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April 4, 2013

Secretary Shaun Donovan
U.S. Department of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410

RE: Request for Hearing

Dear Secretary Donovan:

On March 25, 2013, Westchester County received a letter from Vincent Hom, Director of Community Planning and Development (“CPD”) entitled “Notice of Intent to Reallocate \$7.4 Million in FY2011 Formula Funding” - \$5,378,557 in Community Development Block Grant (“CDBG”) funds, \$1,655,688 in HOME Investment Partnership (“HOME”) funds and \$405,939 in Emergency Shelter Grants (“ESG”) referred to collectively as “CPD funds”. In light of HUD’s notice¹ of its intent to terminate the FY2011 payment of 7.4 million dollars to the County, the County respectfully requests a hearing.²

To receive its annual CPD funds, a grantee must develop and submit to HUD its Consolidated Plan wherein it will identify its goals for these programs as well as for housing programs. HUD is required to approve a Consolidated Plan submission unless the Plan (or a portion of it) is inconsistent with the purposes of the National Affordable Housing Act or is substantially incomplete. HUD is required to make a full grant award unless the Secretary has made a determination that the grantee: (1) has failed to carry out its CDBG-assisted activities in a timely manner; (2) has failed to carry out those activities and its certifications in accordance with the requirements and the primary objectives of Title I of the Housing and Community

¹ The notice fails to specify the provision of law which would authorize such action by HUD. *See e.g.* 42 U.S.C. §5311; 24 C.F.R. 570.913(c)(1).

² The letter also fails to notify the County of the availability of a hearing. As such, the County preserves its objection to the notice as being legally defective. Notwithstanding, there is ample support for the County’s instant and reasonable request for a hearing based on similar HUD actions that attempt to terminate, reduce or limit payments. 24 C.F.R. 570.913(c)(1); 5th Amendment to the United States Constitution; *See e.g. City of Boston v. U.S. Department of Housing and Urban Development*, 898 F.2d 828 (1st Cir. 1990); *City of Kansas City Missouri v. U.S. Department of Housing and Urban Development*, 861 F.2d 739 (D.C. Cir. 1988); *City of Houston, Texas v. U.S. Department of Housing and Urban Development*, 24 F.3d 1421 (D.C. Cir. 1994).

Development Act of 1974, as amended, and with other applicable laws; or (3) lacks a continuing capacity to carry out its CDBG assisted activities in a timely manner. 42 U.S.C. § 5304.

The County has provided extensive and comprehensive analyses to comply with and meet these statutory requirements and there is no reasonable basis by which to find that the County's submissions do not provide sufficient evidence so as to justify the denial of its entitlement grant. In light of the unprecedented amount of work, analyses and submissions by the County, HUD's claim that the County has failed to submit appropriate documentation to HUD's satisfaction is simply unreasonable, arbitrary and capricious.

BACKGROUND

On March 15, 2011, Westchester County submitted its HUD Form 424 – Applications for Federal Assistance under the CDBG, HOME, and ESG programs along with the required certifications with its FY2011 Action Plan. The Plan describes the proposed projects to be undertaken with these funds throughout the Westchester Urban County Consortium communities including the intention to focus on communities that are the neediest – “areas of severe low income and minority concentration and low and moderate income target areas identified in the FY 2009-2013 Consolidated Plan”. This information alone clearly complies with the statutory and regulatory requirements and should have been sufficient for HUD to accept the County's application.

However, by letter dated April 28, 2011, HUD rejected the County's FY 2011 certification that it will affirmatively further fair housing (“AFFH”) based on its review of the County's Analysis of Impediments to Fair Housing Choice (“AI”). On May 13, 2011, HUD provided the County with information regarding its disapproval and corrective actions.³ The County met with HUD personnel on June 2, 3, and 29, 2011 and submitted a revised AI on July 11, 2011. Two days later, by letter dated July 13, 2011, HUD once again rejected the County's response claiming that it provided “insufficient evidence to support the accuracy of its AFFH certification”.

