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United States District Court, N.D. Texas, Dallas Division.

Charles MILLER, et al., Plaintiffs,
v.
CITY OF DALLAS, Defendant.

No. Civ.A. 3:98–CV–2955–D.
|
Feb. 14, 2002.

MEMORANDUM OPINION AND ORDER

FITZWATER, J.

***1** Plaintiffs–African–American single family homeowners and residents of the Cadillac Heights area of Dallas, Texas ("Cadillac Heights"), a predominantly minority and low income neighborhood–allege that defendant City of Dallas ("the City") has provided, and continues to provide, municipal services in a racially- and ethnically-discriminatory manner. On the City's motion for summary judgment, the court must decide whether plaintiffs have adduced sufficient evidence of liability under federal civil rights laws and of damages to be entitled to a trial, and whether their claims are time-barred. The court holds that plaintiffs are entitled to a trial of their causes of action under 42 U.S.C. § 1983 for alleged violations of the Fourteenth Amendment Equal Protection Clause and under 42 U.S.C. § 1981, and to a trial of some but not all their damages claims. The court therefore grants in part and denies in part the City's motion for summary judgment.

I

Ronnie Miller, Erma Cooper, Fred Crawford ("Crawford"), Mable Hayden ("Hayden"), George and Dorothy Thomas ("the Thomases"), Mattie and L.T. Cooper ("the Coopers"), Louise Davis, Lessie Hollins, John Adams ("Adams"), and Velma Harper are each single family homeowners and residents of Cadillac Heights. They contend the City has in the past engaged, and continues to engage, in purposeful racial and ethnic discrimination in providing municipal services to residents of Cadillac Heights, 98.5% of whom they assert are minorities and 46% of whom they allege live in poverty. In particular, plaintiffs assert that the City discriminates against residents of Cadillac Heights with respect to flood protection, zoning, protection from industrial nuisances, landfill practices, streets and drainage, and federal funding for housing and community development.

Plaintiffs sue for damages and equitable relief under 42 U.S.C. § 1983 (for violations of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 2000d,[1] 24 C.F.R. § 100.70(d)(4) (2002), and 42 U.S.C. § 5309);[2] 42 U.S.C. § 1981; and § 804(a) of the Fair Housing Act of 1968 ("FHA"), 42 U.S.C. § 3604(a). The City moves for summary judgment on all claims.[3]

II

The City first moves for summary judgment as to plaintiffs' causes of action under § 1981 and § 1983 [4] on the ground that they cannot establish that any of the alleged constitutional and statutory violations for which plaintiffs sue were committed pursuant to a municipal policy, custom, or usage.

When the summary judgment movant will not have the burden at trial concerning a cause of action, it can meet its summary judgment obligation by pointing the court to the absence of evidence to support the claim. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Once the party does so, the nonmovants must then go beyond their pleadings and designate specific facts showing there is a genuine issue for trial. *See id.* at 324; *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (en banc) (per curiam). Summary judgment is mandatory where the nonmoving parties fail to meet this burden. *Little,* 37 F.3d

at 1076. It is apparent from the City's brief that this ground of its motion rests on this method for obtaining summary judgment. It is therefore important to examine the specific absence of proof to which the City points the court, because if a summary judgment movant fails to discharge its initial burden, the nonmovant has no obligation even to respond to the motion. *See John v. State of La. (Bd. of Trustees for State Colls. & Univs.),* 757 F.2d 698, 708 (5th Cir.1985).

***2** The City's brief specifically points the court to an absence of evidence "that any of the alleged constitutional and statutory violations were committed pursuant to a municipal policy, custom, or usage." D. Br. at 17. In response, plaintiffs have adduced evidence that the actions about which they complain were undertaken by the Dallas City Council, the City Manager, the City Attorney, and the City Board of Adjustment. *See* Ps. Br. at 3–5 and appendix evidence cited therein. Plaintiffs have thus met their burden with respect to this particular component of liability under §§ 1983 and 1981 that the City has raised in its motion.

In its reply brief, the City enlarges its argument and contends that plaintiffs have failed to present evidence that their injuries were *caused by* implementation of a City policy or custom. *See* D. Rep. Br. at 4. Although the City referred in its initial brief to this requirement of liability under §§ 1983 and 1981, *see* D. Br. at 16–17, it did not point the court to the absence of evidence of a connection between the policy and the injury, *see id.* This assertion did not clearly appear until the City's reply brief, and plaintiffs had no obligation to respond to it. *See John,* 757 F.2d at 708.[5]

Accordingly, focusing on the single, narrow assertion the City advances in its original brief–that plaintiffs cannot adduce evidence that any alleged constitutional or statutory violation was committed pursuant to a municipal policy, custom, or usage–the court denies the City's motion for summary judgment.

III

Plaintiffs bring causes of action under § 1983 (for alleged violations of the Fourteenth Amendment Equal Protection Clause, § 2000d, and § 5309) and § 1981, contending the City intentionally discriminated against them based on their African–American race and ethnicity in providing municipal services related to flood protection, zoning, protection from industrial nuisances, landfill practices, streets and drainage, and federal funding for housing and community development. The City moves for summary judgment as to these claims by pointing the court to the absence of evidence that it took any of the actions at issue with a racially discriminatory purpose or intent. *See* D. Br. at 1, 18, 21, 23.

A

Plaintiffs' § 1983 claim based on the Equal Protection Clause of the Fourteenth Amendment requires "[p]roof of racially discriminatory intent or purpose[.]" *Vill. of Arlington Heights v.. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 265 (1977). "42 U.S.C. § 1981 ... also includes a discriminatory intent requirement." *Minority Police Officers Ass'n of South Bend v. City of South Bend, Ind.,* 801 F.2d 964, 967 (7th Cir.1986) (citing *Gen. Bldg. Contractors Ass'n v. Pa.,* 458 U.S. 375, 391 (1982)); *see Dews v. Town of Sunnyvale, Tex.,* 109 F.Supp.2d 526, 531 (N.D.Tex.2000) (Buchmeyer, C.J.). 42 U.S.C. § 2000d provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." To recover under § 2000d, plaintiffs must show that the City discriminated against them on the basis of race, the discrimination was intentional, and the discrimination was a substantial or motivating factor for the City's actions. *Tolbert v. Queens Coll.,* 242 F.3d 58, 69 (2d Cir.2001). Section 5309 prohibits racial discrimination under any program or activity funded in whole or in part with funds made available under the Housing and Community Development Act ("HCDA"). It provides that "[no] person in the United States shall on the ground of race, color, national origin, religion, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter." A § 1983 claim based on a violation of § 5309 requires proof of intentional racial discrimination. *Alexander v. Sandoval,* 532 U.S. 275, 121 S.Ct. 1511, 1516 (2001). A discriminatory purpose, as a motivating

factor, implies that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group ." *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279 (1979).

