" should be read broadly to include any action in a "single undertaking" scheme.[13]

In 2002, these same issues were submitted to the Department of Housing and Urban Development ("HUD") to interpret the scope of "in connection with a development project." In its opinion, HUD first defined that scope as "limited to demolition, rehabilitation, conversion, or similar activities having direct physical consequences." HUD Ruling, November 14, 2002, pg. 14. The opinion went on to state that in the current matter, Lowell would only trigger the "one-for-one" and relocation assistance provisions of 42 U.S.C. § 5304(d) "[i]f those funded activities (demolition or conversion) directly bring about displacement, [] but in no other case." HUD Ruling, November 14, 2002, pg. 14. The Department of Housing and Urban Development concluded the opinion by stating that 42 U.S.C. § 5304(d) "is not triggered by the use of CDBG

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one" replacement. Since Lowell has not challenged the validity of the governing laws and regulations, their reasonableness as applied is not for the court to decide.

[12] The plaintiffs cite the fact that Lowell's purchase orders began to classify the contract as "Design/Engineering/Architecture."

[13] The "single undertaking" or "one project" language can be found, respectively, in the Department of Housing and Urban Development Handbook 1378 and the Preamble of proposed rule 59 C.F.R. § 34301. HUD found these sources to be unpersuasive. See HUD Ruling, November 14, 2002, pgs. 11, 15.

funding to pay for the services of a consultant planning and designing the reinvention of the Julian Steele project." HUD Ruling, November 14, 2002, pg. 17.

In this case, HUD has issued a comprehensive and well-reasoned opinion regarding what activities implicate the requirements of 42 U.S.C. § 5304(d). See *Franklin W. Olin College of Engineering* v. *Department of telecommunications & Energy*, 439 Mass. at 861; *City Council of Agawam* v. *Energy Facilities Siting Board*, 437 Mass. at 828. The opinion found that planning and designing activities did not implicate 42 U.S.C. § 5304(d), and specifically restricted the requirements of that statute to only those cases in which displacement is directly caused by demolition or conversion. With due deference to the HUD opinion, this court must deny the plaintiffs' claim and, pursuant to Mass. R. Civ. P. 56(c), summary judgment may be entered on behalf of the defendants on the claim.[14] *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843-845 (1984).

**C. Count VIII: Violation of Federal Civil Rights Laws**

The plaintiffs claim that the defendants' actions violate Federal Fair Housing and Civil Rights Laws. First, the plaintiffs claim that the defendants discriminated against the plaintiffs through perpetuation of segregation and through disparate discriminatory impact in housing the plaintiffs. Second, the plaintiffs claim that the defendants failed to affirmatively further anti-discriminatory housing practices in violation of Title VIII of the Civil Rights Act of 1968, codified as 42 U.S.C. § 3604(a). Finally, the plaintiffs claim that the defendants were intentionally discriminatory, as demonstrated through a "totality of the circumstances" test and

[14] The pleadings do not make clear whether a review of the HUD decision had been sought in any forum. It is assumed that the issue is properly before the court.

through "steering" plaintiffs into segregated areas. The court will first consider the claims of non-intentional discrimination under Title VIII before turning to intentional discrimination.

The first claims under Title VIII allege perpetuation of segregation and adverse disparate impact in the housing practices of the defendants. The defendants have challenged whether Title VIII allows a claim to stand where there is no allegation of intentional discrimination. The Fair Housing Act makes it unlawful to "make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The First Circuit has held that "the Fair Housing Act prohibits actions that have an unjustified disparate racial impact." *Langlois* v. *Abington Housing Authority*, 207 F.3d at 49, citing *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 934-36 (2d Cir.), affirmed, 488 U.S. 15, 16-18 (1998) (per curiam), *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978), *Metropolitan Housing Development Corporation* v. *Village of Arlington Heights*, 558 F.2d 1283, 1288-90 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).[15] Under Title VIII, however, "merely to show a disparate racial impact is normally not enough to condemn: a vast array of measures, from war-making and the federal budget to

