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May 14, 2012

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

United States *ex rel* Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, New York (No. 06 Civ. 2860 (DLC))

Dear Mr. Astorino:

This letter addresses the County's compliance with the Monitor's request for information and analysis concerning municipal zoning ordinances in the eligible communities.

In the Monitor's Report and Recommendation Regarding Dispute Resolution ("Monitor's Report"), dated November 17, 2011, the County was directed, pursuant to paragraph 14 of the Stipulation and Order of Settlement and Dismissal in the above captioned matter ("Settlement"), to conduct an analysis of municipal zoning ordinances in Westchester County by February 29, 2012, and provide a strategy for overcoming zoning practices deemed exclusionary. Monitor's Report, 13-16. The Monitor also requested, pursuant to paragraph 28 of the Settlement, that the County report on these efforts in its quarterly reports. *Id.* at 16. In a letter dated February 29, 2012, the County provided a response ("Zoning Submission") that purported to address the issues raised in the Monitor's Report. The Monitor has also received the results of HUD's review of the County's Zoning Submission. *See* April 20, 2012 letter from Glenda L. Fussá to Kevin J. Plunkett.

Having reviewed the County's Zoning Submission and HUD's subsequent review of the Zoning Submission, as well as the relevant legal principles, the Monitor concludes that the County's response does not adequately address the information request and requires deeper exploration. The Monitor therefore requests, pursuant to the authority set forth in paragraphs 13 and 16 of the Settlement, that the County: (1) conduct a more searching assessment of the zoning regulations as described in detail below; (2) provide

certain documents and information and (3) make available for interview County personnel in both the Office of the County Executive and the Planning Department.

1. The November Requests for Information

On November 17, 2011, in order to address disputes between HUD and the County, the Monitor issued a Report and Recommendation which, among other things, requested certain information related to zoning: (a) an assessment of certain municipal zoning practices and whether they have an exclusionary effect; and (b) a clear strategy for overcoming those practices deemed exclusionary. *See* Monitor's Report, 13-16. Specifically, the Monitor's Report stated:

> The County should, at a minimum, assess the impact of each of the following zoning practices or explain why the analysis of the listed practices . . . would not be helpful to understanding the impact of the zoning ordinances taken as a whole:
>
> - Restrictions that limit or prohibit multifamily housing development;
> - Limitations on the size of a development;
> - Limitations directed at Section 8 or other affordable housing, including limitations on such developments in a municipality;
> - Restrictions that directly or indirectly limit the number of bedrooms in a unit;
> - Restrictions on lot size or other density requirements that encourage single-family housing or restrict multifamily housing; and
> - Limitations on townhouse development.

Id. at 13-14. (Collectively, "Questioned Practices"). The Monitor's Report also called for the County to develop a clear strategy to overcome municipal exclusionary zoning practices:

> The County should also, at a minimum:
>
> - Develop 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;

- Develop a process to involve municipal decision-makers in consultation regarding changes in zoning and land use restrictions; and

- Provide a description of how these requirements will be included in future contracts or other written agreements between the County and municipalities.

Id. at 15-16. Collectively, these requests for information and analysis are referred to as the "November Requests."

2. The District Court's Decision

The County subsequently filed objections to the Monitor's Report in the U.S. District Court for the Southern District of New York. On March 16, 2012, Magistrate Judge Gabriel W. Gorenstein issued a ruling sustaining the County's objection to the Monitor's findings on source of income legislation, but denying the County's objections on local zoning practices. The County did not object to Judge Gorenstein's findings on the zoning issue. On May 3, 2012, District Judge Denise L. Cote adopted the portion of Judge Gorenstein's opinion on zoning and adopted the Monitor's findings concerning the County's obligation to promote source of income legislation. *See* Judge Cote's Opinion & Order, filed May 3, 2012, at 27-28 (ECF No. 402).

3. The Zoning Submission

On February 29, 2012, the County submitted its response to the Monitor's November Requests entitled "Review and Analysis of Municipal Zoning Ordinances in Westchester County." After reviewing the Zoning Submission, the Monitor now finds that it is deficient in two respects. First, as explained more fully below, at more than 100 pages with a 460-page appendix, the Zoning Submission robustly reports on the present state of zoning ordinances throughout the County. It does not, however, reflect the rigor of analysis required plainly by existing law. Neither state nor federal courts have been silent on the issue of what constitutes exclusionary zoning, yet the County's submission cites no legal authority as a touchstone for its analysis. Such an approach is called for by the November Requests, and, more importantly, Judge Cote's two decisions, *United States ex rel Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, New York*, 495 F. Supp. 2d 375, 387 (S.D.N.Y. 2007) [hereinafter "*Anti-Discrimination Ctr. I*"] and *United States ex rel Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, New York*, 688 F. Supp. 2d 548, 556-58 (S.D.N.Y. 2009) [hereinafter "*Anti-Discrimination Ctr. II*") (quoting County's 2000 and 2004 AIs). A thorough and detailed report is also called for in order for the public to have confidence,