***3** "Because direct evidence of discriminatory purpose is rarely available, courts must make 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." ' *Jim Sowell Constr. Co. v. City of Coppell, Tex.,* 61 F.Supp.2d 542, 546 (N.D.Tex.1999) (Fitzwater, J.) (quoting *Arlington Heights,* 429 U.S. at 266). "The court must therefore look at the totality of the relevant evidence to determine whether invidious discriminatory purpose was a motivating factor for the decision." *Id.* (citing *Washington v. Davis,* 426 U.S. 229, 242 (1976)). "In making this determination, the court is guided by a non-exhaustive list of factors[.]" The so-called *Arlington Heights* factors include "(1) the discriminatory effect of the official action, (2) the historical background of the decision, (3) the specific sequence of events leading up to the challenged decision, (4) departures from the normal procedural sequence, (5) departures from the normal substantive [standards], and (6) the legislative or administrative history of the decision." *Id.* at 546–47 (citing *Arlington Heights,* 429 U.S. at 266–68).[6] "When a court is faced with an aggregation of many decisions made by different administrators ... the impact or effect of the choices made is 'an important starting point' in determining purposeful discrimination." *Clients' Council v. Pierce,* 711 F.2d 1406, 1409 (8th Cir.1983) (quoting *Crawford v. Bd. of Educ.,* 458U.S. 527, 544 ___ (1982)). "The inquiry is a practical one which is designed to determine whether the decisionmaker's actions ... could not 'reasonably be explained without reference to racial concerns." ' *Id.* (quoting *Columbus Bd. of Educ. v. Penick,* 443 U.S. 449, 461 (1979)). To establish discriminatory intent does not require proof that discrimination is the sole purpose behind each failure to equalize services. *See id.* "It is, rather, the cumulative evidence of action and inaction which objectively manifests discriminatory intent." *Id.* "There must be a 'correlation between municipal service disparities and racially tainted purposiveness to mandate a finding of discriminatory intent." ' *Ammons v. Dade City, Fla.,* 783 F.2d 982, 987 (11th Cir.1986) (per curiam) (quoting *Dowdell v. City of Apopka,* 698 F.2d 1181, 1185–86 (11th Cir.1983)). Although official action is not necessarily unconstitutional because it has a racially disproportionate impact, the size of the disparity and the nature of the practice at issue can alone give rise to an inference of discriminatory intent. *See id.* at 988. Courts have found the magnitude of the disparities in municipal services to be "explicable only on racial grounds." *See id.; Dowdell,* 698 F.2d at 1186.

B

Plaintiffs complain that the City is liable under § 1983 for violating the Fourteenth Amendment Equal Protection Clause and under § 1981 for discriminating in five categories of municipal services: flood protection, zoning, protection from industrial nuisances, landfill practices, and streets and drainage.[7] The court considers initially the allegation of their first amended complaint[8] that the City-owned-and-operated Trinity River levee system does not protect Cadillac Heights from flooding because the levees were constructed to provide protection only to Caucasian-owned property, and that the failure to extend levee protection to their neighborhood was racially motivated, with intent to discriminate against African–American property owners and residents. *See* Ps. Am. Compl. ¶ 8.

1

***4** The first *Arlington Heights* factor addresses the discriminatory effect of the official action. Plaintiffs have adduced substantial evidence of discriminatory effect.

There has been periodic flooding of Cadillac Heights as a result of the lack of levee protection for the neighborhood. *See* Ps.App. 2393–94. In fact, plaintiffs point to testimony that the existing levee system, which protects other areas of Dallas, has actually made the flooding in Cadillac Heights worse than it would have been without a levee system. *Id.* at 149. This is clear evidence that would allow a reasonable trier of fact to find that minority neighborhoods such as Cadillac Heights suffer disparate effects from flooding compared to predominantly Caucasian neighborhoods that are protected by a levee system.

2

The second *Arlington Heights* factor pertains to the historical background of the decision. Plaintiffs have adduced evidence that through the 1940s, while the City of Dallas was still part of a segregated society, the City adopted racial ordinances that prohibited Caucasians and African–Americans from living in areas populated by the other group. *See id.* at 158. There is summary judgment proof that during the 1940s, the City viewed racial segregation as a legitimate policy goal in making the types of decisions that plaintiffs challenge. *See, e.g., id.* at 325 (memorandum from City Plan Engineer referring to "Negro Subdivision Development," development of a "real good negro area," and "a real good subdivision that was sold out to negroes very quickly"). Plaintiffs have cited numerous examples of other evidence, some referring to decisions made by the City and its agents as late as 1993, that a reasonable trier of fact could find indicate a history of racial discrimination in policies toward minority communities. *See id.* at 1865–66.

Aside from this general evidence of the City's history of race-based policymaking, plaintiffs point to the particular history of flood protection decisions. The unprotected area was originally designated a "negro district" by the City in the 1940s. *Id.* at 325. In a September 3, 1998 memorandum, the City Executive Coordinator for the Trinity River Project, which is part of the City's Public Works Department, stated that the original levee construction project in the 1950s excluded minority neighborhoods from protection, that the levees could not be built in that manner were they being constructed today, and that they actually increased the flooding problems of minority neighborhoods. *Id.* at 149. In 1983 the United States Army Corps of Engineers ("Corps") asked the City to commit local matching funds for a levee extension project that would remedy Cadillac Heights' flooding problems, but the City declined to act on the Corps' recommendation on the stated ground that there were hundreds of acres of developable land outside the flood plain in south Dallas. *Id.* at 217. In 1991 the City developed a levee plan for the protection of Cadillac Heights and the City's nearby Central Wastewater Treatment Plant, but the levee ultimately built only provided protection for the plant. *See id.* at 2374–76. While there was funding in the City's 1995 bond program for several flood protection projects, none was to assist Cadillac Heights. *See id.* at 1971–81.

***5** Considering the proof plaintiffs have adduced that race was a factor historically in the City's decisionmaking processes, both in general and specifically with regard to flood protection, the evidence discussed above in § III(B)(1) of the discriminatory effects of City flood protection policies takes on greater weight in the discriminatory intent inquiry. If the City historically considered the racial makeup of neighborhoods when formulating policy, if it initially declined flood protection to minority neighborhoods while providing it to predominantly Caucasian areas, and if it continues to deny such protection to the predominantly minority Cadillac Heights neighborhood, a reasonable trier of fact could find from the circumstantial evidence that this conduct is racially motivated.

