

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

HIDDEN VILLAGE, LLC,	)	CASE NO.: 1:10-CV-00887
	)	
Plaintiff,	)	JUDGE JAMES GWIN
	)	
vs.	)	<b><u>DEFENDANTS' REPLY IN SUPPORT OF</u></b>
	)	<b><u>THEIR MOTION FOR SUMMARY</u></b>
CITY OF LAKEWOOD, OHIO, et al.,	)	<b><u>JUDGMENT</u></b>
	)	
Defendants.	)	

Now come Defendants, City of Lakewood, Thomas J. George, Charles E. Barrett, and Edward E. Fitzgerald (collectively "Lakewood Defendants"), by and through counsel, Mazanec, Raskin & Ryder, Co., LPA, and hereby submit the following Reply in Support of Summary Judgment. The Lakewood Defendants reassert that they are entitled to summary judgment, and all of Plaintiff's claims against them should be dismissed with prejudice.

Respectfully submitted,

MAZANEC, RASKIN & RYDER CO., L.P.A.

*s/John D. Pinzone*

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**REPLY IN SUPPORT OF SUMMARY JUDGMENT**

**I. INTRODUCTION.**

The Brief in Opposition (“BIO”) is predicated upon immaterial factual allegations, misconstrued evidence, and erroneous legal contentions. Further, the BIO ignores material undisputed facts relating to the claims of Plaintiff Hidden Village, LLC. Accordingly, the BIO fails to establish a genuine issue of material fact and the Lakewood Defendants are entitled to summary judgment as a matter of law on all of the claims.

**II. CLARIFICATION OF RECORD.**

**A. Clarification of Misconstrued Evidence.**

First, the BIO improperly insinuates that Sgt. Favre’s presence with building officials during an April 18, 2006 visit at Hidden Village was as a police officer and, therefore, improper. (BIO at p. 5.) This erroneous insinuation ignores evidence establishing that Sgt. Favre’s presence at Hidden Village on April 18, 2006, was premised upon his duties as a special assistant to Mayor George for the enforcement of building regulations in Lakewood. (Favre Depo., attached as Ex. A, at p. 13.) Thus, it was not inappropriate for Sgt. Favre to accompany building officials to Hidden Village.

Next, without citation, the BIO erroneously states that Mr. Barrett considered YRP’s use of Hidden Village to be akin to a group home. (BIO at p. 21.) There is no evidence that Mr. Barrett ever considered YRP’s use to be similar to a group home.

The BIO also misconstrues the evidence by asserting that the only concern held by Mayor George and Sgt. Favre related to the zoning issue posed by YRP’s relocation to Lakewood. (BIO at p. 6.) The BIO fails to provide a record citation for this assertion. To the contrary, Mayor

George and Sgt. Favre consistently expressed additional concerns regarding Hidden Village being located in an area with a high rate of criminal activity. (Favre, Ex. A, at pp. 38-39; George, Ex. B, at p. 13.) Sgt. Favre was also concerned that the isolated location of the buildings occupied by YRP in the Hidden Village apartment complex precluded proper supervision. (Favre, Ex. A, at pp. 31-32.) Mayor George also expressed concern regarding LMM's staff being non-cooperative with police inquiries regarding potential criminal activity. (George, Ex. B, at pp. 106-107, *with attached Plaintiff's depo. Ex. 75.*) Clearly, Sgt. Favre and Mayor George had additional concerns with YRP unrelated to the zoning issues.

The BIO relies upon an October 2006 interdepartmental police correspondence and memo in an attempt to establish that Lakewood initiated a concentrated effort to establish YRP as a criminal nuisance. (BIO at pp. 6-7.) However, a close evaluation of the testimony in conjunction with the police department correspondence and memo reveals this assertion to be unsupported. As explained by Chief Malley, the correspondence and memo were necessary to determine whether YRP enrollees were involved or subject to an increase in criminal activity in the area of Hidden Village, to wit:

- Q. Do you know why all of a sudden you had arrests in September (2006) and you hadn't had any prior issue?
- A. No, I don't know why.
- Q. In this [police department memo], [Lt. Ciresi] indicates where the youth reentry program participants reside, i.e., buildings C and D. Was there some effort on the part of the police department to document problems specifically with the youth reentry program as compared to other people?
- A. There was an attempt to determine if the problems or increase in activity were due to youth reentry or not that we could then break down between the other buildings in the complex. (Malley Depo., attached Ex. C, at 48.)

Sgt. Favre further explained that the documentation requested by the police department and memo were necessary due to the record keeping problems posed by the Hidden Village apartment complex and neighboring properties. (Favre, Ex. A, at pp. 113-114.) Sgt. Favre and Chief Malley testified that other apartment complexes were subjected to similar correspondences and memos. (Malley, Ex. C, at pp. 58-59; Favre, Ex. A, at pp. 113-114.) In short, Hidden Village, LLC, complains on the one hand that YRP enrollees were unfairly blamed for increased crime reports in the Hidden Village area, but also complains on the other hand of legitimate efforts to determine whether YRP enrollees were in fact responsible. (BIO at pp. 6-8.)