Thereafter, the County submitted the issue regarding HUD's refusal to certify its AI to the Monitor, who declined to review the issue. Nevertheless, on November 14, 2011, the Monitor issued a Report and Recommendation and ordered the County provide additional zoning information by February 29, 2012.

The County then provided additional submissions to HUD including voluminous amounts of information and detailed analyses thereof in an effort to, *inter alia*, supplement the County's original application so as to satisfy HUD.⁴ Upon information and belief, HUD has not rejected

³ Many documents referred to herein can also be found on the County's websites at (1) <http://homes.westchestergov.com/housing-settlement/press-releases>; (2) <http://homes.westchestergov.com/housing-settlement>; (3) <http://homes.westchestergov.com/housing-settlement/zoning-analysis> ; and (4) <http://homes.westchestergov.com/housing-settlement/analysis-of-impediments>. The County can also provide hardcopies of documents as necessary upon written request.

⁴ In his Report regarding Implementation of the Order regarding Settlement and Dismissal for the 2012 Calendar Year, the Monitor acknowledged that since August of 2012, the County has submitted

any other entitlement grant applicant who has submitted similar detailed analysis. In fact, many applicants have been approved to receive their entitlement grants with far less effort and analysis. The additional information and analyses provided by the County in its submissions include the following:

The first submission, on February 29, 2012 included data on all the zoning districts within 43 communities in Westchester County⁵, identifying 31 characteristics in each of 853 unique zoning districts constituting 26,443 data points. It also included, among other things, types of permissible use, minimum and maximum lot sizes, maximum density requirements, floor area ratio standards and restrictions on Section 8 vouchers.⁶ This submission also included an analysis of the six restrictive practices identified by the monitor. Notably, with respect to restrictive practice #3, limitations relating to Section 8 vouchers, the County found that there were no such limitations in any of the municipalities, and therefore it cannot be said that restrictive practice #3 exists in Westchester County. In conducting the analysis of the restrictive practices in each municipality, the test considered the levels of density, development types, and range of uses permitted under the zoning scheme. It was found that for each of the municipalities that, while some of these “practices” might appear in the zoning codes (such as minimum lot sizes for different zoning districts), there was sufficient variation between different districts to accommodate a wide range of uses.

Notwithstanding the additional documentation that the County provided, HUD rejected the County’s 2012 Action Plan Certification for the same reasons that it rejected the County’s 2011 Action Plan Certification as set forth in its July 11, 2011, *i.e.*, “insufficient evidence to support the accuracy of its AFFH certification.”

On July 6, 2012, the County submitted a report prepared by the Pace University Land Use Law Center. The report, entitled “Affirmatively Furthering Fair and Affordable Housing Under New York and Federal Law and Policies” (“the Pace Report”) was an independent examination by Professor John Nolon of the *Berenson* decision and the law relating to exclusionary zoning. The Pace Report provided a test under *Berenson* that was substantively the same as the test used by the County in its February 29, 2012 submission. Based upon the analysis already conducted by the County, and the test set forth in the Pace Report, the County again determined that there was no exclusionary zoning within Westchester County under *Berenson*.

On July 31, 2012, the County submitted a list showing the number of AFFH units each municipality had completed toward the goals set under the Westchester County Housing Opportunity Commission Affordable Housing Allocation Plan 2000-2015.⁷ On August 8, 2012, the County submitted a table identifying the area and percentage of land zoned for multi-family housing in each of the 31 eligible municipalities. On August 15, 2012, the County submitted

approximately 780 pages of tables, maps, and other data, relating to the zoning practices in each of the eligible municipalities.

⁵ As noted in the submission, the towns of Rye and Pelham have not adopted zoning ordinances, as they do not contain any land that is not also contained within an incorporated village.

⁶ See <http://homes.westchestergov.com/housing-settlement/zoning-analysis>.

⁷ An updated table was provided on November 20, 2012.

tables identifying the racial and ethnic composition of each zoning district in the 31 eligible municipalities, using both 2000 and 2010 Census data.⁸ On August 27, 2012, the County submitted tables indicating the presence or absence of each of the six restrictive practices in each zoning district for each of the 31 eligible municipalities.