3

The third *Arlington Heights* factor examines the specific sequences of events leading to the challenged decisions. These are detailed above in § III(B)(2), and they indicate that after an initial, intentional failure to protect minority neighborhoods from flooding in the 1950s, the City has repeatedly refused to protect Cadillac Heights, despite the fact that its recent decisions do not cite race as a factor in declining to extend the levee system. Considering the City's history of race-based decisionmaking and the disparate impact of flood protection policies on minority communities, under *Arlington Heights'* circumstantial evidence test these sequences of events would permit a reasonable trier of fact to find racially discriminatory intent in the City's flood protection policies.

4

The fifth *Arlington Heights* factor takes into consideration departures from normal substantive standards.[9] With respect to the issue of flood protection, plaintiffs cite the "Master Plan for Housing," commissioned by the City in 1945 before there was any residential or industrial development in what is today Cadillac Heights, which stated there should be no residential development in low land along the Trinity River or White Rock Creek. *Id.* at 332. But the City apparently disregarded this standard a mere two years later when the City Plan Engineer designated Cadillac Heights, which is clearly in the Trinity River's flood plain, for "Negro Subdivision Development." *See id.* at 325.

Plaintiffs also adduce some evidence of the City's

departing from its general substantive standards in making flood protection decisions for Cadillac Heights. In 1984 the City Council adopted the "City of Dallas Planning Policies," which include the goal that "[e]ach neighborhood of the City shall be protected and/or improved so as to be a desirable and attractive residential neighborhood." *Id.* at 13. The same document states the City's objective "[t]o reduce the uncertainty of each neighborhood's future in order to attract more private maintenance, reinvestment and new investment." *Id.* By deliberately denying flood protection to Cadillac Heights, allegedly because there is developable land that lies outside the flood plain and therefore does not need such protection, plaintiffs can make a reasonable argument that the City departed from its standards of protecting neighborhoods and reducing uncertainty in order to attract residential development, maintenance, and investment. Plaintiffs have thus adduced evidence that the City has departed from its normal substantive standards in making flood protection decisions.

5

***6** Considering the flood protection evidence as a whole, the court concludes there is a genuine issue of material fact whether the City has discriminated against residents of Cadillac Heights on the basis of race in connection with the actions that plaintiffs challenge in this suit. The court therefore denies summary judgment as to plaintiffs' flood protection related § 1983 Fourteenth Amendment Equal Protection Clause claim and § 1981 claim.

C

Plaintiffs next allege that the City intentionally discriminated with respect to zoning. They assert that because areas of, and immediately adjacent to, Cadillac Heights are zoned heavy industrial, the neighborhood is subjected to the blighting influences and noxious effects of such industrial uses as a meat packing plant, animal rendering plants, the City's sewage treatment plant, and a junkyard. Ps. Am. Compl. ¶ 12. According to plaintiffs, the City's industrial zoning disproportionately and adversely impacts African–Americans. *Id.* ¶¶ 13–14.

Plaintiffs also maintain that the City has intentionally discriminated by denying them protection from industrial nuisances. They allege that the City has refused to enforce municipal and state laws that would have ended lead pollution caused by smelters and have instead cooperated with two smelters, allowing them to continue polluting the neighborhood. Plaintiffs contend the City has licensed and permitted other neighborhood facilities to pollute the air and environment in Cadillac Heights, but uses its zoning powers and other municipal authority to protect predominantly Caucasian neighborhoods from the harmful effects of industrial uses, leaving Cadillac Heights and other predominantly minority areas disproportionately affected. *Id.* ¶¶ 15–17. They also posit that at least two illegal landfills operate with the City's knowledge and permission in Cadillac Heights, the City has promised but has failed to close and clean up one illegal landfill, and the City has permitted the other one to continue to dump lead slag and battery chip samples, but does not knowingly allow and permit illegal landfills to operate in predominantly Caucasian areas. *Id.* ¶ 18.

1

Because the harms that plaintiffs contend they have suffered as a result of industrial nuisances and landfill practices are alleged to stem from the City's zoning policies, with which plaintiffs take issue directly and on the basis of their effects on nuisances and landfills, the court conducts the *Arlington Heights* analysis of these three factual claims together. Plaintiffs point to substantial evidence of the discriminatory effects of City policies in each of these three areas.

The City's urban planning expert, Robert B. Fairbanks, Ph.D. ("Dr.Fairbanks"), while denying that the City deliberately discriminated against Cadillac Heights, acknowledged that the area deteriorated into a slum "because poor African Americans and Mexican Americans wishing to own their homes or live in newer housing had few options except for areas such as Cadillac Heights located in the underdeveloped river bottoms neighborhood nearby noxious industries." Ps.App. 171. He also equated the effects of the City's urban planning policies with those that tend to accrue when there is a deliberate effort to discriminate based on race. *See id.* Dr. Fairbanks' conclusions in these two respects are supported by statistical evidence that indicates that

minority neighborhoods throughout the City suffer disproportionately from their proximity to industrial sites. *See id.* at 1900–05.

***7** According to 1990 statistics, African–Americans constituted 47.25% of the Dallas population living in Census blocks that were either within an industrial-zoned district or within five hundred feet of one. *Id.* at 1901. Hispanics constituted 28.36% of the Dallas population living in such blocks. *Id.* But as of 1990, the overall population of Dallas was 28.89% African–American, 20.88% Hispanic, and 50.23% other. *Id.* at 1774.

"R–5" zoning, which is how all single-family zoning in Cadillac Heights is classified, refers to districts that receive adequate light and air, but are not guaranteed other neighborhood amenities. *See id.* at 49–57. By definition, this categorization is applied to substandard areas slated for redevelopment at higher densities, rather than areas presumed to be stable and undisturbed in their present use. *See id.* at 55–57. In fact, of the 152 districts in Dallas zoned R–5, 130 are in tracts of land that are 90% to 100% Caucasian. *Id.* at 1776–77.

According to a City consultant, residential land in Cadillac Heights is surrounded by industrial uses that utilize hazardous and toxic materials. *Id.* at 1578–79. The neighborhood is home to two lead smelters whose emissions expose residents to hazardous levels of lead, both in the soil and in neighborhood landfills. *See id.* at 856–60, 898–900, 1559–62, 1708. The City's Director of Environmental Assessment acknowledged that Cadillac Heights and west Dallas, both minority neighborhoods, are the only two residential areas in the City contaminated by lead smelters. *Id.* at 152. Plaintiffs have adduced substantial evidence of the discriminatory effects of the City's zoning policies.