Further, evaluation of the criminal nuisance ordinance demonstrates that it could not be used by Lakewood to remove YRP from Hidden Village. Specifically, the criminal nuisance ordinance issued a citation against the property owner rather than the tenant. (Favre, Ex. A, at pp. 104-108.) A citation issued under the criminal nuisance statute would have expressly stated the suite number of the tenant from which the citation arose. (Id.) The criminal nuisance citation allowed the property owner to use his or her discretion regarding how to manage the single problem tenant. (Id.) Accordingly, when applied, the criminal nuisance ordinance cannot be used by Lakewood to remove the entire YRP. (Id.)

The BIO further misconstrues the evidence by contending that there was no basis provided for the “raid” of May 22, 2007, which is more properly called a joint inspection. To clarify, the joint inspection was a subdued event which did not involve the use of a canine as insinuated by the BIO. (See Affidavit of John D. Pinzone, attached as Ex. D, *with Ex. 1 Hidden Village Security Video of May 22, 2007 Joint Inspection*.) Instead, the testimony establishes that the joint inspection occurred immediately following the joint inspection of the adjacent North

South Lane Apartment complex. (Favre, Ex. A, at pp. 59; 62-63.) The basis of the joint inspection was to verify that all health and safety issues were properly addressed and to determine the appropriate fire code classification for the YRP facilities. (Id. at pp. 65-66; Gilman Depo., attached as Ex. E, at pp. 36-38; Buckon Depo., attached as Ex. F, at pp. 55-57.) Accordingly, there was an adequate basis for the joint inspection of Hidden Village on May 22, 2007.

The BIO erroneously asserts that the joint inspection team only inspected buildings C and D which were exclusively occupied by YRP enrollees. (BIO at p. 10.) Lakewood Fire Inspector Gilman, however, confirmed that building B was also inspected. (Gilman, Ex. E, at p. 39.) Inspector Gilman explained that building A was not inspected because it had a different residential use than buildings B, C, and D, and therefore would have required a more involved and lengthy inspection. (Id. at p. 36.) In short, it is clear that the joint inspection team did not target YRP occupied buildings due to a racial animus.

**B. Undisputed Facts.**

It is undisputed that the Hidden Village buildings occupied by YRP included onsite staff, case managers, and child care workers to provide independent living training and general care. (Withers, Ex. G, at pp. 37-39.) It is also undisputed that training and classes for YRP enrollees were conducted at the YRP buildings, and that YRP apartments were converted to office space and conference rooms. (Id. at pp. 14-15.) The YRP buildings included twenty-four hour staff supervision and a curfew for enrollees. (Id. at pp. 41-43.) These undisputed facts provided a legitimate non-discriminatory basis for Lakewood questioning whether YRP was a permitted residential use.

It is also undisputed that after being informed that YRP was not a permitted use, Hidden Village, LLC, allowed YRP to move into the apartment complex. Despite the move-in, Hidden Village, LLC, was afforded a full hearing before the Planning Commission to appeal Mr. Barrett's determination. The Planning Commission determined that YRP was a permitted use for Hidden Village. (Priore Depo., attached as Ex. H, at p. 33; Lieberman Depo, attached as Ex. I, at pp. 33-34.)

**Importantly, it is undisputed that the actions by the Lakewood Defendants complained of by Hidden Village, LLC, did not preclude any YRP enrollee from obtaining housing at the Hidden Village complex.** (Lieberman, Ex. I, at p. 140; Brauer, Ex. J, at pp. 79-80.) Indeed, it is undisputed that the number of apartments leased to YRP enrollees increased from the initial occupancy date. (Priore, Ex. H, at pp. 23-24.) Any fluctuation in YRP tenancy has been the result of LMM funding issues and is completely unrelated to the Lakewood Defendants. (Brauer, Ex. J, at p. 91; Withers, Ex. G, at p. 78.) Hidden Village, LLC's, claim to damages relate only to its self serving and attenuated allegation that the Lakewood Defendants' actions resulted in a decrease in the sale values of Hidden Village and the Drake Apartment complex in 2006. (Lieberman, Ex. I, at pp. 144-153.) Hidden Village, LLC, does not claim or present evidence that the Lakewood Defendants' actions deprived a racial minority YRP enrollee from obtaining housing in Lakewood.

### III. LEGAL ANALYSIS

#### A. **The Complaint Fails to Plead or Establish a §1983 Fourteenth Amendment Claim.**

The Complaint makes no reference to either the Fourteenth Amendment or Equal Protection Clause. For the first time, the BIO contends that by simply asserting racial

discrimination in the context of housing, the Complaint has raised a §1983 claim for an alleged violation of the Fourteenth Amendment's Equal Protection Clause. (BIO at p. 19.) This contention, however, is incorrect. The claim for which plaintiff is seeking relief must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which the claim is based. *Swierkiewicz v. Sorema N.A.* (2002), 534 U.S. 506, 512; *Bell Atl. Corp. v. Twombly* (2007), 127 S. Ct. 1955, 1964-65; *Chapman v. Troit* (C.A.6, 1986), 808 F.2d. 459

To provide fair notice and sufficiently plead a §1983 claim for an alleged Fourteenth Amendment Equal Protection Clause violation, the Complaint was required to assert factual allegations which would tend to show that the complained of actions had a discriminatory effect and that it was motivated by a discriminatory purpose. *Farm Labor Organizing Comm. v. Ohio State Highway Patrol* (C.A.6, 2002), 308 F.3d. 523, 533. To establish discriminatory effect, the plaintiff must show that similarly situated individuals who were not members of the protected class were treated more favorably. *Id.* at 534. To be considered similarly situated, an individual must be directly comparable in all material respects. *Ercegovich v. Goodyear Tire & Rubber Co.* (C.A.6, 1998), 154 F.3d. 344, 352.