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[15] Those courts which have considered discrimination under the Fair Housing Act have held that multiple theories are available to plaintiffs, including intentional discrimination and disparate impact. See *Darst-Webbe Tenant Association Board* v. *St. Louis Housing Authority*, 417 F.3d 898 (8th Cir. 2005); *Community Services* v. *Wind Gap Municipal Authority*, 421 F.3d 170, 176 (3rd Cir. 2005), citing *Gamble* v. *City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997) ("We apply Title VII discrimination analysis in examining [FHA] discrimination claims."), *Larkin* v. *Michigan Department of Social Services*, 89 F.3d 285, 289 (6th Cir. 1996) ("Most courts applying the FHA, as amended by the FHAA, have analogized it to Title VII of the Civil Rights Act of 1964 . . . ."), *Bangerter* v. *Orem City Corporation*, 46 F.3d 1491, 1503 (10th Cir. 1995) (looking to "the language of the FHAA itself, and to the manner in which analogous provisions of Title VII have been interpreted" in evaluating a disparate treatment claim); *Tsombanidis* v. *West Haven Fire Department*, 352 F.3d 565, 573 (2d Cir. 2003).

local decisions on traffic and zoning, may have a disparate impact. Thus, practically all of the case law, both in employment and housing, treats impact as doing no more than creating a prima facie case, forcing the defendant to proffer a valid justification." *Langlois* v. *Abington Housing Authority*, 207 F.3d at 49-50. For the purposes of this motion, this court will assume the viability of a disparate impact proof under Title VIII.

In this case, there is a genuine issue of material fact. The plaintiffs have offered evidence, through their expert McArdle, that the defendants' actions served to discriminate against the plaintiffs. The defendants have offered a rebuttal through their expert, Moore. Moore suggests that there was no adverse impact as to the plaintiffs and that the relocation policies of LHA did not perpetuate segregation. For the purposes of a motion for summary judgment, a court "'is not to pass on the credibility of the witnesses or on the weight of the evidence.' Further, the opinion of an expert is not to be dismissed as a 'generalized assertion of opinion' so long as it is 'sufficiently substantial . . . to raise an apparent issue of fact.'" *Noble* v. *Goodyear Tire & Rubber Company*, 34 Mass. App. Ct. 397, 403 (1993) (citations omitted). Given the factual dispute present, summary judgment is inappropriate on these grounds for the plaintiffs' claims.

The plaintiffs also claim that the LHA has violated an affirmative duty to further fair housing goals. Under 42 U.S.C. § 3608(e)(5), housing authorities must "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of Title VIII. The bases of the parties' respective claims on the issue are, again, the expert witnesses and their conflicting affidavits. For the reasons stated above, there is a genuine issue of material fact which render summary judgment inappropriate. *Noble* v. *Goodyear Tire &*

*Rubber Company*, 34 Mass. App. Ct. at 403.

The plaintiffs additionally allege intentional discrimination by the defendants. First, the plaintiffs allege that the defendants either knew or should have known that their policies were both contrary to their own written objectives and also furthered segregation in Lowell. Second, the plaintiffs allege that the defendants intentionally acted to promote segregation through "steering" the plaintiffs towards segregated neighborhoods.[16] The Supreme Judicial Court has stated, however, that "[i]n cases where motive, intent, or other state of mind questions are at issue, summary judgment is often inappropriate." *Flesner* v. *Technical Communications Corporation*, 410 Mass. at 809, citing *Pederson* v. *Time, Inc.*, 404 Mass. at 17 ("the generally accepted rule is that the 'granting of summary judgment in a case where a party's state of mind . . . constitutes an essential element of the cause of action is disfavored'"), quoting *Quincy Mutual Fire Insurance Company* v. *Abernathy*, 393 Mass. 81, 86 (1984). Here, both theories advanced by the plaintiffs require proof of discriminatory intent. On the state of the submissions, there is a material fact which will need to be resolved at trial.

[16] "Steering" is the practice of preserving and encouraging "patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups." *Havens Realty Corporation* v. *Coleman*, 455 U.S. 363, 367 n. 1 (1982).

**Order for Judgment**

For the foregoing reasons, the plaintiffs' motion for summary judgment is **ALLOWED IN PART**, as to Count IV, and **DENIED IN PART**, as to Counts VII, and VIII. Pursuant to Rule 56(c), the court **ORDERS** that summary judgment enter on behalf of the defendants on Count VII. The plaintiffs' motion to strike is **DENIED**. The defendants' motion to strike is **DENIED**.

DATE: December 30, 2005

Thomas A. Connors
Justice of the Superior Court