2

The court next considers the history factor. To facilitate zoning decisions, the City Plan Commission ("Plan Commission") recommended in 1945 that a "racial ownership map" and a "racial residence map" be prepared for certain areas. *Id.* at 328. The Plan Commission also recorded the difficulty it had in making such decisions as a result of "the proximity of white and black races," and based on such proximity it recommended specific zoning changes. *Id.* at 327. In 1947 the City Plan Engineer referred to a large portion of what is today Cadillac Heights as suitable for "Negro Subdivision Development." *See id.* at 325. Contemporaneous Plan Commission records indicate that the particular racial makeup of Cadillac Heights entered prominently into City decisions about how to classify the land for zoning purposes. *See id.* at 324. In 1950 the Joint Committee on Negro Housing of the Dallas Chamber of Commerce and the Dallas Citizens Council and the Dallas Inter–Racial Committee issued a report stating that "the only satisfactory and permanent solution to [the 'problem of Negro Housing'] can be realized where there is racial segregation." *Id.* at 1807. The sordid history of the City's decisionmaking process regarding racially-segregative zoning and related policies, when viewed in conjunction with the discriminatory effects of zoning decisions, industrial nuisances, and landfill practices, offers substantial circumstantial evidence of discriminatory intent.

3

***8** Plaintiffs also adduce substantial evidence regarding the specific sequences of events leading to the challenged decisions. They offer the following explanation by City expert Anthony Downs of the City's specific methodology for classifying neighborhoods and how that methodology relates to the issue of race:

> The methodology used by the [C]ity to classify its neighborhoods into five different categories on the basis of their physical condition and position in a typical "life cycle" of neighborhoods makes use of certain indicators that are highly correlated with the percentage of African–American households living in each area. This could be construed as "automatically" classifying areas with high fractions of African–Americans as areas in advanced decline or advanced decline with abandonment. Since such areas are programmed to receive lower levels of financial assistance than other

> areas in better condition, this classification could be seen as "race-based" to the disadvantage of African–American residents.

Id. at 1866. Plaintiffs' expert, Dr. John T. Metzger, similarly concludes that the City continued through the 1990s to use what could reasonably be viewed as racial classifications in designating communities for purposes of allocating services and facilities, such as landfills, street maintenance, and drainage. *See id.* at 1732–49, 1756–57, 1758–59, 1760–61.

Specifically, the Dixie Metals Company ("Dixie Metals") lead smelter, about which plaintiffs complain, was built in 1947. *Id.* at 174. This was shortly after the City designated Cadillac Heights as suitable for "Negro Subdivision Development" and therefore knew that it was likely to be an industrial area. *See id.* at 325. During the mid–1950s, some residents complained of the odor from the smelter as well as a lack of sewage facilities, and they requested unsuccessfully that the area be rezoned. *Id.* at 491. In 1974 the City Council changed the zoning ordinance to require certain uses, like lead smelters, to have a specific use permit ("SUP") in order to operate legally in a particular area. *Id.* at 362. Plaintiffs have presented evidence that the SUP requirement was not enforced as to the Dixie Metals smelter in Cadillac Heights until 1990. *See id* . at 510–25.

Plaintiffs have adduced circumstantial evidence under the sequences of events factor that would allow a reasonable trier of fact to find race-based discrimination in zoning and related practices.

4

Plaintiffs also provide substantial evidence of the City's departure from normal substantive standards in its zoning and related policies.

In dealing with the issues of zoning industrial nuisances, the City since 1974 has required that the Dixie Metals lead smelter have an SUP to operate. *See id.* at 362. The process for obtaining an SUP requires the applicant to show the specific use sought will be compatible with adjacent property and consistent with the character of the neighborhood. *Id.* at 65–68. According to Assistant City Attorney Don Postell, however, the City did not enforce this requirement as to the Dixie Metals lead smelter until 1984. *Id.* at 616–18.

***9** In 1991 the Dallas City Council adopted a "Statement of Housing Policy" that delineated specific goals for the City's communities and was designed to "achieve neighborhood stability through a comprehensive strategy of housing improvement and neighborhood economic development[.]" *Id.* at 1804. There is record evidence that the City has thus far failed, however, to implement these goals in Cadillac Heights. It has neither assessed whether Cadillac Heights needs assistance, *see id.* at 2010, nor developed a plan to guide its application of zoning ordinances for the neighborhood, *see id.* at 1801. Plaintiffs provide other examples of substantive policies from which the City has departed in applying them to Cadillac Heights. *See* Ps. Br. at 24–28. Plaintiffs have thus adduced sufficient evidence of the City's deviation from its substantive standards.

5

Considering the zoning and related evidence as a whole, the court concludes there is a genuine issue of material fact whether the City has discriminated against residents of Cadillac Heights on the basis of race in connection with the actions that plaintiffs challenge in this suit. The court therefore denies summary judgment as to plaintiffs' zoning, industrial nuisance, and landfill practices-related § 1983 Fourteenth Amendment Equal Protection Clause claim and § 1981 claim.

D

Plaintiffs allege that streets and storm water drainage facilities in Cadillac Heights are below City standards, they flood during heavy rains, and many residential streets lack sidewalks. By contrast, Caucasian areas that have been part of the City of Dallas for the same or shorter time periods have adequate streets, curbs, gutters, and storm water drainage facilities. *See* Ps. Am. Compl. ¶ 19.

1

Plaintiffs first offer evidence of discriminatory effects in the City's provision of street maintenance and drainage. They present proof that none of Cadillac Heights' streets meets the City's minimum street width requirements, Ps.App. 75, that several streets lack required sidewalks, *id.* at 76, 2350–58, and that inadequate drainage is a contributor, with the lack of flood protection, to flooding, *id.* at 2360. Plaintiffs point to statistical evidence that they maintain can be interpreted to show that, as of March 8, 2000, only 11.6% of the residential streets in Cadillac Heights met the City's definition of a standard street with either concrete or asphalt surfaces and complete curbs and gutters. *Id.* at 95–104, 309. In 1992, however, 77.79% of all City residential streets met the definition. *Id.* at 301. In fact, 88.5% of streets in tracts that were 90% to 100% Caucasian qualified in 1992 as standard, whereas only 67.9% of those in 90% to 100% minority tracts did. *Id* . at 293–301, 1790–97. This is substantial evidence of discriminatory effect.