Here, the Complaint completely fails to reference the Fourteenth Amendment or the Equal Protection Clause, thereby failing to provide adequate notice of the claim. Further, absent from the Complaint are any factual allegations of a discriminatory effect. In short, there are no allegations that entities similarly situated to Hidden Village, LLC, whose tenants were Caucasians were treated more favorably. The failure to assert any factual allegations in this regard represents a failure to plead a §1983 Fourteenth Amendment Equal Protection Clause claim. See, e.g., *Chapman*, supra; *Louis v. Collins* (N.D. Ohio, 2008), 2008 WL 2705038, at p.

5. Simply asserting racial discrimination in the context of housing is insufficient. *Wilson v. Collins* (C.A.6, 2008), 517 F.3d. 421, 432. Because Hidden Village, LLC, has failed to adequately plead a §1983 Fourteenth Amendment Equal Protection Clause claim, the BIO's reference to such a claim should be disregarded or should be dismissed.

Moreover, Hidden Village, LLC, has failed to produce any evidence of a discriminatory effect necessary to establish a claim under the equal protection clause. Rather, as was established by the Summary Judgment and this Reply, the evidence demonstrates that the actions of Lakewood relating to zoning, law enforcement, and joint inspections have been applied equally regardless of race. And there is no evidence that entities similarly situated to Hidden Village, LLC, whose tenants were Caucasians were treated more favorably. For this additional reason, the §1983 Fourteenth Amendment Equal Protection Clause claim fails as a matter of law.

**B. Hidden Village, LLC, lacks standing to assert a §1983 Fourteenth Amendment Claim.**

It is well established that a claimant does not ordinarily have standing to bring a §1983 cause of action in an attempt to vindicate the civil rights of a third-party. *Barrows v. Jackson* (1953), 346 U.S. 249, 255; *Warth v. Seldin* (1975), 422 U.S. 490, 499. In limited circumstances, federal courts have recognized exceptions to this rule of standing when a plaintiff (i) suffers its own injury in fact, (ii) possess a sufficiently close relationship with the person who possess a right **and** (iii) shows some obstruction that precludes the third-party from seeking relief. *E. Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d. 133, 2007-Ohio-3759, citing *Kowalski v. Tessmer* (2004), 543 U.S. 125, 129-130.

Here, there is not a sufficiently close relationship between Hidden Village, LLC, and the YRP enrollees whose rights Hidden Village, LLC, asserts were violated. Hidden Village, LLC,

only has a contractual relationship with LMM for lease agreements, and has no relationship with the YRP enrollees. Indeed, the YRP enrollees have not entered into the lease agreement or any other agreement with Hidden Village, LLC, to reside in the Hidden Village Apartment complex. (Brauer, Ex. J, at pp. 7-9, 34; Prior, Ex. H, at pp. 22-23 .) Accordingly, there is not a sufficiently close relationship between Hidden Village, LLC, and the YRP enrollees. For this reason, Hidden Village, LLC, does not have the requisite standing to assert a §1983 Fourteenth Amendment claim on behalf of the YRP enrollees.

In addition, there is no evidence that either the YRP enrollees or their sponsoring entity, LMM, would be hindered or precluded from asserting their equal protection rights under the Fourteenth Amendment. Indeed, the YRP enrollees and LMM are in a better position to assert their civil rights, as such claims require individualized evidence. For this additional reason, Hidden Village, LLC, lacks standing to bring a claim under the Fourteenth Amendment Equal Protection Clause on behalf of the YRP enrollees.

The BIO cites to *Scott v. Greenville Cty.* (C.A.4, 1983), 716 F.2d. 1409, as a basis for Hidden Village, LLC, to claim standing to assert the YRP enrollees' civil rights. *Scott*, however, is distinguishable from the instant matter. In *Scott*, the plaintiff was a land developer who was denied a city permit to construct low income housing and sued the city under §1983 alleging, in part, a Fourteenth Amendment Equal Protection Clause violation. The plaintiff developer contended that the denial of the permit was due to racial discrimination and prohibited **unknown prospective** racial minorities from obtaining adequate housing. *Id.*

The distinguishing factor of *Scott* is that because the claim asserted the rights of **unknown prospective** racial minority buyers, only the plaintiff developer could assert the §1983

equal protection claim to protect the civil rights of the unknown prospective buyers. See, e.g., *Clifton Terrace Asscs., Ltd. v. United Technologies Corp.* (C.A.D.C., 1991), 929 F.2d. 714. Here, the YRP enrollees and their sponsoring entity, LMM, are not unknown and there is no evidence showing that they are in any way incapable of asserting their rights under the Fourteenth Amendment Equal Protection Clause. Accordingly, *Scott* is inapposite and should be disregarded.<sup>1</sup>

For the foregoing reasons, Hidden Village, LLC, does not have standing to assert a §1983 Fourteenth Amendment Equal Protection Clause claim on behalf of the YRP enrollees. Therefore, even assuming Hidden Village, LLC adequately pled a Fourteenth Amendment claim, Hidden Village, LLC, lacks standing and the claim should be dismissed.

