

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	:	
COUNTY OF WESTCHESTER,	:	
	:	___ cv ___ (___)
Plaintiff,	:	
-v-	:	COMPLAINT
	:	
UNITED STATES DEPARTMENT OF	:	JURY TRIAL
HOUSING AND URBAN,	:	DEMANDED
DEVELOPMENT (“HUD”), and	:	
SHAUN L. S. DONOVAN, AS SECRETARY	:	
OF HUD,	:	
Defendants.	:	
-----X	:	

Plaintiff County of Westchester (“County”), by and through its undersigned attorney, as and for its Complaint, alleges as follows:

NATURE OF ACTION

1. This is an action arising in equity for judicial review of an administrative action and for injunctive and declaratory relief. It arises out of an April 16, 2013 final administrative determination made by the United States Department of Housing and Urban Development (“HUD”) which was unconstitutional, in violation of federal law, legally erroneous, an abuse of discretion, and arbitrary and capricious, and which deprived the Plaintiff County of Westchester Community Planning and Development Formula Grant Programs Funds (“CPD Funds”) for fiscal year 2011.

JURISDICTION & VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1331, 1343, 1346, 1361, 5 U.S.C. § 701-706. A declaration of Plaintiff’s rights is sought pursuant to 28 U.S.C. §§ 2201 and 2202.

3. Venue is proper in this district pursuant to 29 U.S.C. § 1391(e).

PARTIES

4. Plaintiff County of Westchester is a municipal corporation of the State of New York.

5. Defendant HUD is an agency of the United States of America, sued herein pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 706.

6. Defendant Shaun M. Donovan is Secretary of HUD. He is sued herein in his official capacity, pursuant to the APA, 5 U.S.C. § 706.

FUNDING BACKGROUND

7. HUD administers CPD Funds, including the Community Development Block Grant Program (“CDBG”), the HOME Investment Partnerships Program (“HOME”), and the Emergency Solutions/Shelter Grants Program (“ESG”).

8. The CDBG program provides communities with resources to address a wide range of unique community development needs, including the provision of decent and affordable housing, services to the most vulnerable residents in local communities, and jobs through the expansion and retention of businesses.

9. The HOME program is the largest federal block grant to state and local governments, designed to create affordable housing for low-income households.

10. The ESG program assists individuals and families to quickly regain stability in permanent housing after experiencing a housing crisis or homelessness.

11. HUD's Office of Community Planning & Development ("CPD") distributes the CPD Funds to Westchester County as an "Urban County"—one that has a population of 200,000 or more, and is certified by HUD as an Urban County Entitlement Community.

12. The Westchester County Department of Planning ("Planning Department") is responsible for administering CPD Funds to the Westchester Urban County Consortium ("the Consortium"). The Consortium includes participating towns and villages who agree by a cooperation agreement to apply for CPD Funds through the County.

13. The County's CPD Funds are distributed in accordance with the Westchester Urban County Consortium Consolidated Plan ("Consolidated Plan"), which is prepared by the Planning Department for the Consortium every five years, and serves as the comprehensive housing affordability strategy, community development plan, and submission for funding (including CDBG, HOME and ESG grants). The current Consolidated Plan covers the fiscal years 2009 through 2013.

14. The Consolidated Plan regulations (24 C.F.R. § 91) require the County to submit a certification that it will affirmatively further fair housing ("AFFH"), which means that it will conduct an analysis to identify impediments to fair housing choice within the County ("Analysis of Impediments" or "AI"), take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions taken in this regard.

15. Federal regulations define "certification" as a written assertion based on supporting evidence that must be kept available for inspection by HUD. 24 C.F.R. § 91.50.

16. In addition to the Consolidated Plan, the Consortium submits Fiscal Year Action Plans which detail the proposed projects that the Consortium will undertake with the CPD Funds during a given fiscal year. As part of the Fiscal Year Action Plan, HUD requires that the Consortium certify that it will AFFH.

SETTLEMENT BACKGROUND

17. In 2006, the Anti-Discrimination Center of Metro New York, Inc. (“ADC”) brought suit as *qui tam* relator for the United States of America against the County, alleging that the County violated the False Claims Act, 31 U.S.C. §§ 3729, et seq., through certifications made to HUD between April 2000 and April 2006. Specifically, ADC alleged that the AFFH certifications that the County made during that period to obtain CPD Funds were false because the County failed to conduct an AI on the basis of race.

18. On February 24, 2009, the Honorable Denise M. Cote, U.S.D.J., granted in part and denied in part ADC’s motion for partial summary judgment. The Court held that the County submitted false certifications that it would AFFH by failing to analyze impediments to fair housing choice within the County in terms of race. *See U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 668 F. Supp. 2d 548, 561-62 (S.D.N.Y. 2009) (“the statutes and regulations require not just any AI, but one that analyzes impediments to fair housing that are related to race”). Instead, the County had utilized housing affordability in its AI. The Court denied ADC’s motion for summary judgment as to the knowledge element of a violation of the False Claim Act. No violation of the False Claims Act was ever found.

19. Prior to trial, on August 10, 2009, the United States intervened into the action, and the County and the United States entered into a Stipulation And Order Of Settlement And

Dismissal (“Settlement”). A Special Master, referred to as the Monitor, was appointed by the Court to oversee the Settlement.

20. The Settlement contains various provisions. Most prominently, paragraph 7 of the Settlement requires the County to build 750 affordable AFFH housing units by 2016. These housing units are to be developed among thirty-one of the forty-five local municipalities in Westchester (“eligible municipalities”). Paragraph 23 of the Settlement sets forth certain yearly benchmarks for the development of 750 AFFH housing units, *e.g.*, 300 units with financing in place by the end of 2013. The County is currently well ahead of schedule in terms of those housing-unit benchmarks.