2

Although plaintiffs do not offer evidence of the specific history of street-and drainage-related policy decisions, they do point to the City's history of general race-based decisionmaking in terms of its provision of services. *See supra* § III(B)(2). In light of this history and the present discriminatory effects in the specific areas of streets and drainage, which are similar in nature to the discriminatory effects in flood protection, zoning, industrial nuisances, and landfill practices, there is sufficient circumstantial evidence under *Arlington Heights* to allow a reasonable trier of fact to find the City policies that plaintiffs challenge are intended to be racially discriminatory.

3

***10** Plaintiffs do not offer evidence of the sequences of events leading up to the challenged street and drainage decisions.

4

Plaintiffs do offer sufficient evidence of the City's deviation from normal substantive standards. The failure to meet street width, sidewalk, and drainage standards in Cadillac Heights, *see supra* § III(D)(1), constitutes such evidence. Moreover, plaintiffs cite provisions from a "City of Dallas Planning Policies" document, adopted by the City Council in 1984, that deal with City standards for providing services and facilities to communities. Policy 1.14, for example, requires that standard water and sewer facilities be provided in all neighborhoods. *See* Ps.App. 9. But Donna Long, Program Manager of Waste Water Facilities Project Management for the City's Water Utilities Department, admits that certain residences in Cadillac Heights have substandard waste water service. *See id.* at 2372–73.

5

Considering the streets and drainage evidence as a whole, the court concludes there is a genuine issue of material fact whether the City has discriminated in this respect against residents of Cadillac Heights on the basis of race. The court therefore denies summary judgment as to plaintiffs' streets and drainage-related § 1983 Fourteenth Amendment Equal Protection Clause claim and § 1981 claim.

E

The court next considers the City's contention that plaintiffs cannot recover under § 1983 for violations of §§ 2000d and 5309 with respect to their claim based on federal funding for housing and community development. As before, the court follows the guidance of *Arlington Heights.*

1

Regarding the first factor–the discriminatory effect of the official action–plaintiffs have adduced only weak evidence, if any, of such an effect of the City's administration of activities funded by the Community Development Block Grant ("CDBG") program.[10] They acknowledge that, since 1980, the City has spent at least $475,000.00 in CDBG funds on home improvement loans directed at Cadillac Heights. *See* Ps. Br. at 32.[11] Plaintiffs also concede that the City used $6,502.00 in CDBG funds to rehabilitate part of Packard and Birdsong Streets in the Cadillac Heights during 1987 and 1988. *See id.* They have also introduced evidence indicating that in 1993 the City commenced two new CDBG programs, both designed to rehabilitate and revitalize six predominantly minority neighborhoods on the verge of decline. *See* Ps.App.1989, 1996–2002. Each program was funded at the level of $25 million. *See id.* at 1988–89. One was directed at the stimulation of the rental housing market around downtown Dallas, and the other targeted at rehabilitating residential areas that include Cadillac Heights. *See id.* at 1988–89, 1992–95. Plaintiffs' evidence that, as of March 1999, only 7% of the $25 million directed at residential rehabilitation had been expended, whereas 70% of the funds directed at downtown development had been spent, *see* Ps.App.1990–91, does not constitute strong evidence of discriminatory effect in the administration of the CDBG program. This is so even considering plaintiffs' proof that the downtown area has undergone a demographic shift from 47.5% Caucasian to 73.9% Caucasian during 1990–2000. *See id.* at 1982.

***11** Plaintiffs have adduced evidence indicating that Cadillac Heights was eligible for CDBG funds intended to assist low income persons in paying their share of assessments for obtaining paved streets, but that Cadillac Heights was not included in the City's program. *See id.* at 1935–49. They cite proof that the City has not used the CDBG-funded Target Neighborhood Paving Program to pave streets in Cadillac Heights. *See id.* at 1920, 1925–33. Plaintiffs also assert that the City has failed to publicize the availability of CDBG funds for street paving under the Petition Street Assessment Paving Program. *See id.* at 1922.

2

Regarding the historical background of the decision–the second *Arlington Heights* factor–plaintiffs rely on public comments and deposition testimony by former Dallas Mayor Ron Kirk ("Mayor Kirk") as evidence of the historical background for City decisions relating to allocation of funds under the CDBG program. *See* Ps. Br. at 35; Ps.App. 1870–76. These comments do not relate directly to any CDBG-funded program, but instead reflect Mayor Kirk's opinion that various City policies dating from the immediate post-World-War-II era, including the construction of the Trinity River levee system, were animated by an intent to discriminate on the basis of race. *See* Ps.App. 1871–72, 1873–77. In his deposition testimony, Mayor Kirk disavows any personal knowledge of intentionally discriminatory policymaking by the City. *See* Ps.App. 1871 (reproducing Mayor Kirk's testimony stating that "I wasn't even born in the forties, and I didn't move to Dallas until 1979, so I don't have any factual information on any of that.").

3

Plaintiffs direct the court's attention to the specific sequence of events leading up to the challenged decision–which relate to the third *Arlington Heights* factor–by citing the events that led up to the City's use in the 1980s of CDBG funds for the phase I and phase II drainage study of Cadillac Heights. They have adduced evidence that phase I of the work, which protects the City's wastewater treatment plant and other industries in Cadillac Heights, is already complete. They have produced proof that indicates that phase II, which plaintiffs allege would benefit residential areas in Cadillac Heights, has not yet been funded. *See id.* at 205–07.

4

Plaintiffs do not point to or provide evidence pertinent to the fourth, fifth, or sixth *Arlington Heights* factors (departures from the City's procedural sequence, deviations from the normal substantive factors, or the legislative or administrative history of decisions relating to the City's administration of activities funded by the CDBG program).[12]

5

Taken as a whole, the evidence of substantial disbursement of CDBG funds by the City to aid the development of Cadillac Heights and other low income and minority areas, coupled with the lack of other indicia of racially discriminatory motive on the part of the City in its administration of this federal program, would not enable a reasonable trier of fact to find that race was a motivating factor behind any of the City's decisions in connection with any such program. Accordingly, the court grants the City's motion for summary judgment with respect to plaintiffs' § 1983 claims based on alleged violations of §§ 2000d and 5309.

IV

***12** The City contends that plaintiffs' claims under §§ 1983 and 1981 are barred by limitations. The City has the burden of proof on this issue. *See Meadowbriar Home for Children, Inc. v. Gunn,* 81 F.3d 521, 533 (5th Cir.1996). When the party who will have the burden of proof at trial concerning an affirmative defense seeks summary judgment on the basis of that defense, it "must establish 'beyond peradventure all of the essential elements of the ... defense." ' *Bank One, Tex., N.A. v. Prudential Ins. Co. of Am.,* 878 F.Supp. 943, 962 (N.D.Tex.1995) (Fitzwater, J.) (quoting *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1194 (5th Cir.1986)).