**C. Hidden Village, LLC Lacks Standing to Assert Claims Under §§1981 and 1982.**

Contrary to the assertions of the BIO, the Lakewood Defendants' citation to *Warth* affirmatively establishes that Hidden Village, LLC, does not have standing to assert the §§1981 and 1982 claims on behalf of the YRP enrollees. In *Warth*, a plaintiff association, Metro-Act, attempted to enforce the housing rights of third-party racial minorities per §§1981 and 1982. However, there was no definite Metro-Act member on whose behalf the constitutional rights were asserted. Due to the absence of a representational link through a direct member, the United States Supreme Court found that Metro-Act did not meet the prudential standing requirements. *Warth* at 513-514

Prudential standing considerations include whether the plaintiff's relationship with the third-party was sufficiently close to be adversely effected by the defendant's alleged actions

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<sup>1</sup> Further, *Scott* is a Fourth Circuit case and is not binding authority on this Court.

against the third-party, and whether the third-party is unable to assert a violation. *Id.* at 510. Hidden Village, LLC, has failed to meet these prudential standing considerations. Again, Hidden Village, LLC, did not have a relationship with YRP enrollees and the relationship with LMM was limited to lease agreements. There is no evidence that the Lakewood Defendants actions caused a reduction in the number of YRP enrollees at Hidden Village. Rather, the YRP enrollees at Hidden Village increased from the commencement of LMM's 2006 lease with Hidden Village, LLC. Further, there is no evidence that either the YRP enrollees or LMM would be unable to assert a claim under §§1981 and 1982. Accordingly, Hidden Village, LLC, does not meet the prudential standing requirements.

The BIO cites to *Des Vergnes v. Seekonk Water Dist.* (C.A.1, 1979), 601 F.2d. 9, for the proposition that Hidden Village, LLC, has standing to assert the §§1981 and 1982 claims. *Des Vergnes*, however, is easily distinguishable from the instant case. In *Des Vergnes*, a housing developer alleged that a city water district denied the developer's petition request for water service with the intent of discriminating against unknown prospective buyers. Again, the distinguishing factor of *Des Vergness* is that the unknown prospective racial minority buyers could not protect their rights under §§1981 and 1982. Accordingly, the developer in *Des Vergness* could establish the prudential standing requirements. *Clifton Terrace Asscs., Ltd. v. United Technologies Corp.* (C.A.D.C., 1991), 929 F.2d. 714, (holding that *Des Vergness* did not apply to circumstances in which there was an actual third-party available to assert the §§1981 and 1982 claims.) See, also, *Fair Empl. Council of Greater Washington, Inc. v. BMC Marketing Corp.* (C.A.D.C., 1994), 28 F.3d. 1268.

The Northern District of Ohio in *Johnson v. GSM Management Co.* (N.D. Ohio, 2006), 2006 WL 2813379, at 5, appropriately determined that a fair housing agency did not meet the prudential standing requirements to assert §§1981 and 1982 claims on behalf of individual tenants of an apartment complex. The Northern District held that because the individual tenants were able to protect their own interests, the fair housing agency did not have standing to assert those interests. *Id.* *Johnson* is analogous to the instant case as YRP enrollees and/or LMM could assert the §§1981 and 1982 claims.

Based upon the foregoing, Hidden Village, LLC, fails to meet the prudential standing requirements to assert §§1981 and 1982 claims on behalf of third-parties. Accordingly, the §§1981 and 1982 claims should be dismissed for lack of standing.

**D. Hidden Village, LLC, Fails to State a Prima Facie FHA Claim.<sup>2</sup>**

Hidden Village, LLC, fails to assert a prima facie FHA claim because there is no evidence that the governmental actions complained of resulted in the denial of housing or housing made unavailable to a protected status individual. The BIO footnote 8 erroneously states that holding in *AHF Community Development v. Ellis* (N.D. Texas, 2009), 633 F.Supp. 2d. 287 should be disregarded. As will be established below, regardless of whether the FHA claim is brought under §3604 or 3617, the failure to produce evidence that housing was denied or made unavailable to a protected class member proves fatal to the FHA claims.

At the outset, §3604(a) makes it 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, color, religion, sex, familial status, or national origin.

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<sup>2</sup> As set forth in the Motion for Summary Judgment, the term FHA claim includes all claims under the Federal Fair Housing Act statute, §3602 *et seq.*, and the §§1981 and 1982 claims.

Section 3617 provides:

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 §§ 3603, 3604, 3605, or 3606 of this title.** (Emphasis added.)

Here, the crux of Hidden Village, LLC's, claims is limited solely to whether the complained of governmental actions otherwise made a dwelling unavailable or resulted in the denial of a dwelling because of a person's race. As will be described in more detail below, because §3617 is directly conditioned upon the rights under §3604(a), §3617 also requires Hidden Village, LLC, to set forth evidence that housing was denied or made unavailable to a protected class member.

