

Washington's 'Fair Housing' Assault on Local Zoning

Our experience in Westchester shows what the country can expect from a new federal discrimination rule.

Published: Sept. 6, 2013

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Do you think it is a good idea to give the Department of Housing and Urban Development unchecked power to put an apartment building in your neighborhood? HUD has proposed a new rule that could do just that.

In July, HUD published its long-awaited proposal on "Affirmatively Furthering Fair Housing" in the Federal Register. It is a sweeping set of land-use regulations that has attracted little national attention. The agency wants the power to dismantle local zoning so communities have what it considers the right mix of economic, racial and ethnic diversity. A finding of discriminatory behavior, or allegations of discrimination, would no longer be necessary. HUD will supply "nationally uniform data" of what it thinks 1,200 communities should look like.

Local governments will have to "take meaningful actions to further the goals identified." If they fail to comply, HUD can cut federal funding. Westchester County north of New York City has firsthand experience of what the rest of the nation can expect.

HUD and Westchester are battling over local zoning that arose from a 2009 settlement (signed by my predecessor) to build 750 affordable-housing units in 31 mostly white communities. Westchester is well ahead of schedule in meeting these obligations. Almost 400 units have financing and 124 are already occupied. But HUD isn't satisfied because it wants to control local zoning and remake communities.

HUD has told Westchester that any limits on the size, type, height and density of buildings are "restrictive practices." It demands that the county sue its localities over such common zoning regulations, which are not exclusionary by any stretch of the imagination. If HUD can define what constitutes exclusionary practices, then local zoning as it is known today disappears.



Apartments, high rises or whatever else the federal government or a developer wants can be built on any block in America.

This is not hyperbole. Consider that HUD's list of "restrictive practices" includes limits on density even around reservoirs that supply drinking water to New York City's eight million residents. Who knew ensuring clean water was discriminatory?

HUD's power grab is based on the mistaken belief that zoning and discrimination are the same. They are not. Zoning restricts what can be built, not who lives there.

In the 1970s, New York's highest court, in cases known as the Berenson decisions, established rules for what constitutes exclusionary zoning. Westchester's municipalities either voluntarily or through legal challenges have complied with these judicial rules. Any local zoning code also remains open to legal challenge. There are long-standing legal standards by which local zoning is judged and continually reviewed.

As required by HUD, Westchester County analyzed all 853 local zoning districts in February 2012. It found no evidence of exclusionary practices based on race or ethnicity. The county's conclusion was supported in a separate analysis by John R. Nolon, an affordable-housing expert at Pace University's Land Use Law Center.

HUD rejected the findings and cut off \$17 million of federal funds to the county.

The county prepared seven additional analyses, each one exploring more data as demanded by HUD. But as many times as HUD attempted to move the goal posts, the findings did not change. There is no evidence that zoning requirements on things like building size and height are racially exclusionary.

Last month HUD finally demanded—without presenting any facts—that the county accept its conclusion that there is exclusionary zoning in Westchester as a condition of releasing the funds. The agency's demand flies in the face of the July 31 "report card" issued by James E. Johnson, the federal monitor hired by HUD to oversee its 2009 affordable housing settlement. Mr. Johnson found no evidence of exclusionary zoning based on race or ethnicity.

Westchester is proudly the fourth most diverse county in New York in its population of African-Americans and Hispanics. Hispanics are the county's fastest-growing ethnic group, increasing in every community in the last census. The number of African-Americans continues to grow in contrast to an exodus from many areas in the Northeast. But HUD won't budge. Its vision for remaking neighborhoods depends on gaining control of local zoning.

The \$17 million that HUD is withholding include Community Development Block Grants to help needy residents with neighborhood revitalization, new playgrounds and sidewalks, programs to prevent homelessness and, ironically, affordable housing. Westchester has sued the federal government to release these funds. Our claim is that HUD is unfairly holding hostage the communities and nonprofit agencies that administer those programs in its fight with the county. A federal judge dismissed Westchester's claim last month, saying HUD's ruling was written in a way that "excludes it from judicial review." The lawsuit is now before the Court of Appeals for the Second Circuit.

HUD has no idea how much its new rule will cost, or whether it will even work. The only economic analysis HUD has provided concerns how much it will cost communities to comply with the paperwork. HUD estimates \$3 million to \$9 million. The agency has not published any estimate of other effects, such as on local real-estate markets or local budgets. As stated in the Federal Register, "HUD cannot quantify the benefits and costs of policies influenced by the rule."

HUD is asking for comments on its new rule by Sept. 17. If elected officials and citizens do not want to cede control of their streets, neighborhoods and open space to Washington, now is the time to say so.

Mr. Astorino is the Westchester County executive.