The City has failed to meet this burden. Its summary judgment motion consists in this respect of two paragraphs, one of which discusses generally the limitations period that applies to claims brought under §§ 1983 and 1981. *See* D. Br. at 24. The other paragraph–besides contending that the City is entitled to summary judgment based on limitations–contains two sentences. One asserts that "Plaintiffs' allegations concern conditions that not only already existed when they moved to Cadillac Heights, but that the City has actively been working to resolve in more recent years." *Id.* The other maintains generally that "Plaintiffs' pleadings and discovery responses show that the vast majority of the actions by the City of which Plaintiffs[ ] complain happened more than two years before they filed this case. (*See* Part II above.)." *Id.* These contentions are insufficient to establish beyond peradventure that the City is entitled to summary judgment dismissing plaintiffs' claims under §§ 1981 and 1983 as time-barred. Nor do they satisfy N.D. Tex. Civ. R. 56.5(c), which requires that "[a] party whose motion or response is accompanied by an appendix must include in its brief citations to each page of the appendix that supports each assertion that the party makes concerning the summary judgment evidence."

V

The City seeks summary judgment dismissing plaintiffs' claims under § 3604(a) and § 1983 (for an alleged violation of 24 C.F.R. § 100.70(d)(4)) on the ground that plaintiffs cannot prove that housing, services, or facilities have been made unavailable to them, as is required to prevail under this statute and regulation.

A

Section 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 natural origin.

24 C.F.R. § 100.70(b) provides that

> [i]t shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to engage in any conduct relating to the provision of housing or of services and facilities in connection therewith that otherwise makes

> unavailable or denies dwellings to persons.

24 C.F.R. § 100.70(d)(4) states that prohibited activities relating to dwellings under 24 C.F.R. § 100.70(b) include, but are not limited to,

> ***13** [r]efusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

The evidence indicates that all plaintiffs own the homes in which they live. *See* Ps.App. 2126–35. Plaintiffs have adduced no proof that the City, through any of the alleged acts of discrimination in question, has refused to sell or rent to them after making a bona fide offer, or has refused to negotiate for the sale or rental of a dwelling to them because of any prohibited factor. To recover under § 3604(a) or § 100.70(d)(4), plaintiffs must therefore show the City has "otherwise ma[de] unavailable or den[ied], a dwelling" to them on a prohibited basis. Because they own their homes, they cannot meet this burden.

To affect the availability of housing within the meaning of the FHA, the discriminatory actions must have a direct impact on plaintiffs' ability, as potential home buyers or renters, to locate in a particular area or to secure housing. *See Southend Neighborhood Improvement Ass'n v. County of St. Clair,* 743 F.2d 1207, 1210 (7th Cir.1984). In *Southend* plaintiffs argued *inter alia* that in predominantly African–American areas, where the county held tax deeds, the county did not comply with its statutory obligation to maintain its properties. Plaintiffs alleged "that the County's breach of its obligations diminished the value of their own properties in these neighborhood areas, and prevented them from securing loans and making other contracts related to their properties." *Id.* at 1208. The *Southend* court dismissed the plaintiffs' § 3604(a) claim after determining that this section did not protect plaintiffs' intangible interests in property already owned. *See id.* at 1210.

In *Campbell v. City of Berwyn,* 815 F.Supp. 1138, 1143 (N.D.Ill.1993), the court reached a similar conclusion, dismissing a § 3604(a) claim where the plaintiffs alleged that, with the intent to discriminate on the basis of race, a municipality had terminated police protection of the plaintiffs' home. The court followed *Southend* and held that because "plaintiffs' interest in on-site police protection is an intangible interest in already-owned property [,]" allegations that the municipality engaged in a racially-motivated denial of such protection did not state a claim under § 3604(a). *Campbell,* 815 F.Supp. at 1143. The reasoning of *Southend* has been followed in interpreting § 100.70(d)(4), as well. *See Clifton Terrace Assocs., Ltd. v. United Techs. Corp.,* 929 F.2d 714, 719–20 (D.C.Cir.1991).

Because a reasonable trier of fact could not find the City made unavailable or denied a dwelling to any person, within the meaning of the FHA, the court grants summary judgment in favor of the City as to plaintiffs' claims under § 3604(a) and § 1983 (for an alleged violation of § 100.70(d)(4)).

B

***14** In their response to the City's motion for summary judgment, plaintiffs shift their attention away from § 3604(a) and § 100.70(d)(4) to 42 U.S.C. § 3604(b), a claim not explicitly asserted in their first amended complaint. *See* Ps. Br. at 36–39; *cf.* Ps. Am. Compl. at ¶ 25. Section 3604(b) provides that it shall be unlawful

> [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

The City contends that plaintiffs are not suing under § 3604(b). *See* Ds. Rep. Br. at 18 (asserting that "Plaintiffs have brought suit only under 42 U.S.C. § 3604(a), not under § 3604(b)."). The court disagrees. *See, e.g., NAACP*

v. Am. Family Mut. Ins. Co., 978 F.2d 287, 292 (7th Cir.1992) (holding in FHA context that "[i]dentifying legal theories may assist defendants and the court in seeing how the plaintiff hopes to prevail, but this organization does not track the idea of 'claim for relief' in the federal rules[.] A complaint should limn the grievance and demand relief. It need not identify the law on which the claim rests[.]"). Plaintiffs have thus asserted a § 3604(b) cause of action despite their failure to cite the statute in the first amended complaint.

Because plaintiffs did not explicitly allege a § 3604(b) violation, however, the City did not address the cause of action in its original summary judgment brief. It did not do so until its reply brief. In such circumstances, the court will not address whether the City is entitled to summary judgment concerning the claim. From a procedural standpoint, the City is seeking summary judgment on a ground not raised in its motion, presented instead for the first time in its reply brief, neither of which is permissible. *See John Deere Co. v. American Nat'l Bank, Stafford,* 809 F.2d 1190, 1192 (5th Cir.1987) (holding that it is error for court to grant summary judgment on ground not properly raised); *Senior Unsecured Creditors' Comm. of First RepublicBank Corp. v. FDIC,* 749 F.Supp. 758, 772 (N.D.Tex.1990) (Fitzwater, J.) (holding that court will not consider new argument raised by way of reply brief). From a practical perspective, the court cannot facilely consider out-of-sequence briefing in which the City, in a reply brief, raises a ground for summary judgment that is not then subject to an opposition response and a reply.