In an attempt to circumvent the plain language of §3617, the BIO cites to *People Helpers, Inc. v. Richmond* (E.D. Virginia, 1992), 789 F.Supp. 725. However, *People Helpers, Inc.* did not analyze whether a claim under §3617 could be established when there is no evidence that there was a denial of housing or housing was made unavailable to a protected class member. Indeed, this analysis was unnecessary because the plaintiff in *People Helpers* established that at least one protected class member was actually denied housing due to the alleged interference or retaliatory actions of the governmental defendant. *Id.* at 731. Accordingly, *People Helpers* does not stand for the proposition that §3617 claims do not require evidence of a denial of housing or housing made unavailable to a protected class member.

Again, *AHF* is analogous to the instant matter. The plaintiff property owner in *AHF* attempted to set forth FHA claims under §§3604 and 3617 on behalf of its tenants. *Id.* at 292. The plaintiff property owner in *AHF* premised these claims upon the municipality's joint

inspection of dwellings inhabited by its tenants (termed as “raids”), and improper enforcement of municipal codes. The plaintiff property owner claimed the municipality was attempting to compile violations which would result in the application of a nuisance abatement statute to reduce its tenants. It was alleged that the joint inspections and improper enforcement of municipal codes was motivated by racial discrimination. *Id.* at 299.

The *AHF* Court however, dismissed both the §§3604 and 3617 claims because the plaintiff property owner failed to show that a protected class member was denied housing or that housing was made unavailable. In doing so, the *AHF* Court relied upon multiple opinions from the Fifth and Seventh Circuits which determined the sole purpose of the Fair Housing Act was to address those cases in which a protected class member was denied housing or housing was made unavailable. *Id.*, citing *Cox v. Dallas* (C.A.5, 2005), 430 F.3d. 734, 744; *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n.* (C.A.7, 2004), 388 F.3d. 327, 329.

In *Cox*, the Fifth Circuit determined that a property owner’s claim that the value of their property decreased due to alleged governmental discriminatory actions, standing alone, fails to establish a § 3604(a) claim because such a claim fails to establish that a protected class member was denied housing or that housing was made unavailable to a protected class member. *Cox* at 744. In *Halprin*, the Seventh Circuit reasoned that both a §3604 claim and a §3617 claim fail when a plaintiff cannot demonstrate the denial or unavailability of housing to a protected class member. *Id.* at 329. Specifically, the *Halprin* Court stated:

The [FHA] contains no hint either in its language or its legislative history of a concern with anything but access to housing. \*\*\* Since the focus [of Congress] was on [minorities’] exclusion, the problem of how they were treated when they were included, that is when they were allowed to own or rent homes in [desirable residential] areas, is not at the forefront of congressional thinking. \*\*\* There is nothing to suggest that Congress was trying to solve that future problem, an

endeavor that would have required careful drafting in order to make sure that quarrels between neighbors did not become a routine basis for federal litigation. *Id.* at 29.

In accord with the foregoing, the *AHF* Court first addressed the plaintiff property owner's §3604 claim. *Id.* at 298-302. The *AHF* Court concluded that the joint inspections or "raids" did not result in a denial of housing or result in making housing available to a protected class member.<sup>3</sup> Next, the *AHF* Court held that an "inchoate plan or intent to use a nuisance abatement statute in a racially discriminatory manner did not actually result in the denial or unavailability of housing to protected class members." *Id.* at 301. Thus, because there was no evidence that the complained of governmental actions resulted in the denial or unavailability of housing to protected class members, the plaintiff property owner could not establish a §3604(a) claim.

Next the *AHF* Court addressed the §3617 claim. *Id.* at 302-303. The *AHF* Court correctly interpreted §3617 to also require a showing of a denial of housing or the unavailability of housing to a protected class member due to racial discrimination, to wit:

Specifically, the reasoning of *Cox* suggests that §3617 is concerned with retaliatory acts that affect the availability, rather than the mere enjoyment of property. This conclusion is consistent with the language of §3617, which ties protection against retaliation to a person's exercise or enjoyment of any right granted or protected by §3604 or one of the other enumerated sections. *Id.* at 302, citing *Reule v. Sherwood Valley I Council of Co-Owners, Inc.* (C.A.5, 2007), 235 Fed.Appx. 227, 277-28; *McZeal v. Ocwen Financial Corp.* (C.A.5, 2001), 252 F.3d. 1355.

In short, the *AHF* Court correctly determined that because §3617 claims are directly premised upon the rights secured under §3604, a claim under §3617 required a claimant to establish that housing was denied or made unavailable to a protected class.

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<sup>3</sup> The *AHF* Court questioned the viability of a constructive eviction theory under § 3604, but nevertheless determined that even assuming a constructive eviction theory was viable there was no evidence that the joint inspections resulted in a constructive eviction. *Id.* at 300.

The Sixth Circuit Court of Appeals decision in *Maki v. Laakko* (C.A.6, 1996), supports the conclusion of the *AHF* Court. In *Maki*, the plaintiff tenants made claims under §1981 and the entire Fair Housing Act statute, 42 U.S.C. § 301 *et seq.* *Id.* at 64. Although there was not an extensive analysis of the direct relationship between §§3604 and 3617, the Sixth Circuit held that all of a plaintiff tenants' fair housing claims fail because plaintiff tenants were not denied housing and housing was not made unavailable. *Id.* at 364-365. Specifically, the Sixth Circuit held that because the plaintiff tenants voluntarily left their rental unit, rather than being compelled to leave due to the complained of actions of the landlord, they could not establish a prima facie fair housing act claim under any of the claimed statutory provisions.