whatever view held of existing zoning, that this process is rigorous and firmly grounded in law rather than, in a phrase employed dozens of times in the Zoning Submission, "key observations."[1] Observation is a necessary first step. Analysis must follow. Such analysis is absent from the face of the bulk of the County's Zoning Submission. Second, the County wholly failed to address the Monitor's second request for information: a clear strategy to overcome municipal exclusionary zoning practices.

4. Legal Principles and Analytical Guidance

To assist the County with its analysis, it is necessary to review the relevant legal principles. Exclusionary zoning can exclude potential residents based on either their socioeconomic status or membership in a protected class. *See cf.* 42 U.S.C. §§ 3604, 3605 (banning discrimination because of "race, color, religion, sex, familial status, or national origin" in connection with the sale and rental of housing); *see also Asian Ams. For Equality v. Koch*, 72 N.Y.2d 121, 133 (1988) ("Exclusionary Zoning . . . is a form of racial or socioeconomic discrimination which we have repeatedly condemned."). The analysis of both proceeds on separate, but related, tracks.

a. Socioeconomic Exclusion

Zoning is generally deemed exclusionary when it has the practical effect of "exclud[ing] persons of low or moderate income from the zoning municipality." *Cont'l Bldg. Co. v. Town of N. Salem*, 211 A.D.2d 88, 94-95 (N.Y. App. Div. 3d Dep't 1995) (quoting 1 Anderson, New York Zoning Law and Practice § 8:02, at 360 [3d ed]). Notably, this principle does not mean that each zoning district in a municipality must contain all income levels. Rather, under the *Berenson* doctrine, municipalities must consider both local and regional housing needs and weigh both sets of needs to be addressed by the municipality as a whole. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 110 (1975). By the County's own estimate, municipalities in Westchester must collectively build 10,768 new affordable housing units by 2015 to meet the County's growing need for affordable housing. *See Westchester County Affordable Housing Needs Assessment*, Rutgers University Center for Urban Policy Research, at 67 (2004) (available at http://www.westchestergov.com/pdfs/HOUSING_RutgersReport 033004.pdf) (last accessed May 10, 2012). The County has issued recommendations that allocate a share of the regional affordable housing needs to each municipality. *See* Westchester County Housing Opportunity Commission, *Affordable Housing Allocation Plan 2000-2015* (2005) (available at http://www.westchestergov.com/pdfs/

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[1] Bedford's zoning ordinance, for example, appears promising and may, on further review, serve as a helpful model of a non-exclusionary zoning ordinance that makes adequate provision for a variety of income levels. *See* Zoning Submission App'x, Town of Bedford. The level of review undertaken by the County, however, is inadequate to provide public confidence in such a conclusion.

HOUSING_HOCallocation05.pdf) (last accessed May 14, 2012). The County's Zoning Submission provides no analysis as to whether the Questioned Practices present in the 43 municipalities will allow for each municipality to meet its allocation of affordable housing needs.

As a starting point, the County should: identify the types of housing in each municipality; specify both quantity and quality of the available housing and determine whether the housing meets the local and regional need for affordable housing. *See Berenson*, 38 N.Y.2d at 110.

If the housing need has not been met within a particular municipality, the County should then analyze how each Questioned Practice affects the municipality's ability to meet its allotted share of affordable housing. Municipalities commonly facilitate this need by zoning for multifamily housing as-of-right. *See Cont'l Bldg. Co.*, 211 A.D.2d at 93 ("[M]ultifamily housing, given the nature of its construction and function as a whole, is one of the most affordable types of housing.").[2] The question is not simply whether the zoning ordinance provides for the legal possibility of multifamily housing. Rather, the analysis must address the question whether it is both "physically and economically feasible" that affordable housing could be built under the present zoning regime. *See Cont'l Bldg. Co.*, 211 A.D.2d at 94 (citation and quotation omitted). In *Continental*, for example, 98 percent of the total area in the Town of North Salem was designated for residential development on minimum-sized lots ranging from one-half acre to four acres, yet only 0.33 percent of this land was designated for multifamily development as of right, amounting to approximately 43 acres out of the Town's total land area of 14,000 acres. *Id.* at 92-93. The court found that although the town provided for 129 multifamily housing units as-of-right, and included provisions in its zoning code for density bonuses, accessory apartments, multifamily housing units for the elderly and handicapped, and the opportunity to develop multifamily housing in two mapped planned development districts, the Town did too little to genuinely address the established need for multifamily housing. *Id.* at 94.