With respect to the September 6, 2012 submissions, the County, on August 1, 2012, met with the Monitor, the Monitor's experts and representatives of HUD in order to establish a methodology for further analysis of the restrictive practices. The methodology included the creation of numerous maps and overlays and doing a cost analysis utilizing three different methodologies. On September 6, 2012, the County provided this analysis, consisting of a large number of maps and tables.

On November 21, 2012, the County submitted an analysis of the racial and ethnic makeup of single-family zoning districts across all municipalities, eligible and ineligible, in Westchester County, for 17 different minimum lot sizes. The analysis revealed that there was no correlation between minimum lot size and ethnic or racial population across municipalities with districts with similar minimum lot sizes.

DISCUSSION

Despite having received the last of these submissions nearly four months prior, the County was not informed of their alleged "deficiencies" until March 13, 2013. In its March 13, 2013 letter, Deputy Regional Counsel for New York / New Jersey claims that "the County has failed to conduct a proper analysis of exclusionary zoning practices and to develop a clear strategy to overcome such practices, including litigation". HUD focused primarily on the County's "zoning analysis" and "source of income legislation", neither of which are mandated by federal law.

Contrary to HUD's protestations, the County has satisfied all of the statutory obligations to receive CPD funds. The concerns in HUD's letter claiming that the County has failed to adequately analyze exclusionary zoning practices and meet its source of income legislation obligation are unfounded and therefore HUD is improperly withholding its funds. HUD is abusing its role and exceeding its authority by failing to accept the County's application and by mandating requirements that are not statutorily required. Such action prohibits the County outright from being able to propose eligible CPD projects. In fact, HUD's action herein prevents any use of CPD funds and is, in effect, a policing tactic that is neither authorized by statute and regulation. *See* 24 C.F.R. ¶ 91.500 (and statutes cited therein); *see* 42 U.S.C. § 5304(e); 42 U.S.C. § 5311(b).

With respect to the zoning issue, the County, utilizing the *Berenson*⁹ analysis, has determined that each of the eligible municipalities has at least one multi-family zoning district and no restrictions on Section 8 housing in any zoning district. Furthermore, each municipality has single- and/or two-family zoning districts where affordable housing units could be acquired

⁸ The original submission included data on black and Hispanic populations. At the monitor's request, a revised table was submitted on October 5, 2012, adding in data for the white population.

⁹ *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975).

or developed. Moreover, New York State law permits the development of cluster housing, regardless of local zoning ordinances. Finally, each municipality has the ability to grant waivers or variances on a case-by-case basis, as needed, to permit the construction or development of affordable housing units. Based upon the aforementioned, each municipality receiving FY 2011 CPD funds would have the capacity to meet their obligation to AFFH.

Further, the *Berenson* analysis is a state law doctrine that is intended to address the reasonableness of a town, village or city's exercise of its state constitutional right to legislate in adopting a zoning ordinance. The *Berenson* analysis and the conclusions thereto, as to whether a zoning ordinance is reasonable or not, is separate and distinct from a determination that there has been a violation of the Fair Housing Act with respect to discrimination in housing. The County has concluded under the *Berenson* analysis that the municipalities within Westchester have reasonable and non-exclusionary zoning ordinances. HUD has no authority to reject the County's conclusions in this regard and its mere "disagreement" with the County's analysis does not render that analysis invalid or improper.

Challenging the County's conclusions, HUD improperly focuses on the Housing Opportunity Commission's Report. However, there is absolutely no obligation upon the County or upon any municipality within the County (by the Settlement Agreement or otherwise) to be bound by the recommendations contained in said report. Besides, the recommendations therein do not address the classes required to be protected under the Fair Housing Act.