Here, Hidden Village, LLC, has failed to allege or present evidence that a protected class member was denied housing or that housing was made unavailable to a protected class member due to the complained of actions. Priore and Lieberman confirmed that since the initial 2006 lease with LMM the number of YRP enrollees has increased. Any fluctuation in YRP tenancy has been the result of LMM funding issues and is completely unrelated to the Lakewood Defendants. There is no evidence that a YRP enrollee was denied housing or that housing was made unavailable to a YRP enrollee as a result of the complained of actions. Mr. Brauer, YRP Director, confirms that YRP tenancy has increased at Hidden Village, LLC, and there have been no instances in which a YRP enrollee was excluded from living at Hidden Village.

Because Hidden Village, LLC, has failed to allege or present evidence that the complained of actions resulted in the exclusion of a protected class member from living at Hidden Village, it cannot establish a prima facie FHA claim. For this reason, the Lakewood

Defendants are entitled to summary judgment on all FHA claims. See, *e.g.*, *Maki, Cox, Halprin*, and *AHF*.

**E. Hidden Village, LLC, Fails to Show that the Lakewood Defendants' Non-Discriminatory Actions were a Pretext for the FHA claims.**

The Lakewood Defendants' Motion for Summary Judgment establishes legitimate non-discriminatory grounds for the actions complained of by Hidden Village, LLC. The BIO fails to show that the legitimate non-discriminatory reasons were a pretext for racial discrimination.

Within the context of a housing discrimination case, pretext can be established by (1) a direct evidentiary showing that a discriminatory reason more likely motivated the defendants or by (2) an indirect evidentiary showing that the defendants' explanation is not credible. *Lindsay v. Yates*, (C.A.6), 578 F. 3d 407. Mere conjecture that the defendant's explanation is a pretext for intentional discrimination is an insufficient basis for a denial of summary judgment. To avoid summary judgment, the plaintiff is required to produce evidence that the proffered reasons were factually untrue. Despite the shifting burdens of production, the ultimate burden of persuasion remains at all times with the plaintiff. *Lindsay*, 578 F. 3d at 421.

Here, the BIO specifically makes reference to Mr. Barrett's testimony that Sgt. Favre commented that the YRP had "some blacks in the program." (Barrett, attached as Ex. J, at p. 40.) Sgt. Favre denies making this comment. (Favre, Ex. E, at p. 30.) Even assuming Sgt. Favre made the comment, a single statement regarding the racial composition of YRP does not demonstrate a pretext for the legitimate nondiscriminatory grounds of the Lakewood Defendants. *Ohio Univ. v. Ohio Civ. Rights Comm.*, 175 Ohio App.3d 414, 2008-Ohio-1034, at ¶98. There is also no evidence showing a nexus between the alleged statement and the complained of actions. *Id.* Indeed, the alleged comment was made only to Mr. Barrett and the comment was not made

as part of a decision making process that resulted in any governmental actions. Accordingly, even assuming the single comment was made, it does not establish a pre-text for the legitimate nondiscriminatory grounds.

The BIO also generically refers to its assertion of facts in an attempt to show a pretext. (BIO at p. 18.) To avoid needless repetition, Lakewood Defendants direct the Court's attention to the undisputed facts relating to the legitimate non-discriminatory concerns of Lakewood officials relating to zoning, a high crime area which could not be supervised, and the basis of the joint inspection. Thus, for this additional reason, the FHA claims should be dismissed.

**F. Hidden Village, LLC, Does Not Have Standing to Assert a §1983 Fourth Amendment Claim.**

The BIO fails to address the standing issue in relation to the §1983 Fourth Amendment claim for an alleged unreasonable seizure. As was established by the Motion for Summary Judgment, a §1983 claim for a Fourth Amendment violation is entirely personal to the direct victim of the alleged constitutional violation. *Claybrook v. Birchwell* (C.A.6, 2000), 199 F.3d. 350, 357. In *Shamaeizadeh v. Cunigan* (C.A.6, 2003), 338 F.3d. 535, 544, the Sixth Circuit held that because a landlord had no reasonable expectation of privacy in a rented apartment, the landlord lacked standing to assert a §1983 claim for an alleged unreasonable search of the rented apartment. Indeed, only the tenant of the rented apartment has standing to assert a §1983 Fourth Amendment claim for an unreasonable search of the apartment. *Id.* See, also, *Bonds v. Cox* (C.A.6, 1994), 20 F.3d. 697; *Rakas v. Illinois* (1978), 439 U.S. 128, 133-134; *Purnell v. Akron* (C.A.6, 1991), 925 F.2d. 941.

Here, it is undisputed that the joint inspection which forms the basis of the claimed unreasonable search occurred in buildings occupied by LMM administrative staff and YRP

enrollees. There is no evidence that Hidden Village, LLC, occupied these buildings or had any expectation of privacy. Only LMM or the individual YRP enrollees had a reasonable expectation of privacy in the areas inspected during the joint inspection. Therefore, only the YRP enrollees or LMM administrative staff have standing to assert a §1983 Fourth Amendment claim. *Shamaeizadeh; Bonds; Rakas; Purnell*. Hidden Village, LLC, simply does not have standing to assert such a claim. For this reason, Hidden Village, LLC's §1983 Fourth Amendment claim should be dismissed for lack of standing.

