



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-7000

OFFICE OF THE ASSISTANT SECRETARY FOR
COMMUNITY PLANNING AND DEVELOPMENT

August 9, 2013

Honorable Robert P. Astorino
County Executive
Westchester County
148 Martine Avenue
White Plains, NY 10601

**RE: Review of County's July 23, 2013 Zoning Submission; Assurances Required
by August 15, 2013 to Avoid Reallocation of Funds.**

Dear Mr. Astorino:

HUD has reviewed Westchester County's July 23, 2013 zoning analyses for Ardsley, Bronxville, Eastchester, Larchmont, Lewisboro, North Salem, Ossining, Pelham, Pound Ridge, and Scarsdale ("Zoning Submission"). As described below, while the Zoning Submission demonstrates meaningful progress, it continues to fail in critical aspects previously identified by HUD.

Background

In a letter dated December 21, 2010, HUD identified deficiencies in the County's Analysis of Impediments to Fair Housing Choice ("AI") submitted on July 23, 2010, provided specific ways that the County could remedy the noted deficiencies, and offered further technical assistance for a revised AI. The County resubmitted its AI on April 13, 2011. The County's April 2011 submission demonstrated limited progress in addressing the concerns outlined in the December HUD letter. In a letter dated May 13, 2011, HUD described in detail how the County's submission fell short of certain clear expectations and provided corrective actions. Additionally, HUD provided the County with technical assistance over three days – June 2, 3 and 29, 2011 – to aid the County in revising its AI. After the technical assistance sessions, in a July 13, 2011 letter, HUD advised the County that the only reason the AI remained unacceptable was that "the revised AI did not incorporate the Corrective Actions identified [in the May 13 letter] to address deficiencies regarding promotion of source-of-income legislation or plans to overcome exclusionary zoning practices" (citing the May 13 Letter at pp. 3, 5-6).

The County has since adopted source-of-income legislation. Therefore, the only issue holding up the acceptability of the County's AI is the inadequacy of its plans to overcome exclusionary zoning practices. HUD identified the actions that we expected the County to meet in the May 13 Letter at pp. 5-6. Those actions focus on the identification of restrictive practices that the County would challenge and the strategy for overcoming exclusionary zoning. The May 13 Letter, specified the following six restrictive zoning practices that HUD expected the County

to analyze: (1) restrictions that limit or prohibit multifamily housing development; (2) limitations on the size of a development; (3) limitations directed at Section 8 or other affordable housing, including limitations on such developments in a municipality; (4) restrictions that directly or indirectly limit the number of bedrooms in a unit; (5) restrictions on lot size or other density requirements that encourage single-family housing or restrict multifamily housing; and (6) limitations on townhouse development (collectively, "Restricted Practices").

Subsequent to HUD's July 13, 2011 letter, the County did not resubmit a revised AI until April 24, 2013. The revised AI incorporated data that the Monitor overseeing the County's performance of its obligations under the Stipulation and Order of Settlement and Dismissal entered in *U.S. ex rel. Anti-Discrimination Center of Metro New York v. Westchester County* (the "Settlement") had required the County to provide.¹ In a letter dated May 20, 2013, HUD explained that the zoning analysis incorporated in the revised AI does not provide sufficient evidence to support the County's AFFH certification in that it was inconsistent with federal precedent in interpreting the Fair Housing Act and applicable state law. Moreover, the "Analysis of Disparate Impact of Zoning Ordinances in Each of the 31 Eligible Municipalities on the Basis of Race" set forth in Appendix 51 of the April 24 AI (the "Disparate Impact Analysis") is based on a problematic methodology and asserts conclusions not supported by the data provided.²

¹ In a Report and Recommendation Regarding Dispute Resolution (Amended), dated November 17, 2011, the Monitor directed the County to assess the impact of each of the six zoning practices identified above, or explain why the analysis of the practices would not be helpful to understanding the impact of the zoning ordinances taken as a whole. The Monitor also directed the County to develop a clear strategy to overcome municipal exclusionary zoning practices, which would include: (1) a process for notifying municipalities of zoning issues that hinder the County's obligations under the Settlement and changes that must be made, and if not made, the consequences of municipalities' failure to make them; (2) a process to involve municipal decision-makers in consultation regarding changes in zoning and land use restrictions; and (3) a description of how these requirements will be included in future contracts or other written agreements between the County and municipalities and developing a compliance enforcement strategy. While the County provided the Monitor with a zoning analysis on February 29, 2012, in a letter dated May 14, 2012, the Monitor determined that the County's analysis was inadequate. Since that date, the Monitor has made a series of data requests from the County, as well as municipal officials. The Monitor used that data to produce his own Report on Westchester County's Analysis of Municipal Zoning, dated July 31, 2013. In it, the Monitor concluded that the zoning codes of seven municipalities are exclusionary under New York State law, after application of the test established in the *Berenson v. New Castle*, 38 N.Y.2d 102, 107, 100 (1975). The Monitor did not reach a conclusion regarding whether any individual municipality was exclusionary on the basis of race, but did find that "the County's conclusion that exclusionary zoning does not exist anywhere in Westchester County is not supported by its own data." The Monitor also acknowledged that "the data shows that zoning restrictions in some of the seven municipalities may serve to perpetuate segregative housing patterns and may have a disparate impact on racial and ethnic minorities, and therefore may violate federal law."