Furthermore, HUD cannot condition the disbursement of entitlement CPD funds upon a "*Huntington*¹⁰ analysis" of local zoning. A *Huntington* analysis requires a case-by-case, fact-specific inquiry into the disparate impact of local zoning ordinances, as it relates to a specific proposed project within a municipality. For the purposes of approving the County's FY 2011 certification, however, the relevant question is whether the municipalities receiving CPD funds can satisfy their obligation to AFFH generally at the time that the FY 2011 CPD funds are expended, not whether a municipality has a zoning ordinance in place that might, upon the proposal of some hypothetical project, be subject to a *Huntington* challenge.

Nor can HUD condition disbursement upon an assurance from that County that it will "abide by the District Court's ruling on the parties' dispute, and . . . update its AI as appropriate to describe the County's plans to promote such legislation consistent with that ruling when provided." (March 25, 2013 letter from Vincent Hom). This is simply not required for approving the County's FY 2011 and 2012 certifications that it will AFFH. In fact, the County submits that this requirement is arbitrary and capricious, and contrary to federal law. *See* 5 U.S.C. § 706(2).

First of all, HUD's actions are in violation of federal law. Title 42 U.S.C. § 12711 provides that:

Notwithstanding any other provision of this subchapter or subchapter II of this chapter, the Secretary shall not establish any criteria for allocating or denying funds made available under programs administered by the Secretary based on the adoption, continuation, or discontinuation by a jurisdiction of any public policy, regulation, or law that is (1) adopted, continued, or discontinued in accordance

¹⁰ *Huntington Branch v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988).

with the jurisdiction's duly established authority, and (2) not in violation of any Federal law.

The absence of source-of-income legislation does not violate federal law. Thus, forcing the County of Westchester to adopt source-of-income legislation, under pains of losing the CPD funds, clearly violates 42 U.S.C. § 12711.

Second, there are many states and municipalities across the country that do not have source-of-income legislation, but nevertheless receive CPD grants. Additionally, HUD never challenged nor determined an AI to be deficient if it should fail to mention source-of-income legislation, let alone proffer a plan to promote such legislation. Additionally, on information and belief, HUD has never conditioned CPD grants to entitlement municipalities on the promotion of source-of-income legislation, let alone its adoption. In fact, HUD policy appears much less robust, as HUD merely requires that discretionary grant applicants demonstrate compliance with any state and local laws that prohibit housing discrimination based on source of income. *See* Notice of HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) Policy Requirements and General Section to HUD's FY2012 NOFAs for Discretionary Programs; HUD 2010 Annual Report on Fair Housing ("HUD has required all discretionary grant applicants to demonstrate compliance with any state and local laws that prohibit housing discrimination based on source of income.").

Third, requesting a "binding commitment" that the County will comply with the District Court's Order is unwarranted. The District Court directed the County Executive to request "that the legislature reintroduce the prior source-of-income legislation, provid[e] information to assist in analyzing the impact of the legislation, and sign[] the legislation passed." *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 2012 WL 1574819, at *7 (S.D.N.Y. May 3, 2012). The County is in compliance with this directive. In any event, because the Government has an adequate enforcement mechanism to ensure compliance with the District Court's directive, HUD's demands for assurances in this regard are clearly arbitrary. Such a demand is in excess of HUD's statutory authority. *See* 5 U.S.C. § 706(2). Moreover, given HUD's express complaint that the County "continues to appeal" the District Court's Order, the demand for such an assurance is revealed as a blatant attempt to strip the County of its right to appeal the District Court's Order.

Lastly, the obligation to promote source-of-income legislation is a component of the 2009 Settlement. It has nothing to do with whether the FY 2011 and 2012 CPD funds will be spent to AFFH. The Settlement was entered into between the County and the United States in order to resolve certain allegations that the County failed to analyze impediments to fair housing based on race. *See U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009). HUD is impermissibly using CPD funds to leverage compliance with its interpretation of the Settlement. This is an abuse of HUD's power under the statutes authorizing the granting of CPD funds, as none of those statutes allow such a conditioning of funds.

CONCLUSION

Accordingly, the County respectfully requests a hearing regarding HUD's intent to terminate the County's FY2011 CPD funds to raise, among other things, the aforementioned arguments.

Sincerely,



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