Even if the court did address the § 3604(b) claim on the merits, it would likely deny summary judgment. In *Campbell* the court held the plaintiffs' proper remedy for discriminatory provision of police protection services to a house they already owned was under § 3604(b) rather than § 3604(a). *See Campbell,* 815 F.Supp. 1143–44. This court has held above that plaintiffs have raised a genuine issue of material fact concerning the City's provision of services to them. This conclusion would preclude summary judgment with respect to their cause of action under § 3604(b).

VI

***15** The City maintains that it is entitled to summary judgment dismissing plaintiffs' claims for compensatory damages. It argues that plaintiffs seek compensatory damages only for reduced property values or emotional harm but cannot produce evidence to support such damages. The City also contends it cannot be held liable for punitive damages.

A

The court considers first plaintiffs' claim for diminution of their property values. The City has pointed the court to an absence of evidence to support such damages. To prove they are entitled to this relief, plaintiffs rely on the expert testimony and written opinion of John E. Flemister ("Flemister") to demonstrate what would be the fair market values of their homes "absent the effects of flooding and environmental concerns." D.App. 424; *see also* Ps.App. 2126–35, D.App. 426–33.[13] In his written opinion, Flemister opines concerning specific dollar values for each property absent environmental impairments. *See* Ps.App. 2126–35. Plaintiffs have also adduced the expert opinion of Jill McCluskey, Ph.D., an economist, concerning what diminution in the value of a property may be expected because of exposure to the various adverse environmental conditions allegedly caused by the City's discriminatory policies. *See id.* at 2112–16. This evidence is sufficient to create a genuine issue of material fact regarding whether plaintiffs have suffered a diminution in the value of their homes, and it provides a rational basis upon which the trier of fact may calculate the magnitude of any losses that plaintiffs have incurred. *See, e.g., Migerobe, Inc. v. Certina USA, Inc.,* 924 F.2d 1330, 1339 (5th Cir.1991). Therefore, the court denies the City's motion for summary judgment on the question of damages stemming from the diminution in value of plaintiffs' property.

B

The City next points the court to the absence of evidence to support plaintiffs' claim for emotional damages.

Damages for emotional harm are recoverable "only when

a sufficient causal connection exists between the statutory violation and the alleged injury" and "only when claimants submit proof of actual injury." *Patterson v. P.H.P. Healthcare Corp.,* 90 F.3d 927, 938 (5th Cir.1996). The Fifth Circuit in *Patterson* set forth the level of specificity required, and the types of evidence that may be used, to prove a claim for emotional harm.

> In order to establish intangible loss, we recognize that *Carey [v. Piphus,* 435 U.S. 247 (1978),] requires a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of the damage award. Hurt feelings, anger and frustration are a part of life. Unless the cause of action manifests some specific discernible injury to the claimant's emotional state, we cannot say that the specificity requirement of *Carey* has been satisfied.

Id. at 940 (citations partially omitted). In fashioning this standard for recovery of damages for emotional harm, the *Patterson* court turned to the Equal Employment Opportunity Commission's ("EEOC's") official guideline statement for guidance. The court quoted a section of that document that provides:

> ***16** Emotional harm will not be presumed simply because the complaining party is a victim of discrimination. The existence, nature, and severity of emotional harm must be proved. Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, or headaches.... The commission will typically require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations.

Id. at 939 (quoting EEOC Policy Guidance No. 915.001 § II(A)(2) at 10–12 (footnotes omitted)).

Aside from the cases they cite to contend that post *Patterson* decisions have upheld awards for emotional damages, *see* Ps. Br. at 43–44, plaintiffs do not focus directly on emotional harm damages but instead discuss the conditions in Cadillac Heights that they maintain can reasonably be found to cause emotional harm, *see id.* at 44–49. In other words, in response to the City's motion pointing out an absence of evidence that any plaintiff in fact suffered emotional harm, plaintiffs simply cite conditions that they posit could reasonably cause such injury. The court holds they must have done more to avoid summary judgment.

"Neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a constitutional violation occurred supports an award of compensatory damages." *Brady v. Fort Bend County,* 145 F.3d 691, 718 (5th Cir.1998) (quoting *Price v. City of Charlotte,* 93 F.3d 1241, 1254 (4th Cir.1996)). Plaintiff's brief does not cite any deposition testimony, interrogatory response, medical report, or other evidence that relates to a specific form of emotional harm that any plaintiff may have suffered. The City cites in its brief excerpts from answers to an interrogatory that asked each plaintiff to

> [s]tate in detail the damages which YOU claim to have sustained as a result of the alleged conduct of the CITY. In YOUR answer, please list each category of damage sustained, the amount claimed as damages, the basis of your claim for damages and the method used for calculating the damages. Please include intangible damages, if any, in YOUR response.

D. Br. at 34. Plaintiffs' responses are insufficient under *Patterson* to permit a reasonable trier of fact to award them damages for emotional harm. The answers of

Adams and the Coopers do not contain even a conclusory statement of such an injury. *See* D.App. 227, 238, 249. Viewing the responses of Crawford, Hayden, and the Thomases in the light most favorable to them as nonmovants, *see id.* at 260, 271–72, 284–85, they may be said to contain only uncorroborated and conclusory allegations of emotional harm that are insufficient to raise a genuine issue of material fact. *See Brady,* 145 F.3d at 718.

***17** The court therefore grants summary judgment dismissing plaintiffs' claims for damages for emotional harm.

C

The court agrees that plaintiffs cannot recover punitive damages from the City. The Supreme Court has concluded "that considerations of history and policy do not support exposing a municipality to punitive damages for the bad faith actions of its officials" and held that "a municipality is immune from punitive damages under 42 U.S.C. § 1983." *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 271 (1981). Municipalities are also immune from punitive damages under § 1981. *See Poolaw v. City of Anadarko,* 738 F.2d 364, 366–67 (10th Cir.1984); *Heritage Homes of Attleboro, Inc. v. Seekink Water Dist.,* 670 F.2d 1, 3 (1st Cir.1982). Addressing a claim for punitive damages under the FHA, the Third Circuit in *New Jersey Rooming & Boarding House Owners v. Asbury Park,* 152 F.3d 217, 225 (3d Cir.1998), observed that "it is not clear that punitive damages can ever be awarded against a municipal defendant." The *Asbury Park* court reasoned the only potential availability of punitive damages was found in the Supreme Court's pronouncement in *City of Newport* that "[i]t is perhaps possible to imagine an extreme situation where taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights." *City of Newport,* 453 U.S. at 267 n. 29. The court in *Asbury Park* held that, because no such evidence was present, the municipal defendant was entitled to judgment as a matter of law precluding an award of punitive damages. *See Asbury Park,* 152 F.3d at 225. Plaintiffs have failed to adduce evidence of "widespread and knowledgeable participation by the taxpayers" in the discriminatory policies and customs at issue. Accordingly, the court holds the City is entitled to summary judgment dismissing their claim for punitive damages.