² These conclusions are supported by the Monitor's finding that "the County's conclusion that exclusionary zoning does not exist anywhere in Westchester County is not supported by its own data."

After that date, the County made two partial zoning submissions to HUD, the first one on June 13, 2013, covering five municipalities, and, after a technical assistance session held on July 2, 2013, another one on July 23, 2013, covering 10 municipalities.

Westchester's July 23, 2013 Zoning Submission

Westchester County's July 23, 2013 zoning analyses for Ardsley, Bronxville, Eastchester, Larchmont, Lewisboro, North Salem, Ossining, Pelham, Pound Ridge, and Scarsdale ("Zoning Submission") do address for the first time significant concerns that HUD has continuously raised. Overall, the Zoning Submission addresses:

- Identification and discussion of each of the six Restrictive Practices that the Department and Monitor have identified.
- Identification of the small number of racial and ethnic minorities in the jurisdictions, all of which have a significantly lower population of Black and Hispanic households in the jurisdictions than in the County as a whole.
- Recommendations by the County for some changes to accommodate affordable and multifamily housing.

More specifically, the AI acknowledges that the percentage of the single-race Black population in each of these municipalities (between 1.3% to and 4.1%, except for Pelham, with a population of 9.5%) is lower than the percentage of the single-race Black population in Westchester County as a whole (14.6%), and that the percentage of Hispanic population in each municipality (between 3.9% and 7.5%, except for Ossining and Pelham, at 11.8% and 12.3% respectively) is less than the percentage of Hispanic population in Westchester County as a whole (21.8%).

In the final paragraph of each analysis, the County identifies changes that each municipality might undertake to its zoning ordinance in order to increase the supply of affordable and multifamily housing. See, e.g., Ardsley analysis, p. 9 (amending a zoning code to permit accessory apartments, Larchmont, p. 8 (adopting the Model Ordinance), Pound Ridge, p. 10 (analyzing whether there is any developable area that could support "cluster housing"). Such strategies tacitly support a conclusion that existing zoning ordinances may have exclusionary effects.

While progress has been made, the County continues to assert that local zoning ordinances do not have a disparate impact on minorities and that the County "has concluded that [the municipality's] zoning ordinance does not show a disparate or segregative impact on minorities and does not include provisions that can be identified as impediments to AFFH with respect to race or ethnicity." These conclusions are simply not supported by the available data and do not reflect an adequate disparate impact analysis. As the County itself acknowledges, Restrictive Practices exist in these municipalities that have the effect of limiting the availability of affordable housing. Such limitations may in fact have an exclusionary effect based on race,

national origin, or familial status, which the data supports.³ The refusal to acknowledge any connection between zoning restrictions that affect the availability and location of affordable housing and fair housing protections directly challenges the Court's rulings on the matter and the Settlement itself. HUD therefore cannot accept the County's Zoning Submission. Thus, the County's AI remains unacceptable.

Time is of the essence due to the reallocation process and potential lapse of the fiscal year 2011 formula grant funding. With this in mind, the Department is requiring special assurances and evidence that the County is capable of conducting an adequate disparate impact analysis. In order to provide sufficient evidence to support the certification to affirmatively further fair housing, the County must provide the attached special assurances and demonstrate that it can complete an amended exclusionary zoning analysis for a single municipality by 5 p.m. on Thursday, August 15, 2013.

The selected municipality must be one of the jurisdictions identified by the Monitor as having restrictive zoning practices that are exclusionary under New York State law under the *Berenson* test. Those municipalities are the Town of Lewisboro; Town of Ossining; and the Town of Pound Ridge. The zoning analysis for the selected municipality must be amended to:

1. Retain the description of the presence of Restrictive Practices in the in the subject municipality;
2. Retain the description of single race Black and/or Hispanic populations (and families with children if appropriate) in the subject municipality relative to the County as whole;
3. Strike unsupported conclusions that the identified Restrictive Practices in the subject municipality do not have a disparate impact or segregative impact based on race or national origin.
4. State that the existence of each Restrictive Practice may have the effect of excluding potential residents of the subject municipality based on race, national origin, and in the case of restrictions on the number of bedrooms in a unit, based on familial status (the presence of children under the age of 18). Where Restrictive Practices have the potential effect of reducing the availability of affordable housing opportunities in a community with relatively low populations of Black and Hispanic households, and where

³ The median household income in Westchester County for Whites is \$72,140 as compared to \$39,446 for Blacks and \$41,278 for Hispanics. The County's Consolidated Plan also identifies that "72% of Consortium households own their own home, yet only 46% of Black households and 35% of Hispanic households own their own home."