**G. Hidden Village, LLC, Fails to Establish a Fourth Amendment Violation.**

The BIO alleges that Lieberman and Ms. Withers objected to the joint inspection of the YRP occupied buildings and that, despite these objections, the joint inspection continued.<sup>4</sup> For the reasons that follow, the inspection of the YRP occupied buildings comported with the Fourth Amendment.

The Fourth Amendment recognizes warrantless administrative inspections of premises when voluntary consent of an occupant is provided. *Georgia v. Randolph*, 547 U.S. 103, 106 (2006); *Illinois v. Rodriguez*, 497 U.S. 177 (1990). A third-party's consent to search an area is valid if the third-party has mutual use of the area, with joint access to or control of the area for most purposes. *U.S. v. Matlock* (1974), 415 U.S. 164, 171, fn. 7.

The joint inspection was conducted pursuant to Lakewood ordinances and the Ohio Revised Code, none of which initially require a warrant to conduct. Ms. Withers' alleged objection only consisted of questioning the joint inspection team as to why they were conducting the inspection and why there was no prior notice. (Withers, Ex. B, at p. 64.) Ms. Withers

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4. The BIO makes no reference to the visit by Inspector Gilman and State Fire Inspector after the joint inspection as a basis for a Fourth Amendment violation. Nevertheless, the Motion for Summary Judgment demonstrates this post-inspection visit did not result in a Fourth Amendment violation.

contacted LMM Director, Mr. Brauer, who consented to the joint inspection teams' access to YRP occupied buildings. (Id.) Also, it is undisputed that there was no refusal of access by any YRP enrollee. The consent of Mr. Brauer and the YRP enrollees resulted in an administrative inspection which comported with the Fourth Amendment.

There is also no evidence that Lieberman's supposed objection to the joint inspection team was ever expressed to the joint inspection team. Lieberman stated that the supposed objection he made to the joint inspection team was only expressed to property manager Marilyn Watts. Ms. Watts testified that she was not present during the joint inspection and only expressed an objection after the joint inspection had been completed. (Watts Depo., attached as Ex. K, at pp. 24-27.) Moreover, because Lieberman had no reasonable expectation of privacy at the YRP occupied buildings, his objection did not abrogate Mr. Brauer's consent. For this additional reason, Hidden Village, LLC's, § 1983 Fourth Amendment claim fails.

**H. The Lakewood Defendants Named in Their Individual Capacities are Entitled to Qualified Immunity as to all Claims.**

Contrary to the assertion of the BIO, the Lakewood Defendants' Motion for Summary Judgment expressly seeks qualified immunity for the FHA claims in addition to the §1983 claims. (Motion for Summary Judgment at p. 20.) Specifically, the Motion for Summary Judgment stated because Hidden Village, LLC, had failed to establish a violation of any FHA claim or §1983 claim, all the individually named Lakewood Defendants would be entitled to qualified immunity. (Id.) Moreover, the Motion for Summary Judgment cited to *Buckeye Ace Comm. Hope Foundation v. Cuyahoga Falls* (N.D. Ohio, 1997), 970 F.Supp. 1289, 1320, which applies qualified immunity for an individual capacity defendant to FHA claims. (Id. at 19.) Thus, the Lakewood Defendants appropriately raised the qualified immunity defense on behalf

of the individual capacity Defendants as to all federal claims. To avoid needless repetition, this Reply incorporates the standards for qualified immunity addressed in the Lakewood Defendants' Motion for Summary Judgment.

**1. Thomas George is Entitled to Qualified Immunity.**

The BIO fails to establish that an official in Mayor George's position should have known that his conduct would violate federal fair housing laws. The BIO's reliance upon Sgt. Favre's statement is misplaced as Mayor George made clear that he was unaware of the racial makeup of YRP and had no knowledge of the statement by Sgt. Favre. (George Depo., Ex. C, at pp. 89-90.) Instead, as was established by the Summary Judgment Mayor George's actions were motivated by legitimate nondiscriminatory reasons relating to strict enforcement of Lakewood zoning; legitimate concerns regarding an increase in criminal activity near Hidden Village; and LMM's staff being non-cooperative with police inquiries regarding potential criminal activity. Thus, Mayor George is entitled to qualified immunity on all federal statutory and constitutional claims.

**2. Charles Barrett is Entitled to Qualified Immunity.**

Again, the Brief in Opposition does not point to any evidence demonstrating that a reasonable official in Mr. Barrett's position should have known that his determination relating to zoning would violate federal fair housing laws. Mr. Barrett's determination that YRP was not a permitted use for Hidden Village and his notification for a non-conforming use were legitimately based upon the Lakewood zoning code. As was thoroughly established by the Motion for Summary Judgment, the operation of the YRP program included many nuances that did not conform with a residential use. Mr. Barrett explained these nuances and applied the Lakewood Zoning Code to reach the determination that YRP was a non-conforming use. Clearly, a

reasonable official in Mr. Barrett's position would have no reason to believe that his interpretation and enforcement of the zoning code violated a federal statute or constitutional right. Thus, Mr. Barrett is entitled to qualified immunity on all federal claims.