The City's motion for summary judgment is granted in part and denied in part.

SO ORDERED.

All Citations

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Footnotes

1 Although courts have recognized that there is a private right of action under § 2000d, *see, e.g., Alexander v. Sandoval,* 532 U.S. 275, 121 S.Ct. 1511, 1516 (2001), plaintiffs bring their § 2000d claim through the remedial mechanism of § 1983. *See* Ps. Am. Compl. ¶ 25 (alleging *inter alia* that the provisions of § 2000d "are enforceable pursuant to 42 U.S.C. § 1983 .")

2 In contrast with, for example, § 2000d, there is no private right of action under § 5309. *Latinos Unidos De Chelsea En Accion (Lucha) v. Sec'y of Hous. and Urban Dev.,* 799 F.2d 774 (1st Cir.1986). Plaintiffs must pursue relief for a violation of this statute via § 1983.

3 The City has filed objections in which it challenges some of plaintiffs' evidence as improperly authenticated under Fed.R.Evid. 901 and Fed.R.Civ.P. 56(e) and as inadmissible hearsay. In a supplement to its objections, the City has stipulated "that the City documents in the plaintiffs' appendix that were produced by the City through the City Attorney's Office to plaintiffs in this case, and which purport to be the product of a City Council, board, department, officer, or employee, are authentic under Federal Rule of Evidence 901(7)." D. Supp. to Objs. at 1. The evidence in

plaintiffs' appendix that is subject to the City's hearsay challenge includes documents from the United States Army Corps of Engineers, the United States Census Bureau, the Texas Natural Resources Conservation Commission and its predecessors, environmental reports prepared concerning specific industries in Cadillac Heights, depositions, spreadsheets containing summaries and calculations based on City and United States Census data, a journal article, newspaper articles, plaintiffs' expert reports, and maps. To the extent the court has relied on evidence to which the City objects, the objections have been considered on the merits and are overruled. As to evidence to which an objection has been made but on which the court has not relied for any purpose in deciding the City's motion, the objections are overruled as moot.

[4] Although plaintiffs devote part of their responsive brief to the argument that they need not establish a violation of the FHA pursuant to an official policy, practice, custom, usage, or decision of the City, *see* Ps. Br. at 2–3, the court notes that the City does not contend otherwise, *see* D. Br. at 17; D. Rep. Br. at 4 (referring only to § 1981 and § 1983 claims).

[5] Moreover, this court will not consider on summary judgment a new argument raised in a reply brief. *See, e.g., Senior Unsecured Creditors' Comm. of First RepublicBank Corp. v. FDIC,* 749 F.Supp. 758, 772 (N.D.Tex.1990) (Fitzwater, J.).

[6] Plaintiffs and the City have briefed plaintiffs' claims according to the *Arlington Heights* factors. *See* D. Br. at 18–20; Ps. Br. at 5–29, 35–36; D. Rep. Br. at 10, 13–18. In *Arlington Heights* the Supreme Court addressed these factors in the context of a lawsuit alleging violations of the Fourteenth Amendment and the FHA. *See Arlington Heights,* 429 U.S. at 254. Although the court has found no published decision that uses them to analyze a claim under § 1981 and a § 1983 cause of action alleging violations of § 2000d or § 5309, it can discern no reason why they do not apply equally as well in these contexts. The function of these nonexclusive factors is to assist the trier of fact in assessing whether the evidence supports a finding of intentional discrimination. *See Arlington Heights,* 429 U.S. at 266, 268 ("The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed."). This purpose is not materially different whether a claim is brought under one federal civil rights statute that requires proof of intentional discrimination by a public body or another such statute.

[7] The court addresses *infra* at § III(E) plaintiffs' claims related to the City's conduct in relation to expenditures of federal funding for housing and community development that are based on alleged violations of §§ 2000d and 5309.

[8] Plaintiffs' first amended complaint, filed March 27, 1999, is styled "complaint," but as reflected in their motion for leave, the court's order granting leave to file the pleading, and the City's treatment of the document in its summary judgment motion, it is clearly intended to be their first amended complaint.

[9] The fourth *Arlington Heights* factor assesses departures from the normal procedural sequence. Plaintiffs have offered no evidence concerning this factor as to any of their factual claims. The sixth *Arlington Heights* factor considers the legislative or administrative history of the decision. Plaintiffs have cited no proof regarding this element as to any of their factual claims besides the specific sequences of events leading up to those decisions. They have included in their brief a section detailing administrative and judicial rulings finding the City guilty of racial discrimination throughout its history, but such rulings do not constitute a factor in the *Arlington Heights* analysis.

[10] Plaintiffs allege that "[t]he city of Dallas is a program or activity which has received federal funds in the past and is a current recipient of federal funds." Ps. Am. Compl. at ¶ 5. The court disagrees that the City of Dallas as a whole may be regarded as a program or activity receiving federal assistance. *See, e.g., Hodges v. Public Bldg. Comm'n of Chicago,* 864 F.Supp. 1493, 1504–05 (N.D.Ill.1994). Because the only City programs or activities that plaintiffs identify as receiving federal financial assistance are those funded under the federal CDBG program, *see* Ps. Br. at 32–35, the court examines the evidence set out below in assessing whether there is a genuine issue of material fact

as to plaintiffs' § 1983 causes of action based on §§ 2000d and 5309.

[11] The City contends the expenditures are even higher, totaling $895,000. *See* Ps.App.2001.

[12] Their assertion that "the City considered spending CDBG money for a park in Cadillac Heights several years ago[,]" but that "[n]o CDBG or other funds were authorized for the park[,]" *see* Ps. Br. at 32, does not fit in any of these categories. Although the *Arlington Heights* factors are not exclusive, this evidence, considered alone or in combination with the other proof on which plaintiffs rely, is insufficient to create a genuine issue of material fact.

[13] The City has also filed a reply appendix. The court has not considered it for any purpose in deciding this motion. *See Dethrow v. Parkland Health Hosp. Sys.,* 204 F.R.D. 102, 103–04 (N.D.Tex.2001) (Fitzwater, J.).