<http://planning.westchestergov.com/images/stories/cdbg/ConPlanChap1.pdf> Given these disparities, the conclusive determination that limits on affordable housing opportunities have no exclusionary effect according to race does not follow.

demographically Black and Hispanic Households have greater affordable housing needs, the County must acknowledge that such practices are potentially discriminatory based on race, national origin and, therefore, are a cause for concern. Where a Restrictive Practice may have the effect of reducing the availability and affordability of housing suitable for families with children, the County must similarly acknowledge such practice is potentially discriminatory on the basis of familial status.

5. State that Restrictive Practices identified as potentially discriminatory will be investigated further as the County completes its zoning analysis and implements its zoning strategy to determine whether practices with potential discriminatory effects serve a legitimate governmental purpose and whether there are less discriminatory means to achieve such purpose.

Absent a satisfactory response by the established deadline, HUD will move forward with the process of reallocating the fiscal year 2011 CDBG, HOME, and ESG formula grant funds initially allocated to the County. Completing the 31 zoning analyses and implementing the exclusionary zoning strategy will be included as grant conditions, which must be satisfied prior to the County making draws on the County's line-of-credit.

Sincerely,



Mark Johnston,
Deputy Assistant Secretary
for Special Needs

Required Special Assurances for Westchester County

The County must sign and submit the following assurances to HUD by 5 p.m. on August 15, 2013.

1. The County acknowledges that it has an ongoing duty to affirmatively further fair housing that includes compliance with the 2009 Settlement.
2. The County adopts and incorporates by reference into its Analysis of Impediments to Fair Housing Choice ("AI") the findings of the Monitor's Report on Westchester County's Analysis of Municipal Zoning and will comply with his recommendations and information requests.
3. The County will submit a final Zoning Submission for all 31 eligible municipalities by October 15, 2013, that is consistent with the amendments required in HUD's August 9, 2013 letter, and is acceptable to HUD. The County will incorporate its final zoning analyses into the Updated AI.
4. The County adopts, incorporates by reference into its AI, and commits to implementation of, the attached strategy to overcome exclusionary zoning practices.

Robert P. Astorino,
County Executive

Strategy on Exclusionary Zoning

The County has incorporated into its Analysis of Impediments to Fair Housing choice and commits to implementation of the following strategy to overcome exclusionary zoning practices:

- 1) First, the County will identify the eligible municipalities with Restrictive Practices that may potentially have discriminatory exclusionary effects by October 15, 2013.
- 2) The County will communicate in writing with municipal decision-makers to identify restrictions and seek removal or reduction of unjustifiable restrictions with potentially discriminatory exclusionary effects. Factors to be discussed and considered shall include, but shall not be limited to:
 - a. Identification of the Restrictive Practice(s) present in the municipality;
 - b. An examination of the representation of the single race black population in the municipality (as a percentage), in comparison to its representation in the County as a whole;
 - c. An examination of the representation of the Hispanic population in the municipality (as a percentage), in comparison to its representation in the County as a whole;
 - d. An examination of the representation of families with children in the municipality (as a percentage), in comparison to its representation in the County as a whole;
 - e. Observation that the presence of the Restrictive Practice(s) could have the potential to impede fair housing choice for such populations;
 - f. An explanation of whether the restriction is legally justified by examining:
 - i. Whether the restriction is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests; and
 - ii. Whether those interests could not be served by another practice that has a less discriminatory effect.
 - g. If any Restrictive Practice(s) does not have a legally sufficient justification, the County must insist that the municipality pursue a less restrictive alternative (note that a legally sufficient justification must be supported by evidence and may not be hypothetical or speculative).
- 3) Third, after the County has exhausted its attempts to communicate and obtain the cooperation of said municipality, as set forth above, where there is no legally sufficient justification for the Restrictive Practice, the County shall engage in enforcement activities, which may include:
 - a. Initiating litigation against the municipality, possibly under *Berenson*, an action for breach of the terms of the Urban County Consortium Cooperation Agreement, a Fair Housing Act action, or an Article 78 proceeding; or
 - b. Refer for enforcement to the U.S. Department of Justice.