**3. Edward E. Fitzgerald is Entitled to Qualified Immunity.**

Likewise, there is no evidence that Edward E. Fitzgerald acted in an manner that would have caused a reasonable official in his position to understand that his conduct would violate federal statutory or constitutional rights. Mr. Fitzgerald's mere suggestion regarding a new approach to the zoning issue presented by YRP's could not place a public official on notice that he or she was violating federal housing laws. *Bass v. Robinson* (6th Cir., 1999), 167 F.3d 1041, 1048 (mere passive action by a public official could not subject the official to liability.) And his participation in meetings to discuss zoning issues relating to YRP does not establish a basis to abrogate qualified immunity. (Id.) Finally, Mr. Fitzgerald's assignment of a building inspector to participate in the joint inspection was under his authority as Building Commissioner and would not place a reasonable official on notice that such action would violate any federal constitutional or statutory rights. Thus, Mr. Fitzgerald's limited role results in qualified immunity and the federal claims against him should be dismissed.

**I. Hidden Village, LLC, Fails to Establish a §1983 Monell Claim.**

As was established by the Motion for Summary Judgment, a §1983 *Monell* claim cannot be sustained when the claimant fails to demonstrate an underlying constitutional violation. *Los Angeles v. Heller* (1986), 475 U.S. 796, 799; *Peet v. Detroit* (C.A.6, 2007), 502 F.3d. 557, 566. Because an underlying §1983 constitutional violation has not been established, the *Monell* claim fails as a matter of law.

Moreover, as was established by the Motion for Summary Judgment, the evidence fails to establish an official policy which directly caused the claimed constitutional violation. Thus, for this additional reason, the *Monell* claim fails as a matter of law.

Based upon the forgoing, the BIO fails to establish an official Lakewood policy that was the direct cause of the alleged §1983 Fourth and Fourteenth Amendment *Monell* claims. Thus, for this additional reason, the *Monell* claims fail as a matter of law.

**J. Lakewood is Entitled to Immunity Pursuant to R.C. Chapter 2744.**

In an attempt to circumvent Lakewood's immunity under R.C. Chapter 2744 as to the state law trespass claim, the BIO erroneously relies upon numerous factual allegations which are irrelevant to the trespass claim. As was established by the Motion for Summary Judgment, the trespass claims are not causally related to any of the immunity exceptions. More importantly, the BIO concedes that the trespass claim is an intentional tort. (BIO at 23.) Because the immunity exceptions under R.C. 2744.02(B) only relate to negligence, it is axiomatic that the exceptions do not apply to intentional torts. *Wilson v. Stark County Dept. of Human Services* (1994) 70 Ohio St.3d 450. Consequently, none of the immunity exceptions apply and Lakewood is entitled to immunity under R.C. Chapter 2744 for the intentional tort of trespass.

**K. The Individual Lakewood Defendants are Entitled to Immunity Under R.C. Chapter 2744.**

The BIO fails to set forth any evidence demonstrating that any action by Mr. Barrett or Mayor George resulted in the alleged trespass. Mr. Barrett was not involved in the decision to conduct the joint inspection or the joint inspection itself. Likewise, Mayor George was not involved in the decision to conduct the joint inspection or the joint inspection itself.

Accordingly, Hidden Village, LLC, has failed to show that the reckless/wanton, malicious, or bad faith actions of either Mr. Barrett or Mayor George resulted in the trespass.

Moreover, the only action taken by Mr. Fitzgerald relating to the joint inspection was his assignment of a building inspector to participate in the inspection. Absent is any evidence that Mr. Fitzgerald's assignment of a building inspector was made with the requisite level of recklessness/wantonness, maliciousness, or in bad faith. Instead, Mr. Fitzgerald acted within the scope of his authority as Building Commissioner to assign an inspector to participate in the joint inspection. Thus, Hidden Village, LLC, has failed to show that Mr. Fitzgerald acted recklessly/wantonly, maliciously, or in bad faith.

Mr. Barrett, Mayor George, and Mr. Fitzgerald are entitled to immunity as to the trespass claim under R.C. Chapter 2744.

**L. The Trespass Claim Fails as the Lakewood Defendants were Privileged to Enter Hidden Village.**

The joint inspection team had authority to and were privileged to via Lakewood Ordinances and the Ohio Revised Code to conduct the inspection at Hidden Village. As was established by the foregoing, despite the alleged objections by Lieberman and Ms. Withers, consent to conduct the inspection was provided by Mr. Brauer. In short, the joint inspection team acted within the scope of their legal authority and was privileged to enter the property to conduct the inspections. For this additional reason, the trespass claim fails. *Chalker v Howland Township Trustees* (1995), 74 Ohio Misc.2d 5.

**IV. CONCLUSION**

In conclusion, there are no genuine issues of material fact and the Lakewood Defendants are entitled to judgment as a matter of law on all claims asserted by Hidden Village, LLC.

Respectfully submitted,

MAZANEC, RASKIN & RYDER CO., L.P.A.

*s/John D. Pinzone*

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 3, 2010, a copy of the foregoing Defendants' Reply in Support of Their Motion for Summary Judgment was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

*s/John D. Pinzone*

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