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[2] While "multi-family housing does not necessarily equal affordable housing . . . multi-family housing has historically been recognized as a barometer in assessing exclusionary zoning claims." *Land Master Montg I, LLC v. Town of Montgomery*, 821 N.Y.S.2d 432, 439 (N.Y. Sup. Ct. Orange Cnty. 2006) (citing *Berenson* and *Cont'l Bldg. Co.*, *supra*), *aff'd* 863 N.Y.S.2d 692 (N.Y. App. Div. 2d Dep't 2008), *appeal dismissed*, 11 N.Y.3d 864. Note that only allowing multifamily housing by permit, "which commit[s] multi-family and affordable housing to the total discretion of Town officials" does not overcome the exclusionary nature of a zoning code that does not provide for multi-family housing construction as-of-right. *See id.* at 440; *see also* Zoning Submission at 4, 8 (discussing as-of-right, special use, and uses subject to site plan review in certain municipalities).

In its report, the County fails to evaluate the practical effect of the six Questioned Practices on the number of affordable units that can be built, and whether that number is sufficient to meet its allotted share of regional affordable housing needs. For example, in examining the exclusionary impact of restrictions that limit or prohibit multifamily housing, the County states that "[t]he key observation to be made is whether a zoning ordinance permits a wide range of uses that would reasonably be expected to locate in the specific geographic area." Zoning Submission, 14 (analyzing restrictions on multifamily housing in the Village of Ardsley).[3] This "test," which is repeated for each of the 43 municipalities, has no basis in law. The County fails to specify the amount of developable land or the number of units that are physically and economically feasible given the zoning restriction, whether this would allow the municipality to meet its share of the local or regional housing need for affordable housing.

Furthermore, the County's conclusion that "[t]he analysis has not identified specific local zoning practices that have exclusionary impacts," including zoning that excludes residents based on socioeconomic status is at odds with the County's previously submitted Analyses of Impediments ("AIs"). Zoning Submission, 13. In the County's AI completed in 2000, the County lists "'Few High Density Zones' which 'limits the number of affordable units that may be built'" as an impediment to affordable housing. See *Anti-Discrimination Ctr. II*", 688 F. Supp. 2d at 556-58 (quoting County's 2000 and 2004 AIs). In it's response to this submission, the County must make certain to address the impact of the lack of high density zones as it assesses the Questioned Practices concerning "Limitations on the size of a development," and "Restrictions on lot size or other density requirements that encourage single-family housing or restricted multifamily housing." Monitor's Report, p. 13-14.

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[3] The Zoning Submission provides a similar test for two other Questioned Practices. For "[l]imitations on the size of the development . . . [t]he key observation to be made is whether a zoning ordinance provides for a range of density appropriate to the geographic area and supportable by existing or new infrastructure." Zoning Submission, p. 14. Similarly, for "[r]estrictions on lot size or other density requirements that encourage single-family housing or restrict multifamily housing . . . [t]he key observation to be made is whether a zoning ordinance provides for a range of housing types and a range of density that is appropriate to the geographic area and supportable by existing or new infrastructure." *Id.* at 15.

b. Racial or Ethnic Exclusion

Zoning is also exclusionary when it has a discriminatory effect by adversely impacting a particular minority group or by perpetuating segregation. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988) (citation omitted), *review declined in part and judgment aff'd.*, 488 U.S. 15 (1988); *Anti-Discrimination Ctr. I*, 495 F. Supp. 2d at 387 ("[The Fair Housing Act] bans practices that are motivated by a racially discriminatory purpose as well as those that 'disproportionately affect minorities.'") (quoting *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1100 (2d Cir.1988)). In *Huntington*, the court found that the Town of Huntington's zoning ordinance restricted multi-family housing to a section of the town that was already largely minority, and would have the effect of perpetuating segregation in the town. *Id.* at 937-38. In reversing the lower court's decision, the Second Circuit held that the lower court had failed to consider the segregative effect of maintaining a zoning ordinance that restricts private multi-family housing to an area with a high minority concentration. *Id.*

In her decision concerning the AI, Judge Cote noted that race was an essential consideration in any impediment analysis the County conducts as part of its CDBG certification requirement. In her original decision denying the County's motion to dismiss in this case, she stated "impediments include policies, practices, or procedures that appear neutral on their face" and that a grantee of CDBG funding "must consider impediments erected by race discrimination" as part of its AFFH obligation. *Anti-Discrimination Ctr. I*, 495 F. Supp. 2d at 387 (quoting HUD guidelines). Judge Cote concluded that "[i]n the face of the clear legislative purpose of the Fair Housing Act . . . an interpretation of 'affirmatively further fair housing' that excludes consideration of race would be an absurd result." *Id.* at 387-88. Here, the County has submitted a report focused on exclusionary practice yet reflects nowhere in its analysis the discriminatory or segregative impact of the six Questioned Practices on the location of housing for ethnic or racial minorities. Such analysis is essential.

5. In-Depth Review

As you know, paragraph 13(b) of the Settlement grants the Monitor "access to all books, records, accounts, correspondence, files and other documents, and electronic records of the County and its officers, agents and employees concerning the subject matter and implementation" of the Settlement. *See also* Magistrate's Opinion and Order, 16-17 ("[T]he Settlement vests considerable power in the Monitor as to the information he may seek from the County."). Pursuant to that authority, the Monitor now requests that the County provide the following information to assess the County's efforts to comply with the November Requests:

a. A revised zoning analysis, consistent with the legal principles set forth above, for each of the six Questioned Practices listed in the Monitor's Report that are present

in each eligible municipality. Please provide the analysis no later than **July 2, 2012**. In its analysis, the County must, at a minimum:

i. State whether each municipality has met its allotted number of affordable housing units under the County's Affordable Housing Allocation Plan and identify any shortfall;

ii. State the effect that each Questioned Practice will have on the cost and geographic placement of affordable housing in each municipality, and provide specific quantitative or qualitative evidence to support any conclusions;

iii. State the percentage of developable land, including land occupied by existing housing units, that is zoned for building multi-family housing as-of-right in each municipality; and

iv. State the racial and ethnic composition of each zoning district in a given municipality and indicate which of the Questioned Practices are present in that district.

b. Also, by **July 2, 2012**, the County is directed to provide a clear strategy to overcome municipal exclusionary zoning practices. The County's strategy must, at a minimum:

i. Develop 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;

ii. Develop a process to involve municipal decision-makers in consultation regarding changes in zoning and land use restrictions; and

iii. Provide a description of how these requirements will be included in future contracts or other written agreements between the County and municipalities.

c. The names and positions of all personnel who participated in preparing the Zoning Submission, and reasonable estimates of time spent by each individual preparing the Zoning Submission;

d. All documents, including but not limited to preliminary drafts, data and memoranda, regarding the County's preparation of the Zoning Submission;

e. All records of communications between and among County officials, agents and employees concerning the preparation of the Zoning Submission;

f. All records of communications with any individuals not employed by the County concerning any aspect of the Zoning Submission.

g. A tabulation, for each municipality, of the number of applications for permits to develop affordable housing received from January 1, 2007 to May 9, 2012.

h. Copies of all rejected applications for permits to develop affordable housing in each eligible municipality received from January 1, 2007 to May 9, 2012.

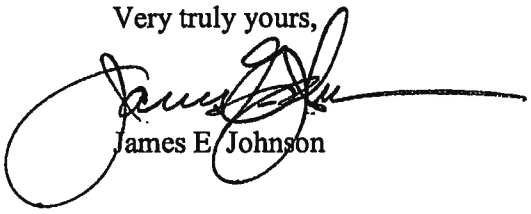
To the extent the County seeks to assert any privilege with respect to any requested document, please prepare a log of all documents withheld on the basis of such privilege, identifying, at a minimum, the date, author, recipient(s) (if applicable) and subject matter of the document, as well as the nature of the privilege asserted.

Please provide your response to items (c) through (h) no later than **July 9, 2012.** For planning purposes, please note that shortly after receiving the County's document production (and privilege log, if applicable), pursuant to paragraph 16 of the Settlement, the Monitor will request interviews of County personnel who participated in preparing the Zoning Submission.

6. HUD's Offer of Technical Assistance

The Monitor notes that HUD has extended an offer of technical assistance to the County that could be helpful as the County endeavors to fulfill its obligation to comply with the information request. The Monitor will evaluate the need for undertaking a more searching review based on the results of any sessions in which HUD and the County work to achieve compliance with the outstanding request.

Very truly yours,



James E. Johnson

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