21. The Settlement also contains four provisions that deserve mention: (1) paragraph 14(b), which relates to the resolution of disputes arising under the Settlement; (2) paragraph 25(a), which relates to a model zoning ordinance; (3) paragraph 32(b), which relates to an analysis of impediments to fair housing; and (4) paragraph 33(g), which relates to source-of-income legislation.

Dispute Resolution

22. Paragraph 14 of the Settlement provides that settlement disputes that may arise between the County and the United States may be brought before the Monitor. Pursuant to paragraph 14(c), the Monitor may issue a report and recommendation on the dispute. The parties may appeal the Monitors recommendations to the assigned U.S. Magistrate Judge under paragraph 14(d).

Model Zoning Ordinance

23. In paragraph 25 of the Settlement, as one of the many vehicles to facilitate the development of the 750 AFFH housing units, the County agreed to promote to the local municipalities within its borders a model zoning ordinance. Westchester County has no legislative control over zoning within its borders. In New York State, through state enabling legislation, municipal planning and land use controls are delegated to local municipalities, i.e., cities, towns and villages. The model zoning ordinance provisions are designed to supplement or replace existing municipal zoning codes of the local municipalities for the purposes of ensuring the provision and promotion of fair and affordable housing development throughout the County.

24. In October 2010, the Monitor approved the County's model zoning ordinance, which includes, among other things, a requirement that within all residential developments of 10 or more units created by subdivision or site plan approval, no less than 10% of the total number of units must be created as affordable AFFH units. Additionally, in residential developments of five to nine units, at least one affordable AFFH unit shall be created. The model zoning ordinance also encourages a variety of incentives to encourage the creation of additional affordable AFFH units above the number required to be created by the ordinance.

25. Since October 2012, and as of the filing of this Complaint, twelve of the thirty-one eligible municipalities have adopted some or all of the components of the model zoning ordinance. Additionally, five of the eligible municipalities have shared with the County draft zoning amendments that would incorporate the model zoning ordinance. Moreover, three eligible municipalities have advised the County that, prior to the Monitor's approval of the model zoning ordinance provisions, they previously amended their zoning ordinances, and that

their prior amendments dealt effectively with the same topics included in the model zoning ordinance. It should be noted that each of these three municipalities has approved developments of affordable AFFH units or has affordable AFFH developments in the local approval process. Most of the other eligible municipalities have continued to review the recommended provisions.

An AI Based on Race

26. In paragraph 32(b), the County agreed to complete an AI to fair housing within its jurisdiction, including an analysis of impediments based on race, *i.e.*, the very AI deficiency that Judge Cote found in her summary judgment opinion of February 24, 2009. Importantly, the Settlement did not establish HUD's acceptance of the Settlement AI as a condition precedent to HUD's granting of future CPD funds.

Promotion of Source-of-Income Legislation

27. In paragraph 33(g) of the Settlement, the County also agreed to "promote, through the County Executive, legislation currently before the Board of Legislators to ban 'source-of-income' discrimination in housing"

28. At the time the County entered into the Settlement, the Board of Legislators ("BOL") had begun consideration of source-of-income legislation. In response to the Settlement Agreement, the County Executive's Office made several efforts to promote the adoption of source-of-income legislation. Specifically, in October 2009, former County Executive Andrew Spano issued a letter to the leadership of the Board of Legislators urging the board's adoption of such legislation. In November 2009, former County Executive Spano issued letters to several housing advocacy organizations urging their continued support and advocacy for the proposed legislation, including: (1) Legal Services of the Hudson Valley/Westchester Residents Against

Income Discrimination; (2) Westchester Residential Opportunities, Inc.; (3) Mount Vernon United Tenants; (4) Human Development Services of Westchester; and (5) Housing Action Council.

29. The BOL did not vote on the measure before the legislative session expired on December 31, 2009, but the legislation was reintroduced shortly thereafter in the new session, on January 19, 2010. On June 14, 2010, the BOL passed Local Law 3-2010, an amended version of the 2009 legislation. On June 25, 2010, the current County Executive Robert P. Astorino vetoed that legislation.

POST-SETTLEMENT DISPUTE RESOLUTION

30. The Consortium's Fiscal Year 2011 Action Plan details the proposed projects that the Consortium would have undertaken with the CPD Funds during CPD program year May 1, 2011 through April 30, 2012. The Consortium's Fiscal Year 2011 Action Plan was submitted to HUD for approval on March 15, 2011. As part of the submission, the County certified that it would AFFH. In conjunction with the Consortium's Fiscal Year 2011 Action Plan, the County submitted to HUD an AI on April 13, 2011. The main report of the County's AI alone totaled over 200 pages. When combined with the seventeen appendices, including studies, charts, tables, strategies and analyses, the AI totals approximately 1,000 pages.

31. On April 28, 2011, HUD disapproved the Consortium's Fiscal Year 2011 Action Plan, alleging that it was "substantially incomplete." Specifically, HUD rejected the County's certification that it would AFFH, based on its review of the County's previously-submitted AI, which as discussed above requires analyzing impediments to fair housing based on race.

32. On May 13, 2011, HUD provided the County with information regarding its disapproval. HUD identified eight (8) reasons for rejecting the Consortium's Fiscal Year 2011 Action Plan & AI, including: (1) the County's plan to promote of source-of-income legislation under the Settlement; and (2) the County's plans to overcome exclusionary zoning practices within its jurisdiction, as per the Settlement. HUD also specified "corrective actions" that the County must take by June 13, 2011 (only one month later) in order for its AI to be acceptable to HUD.

33. Specifically regarding the zoning practices, HUD described the AI deficiency as follows:

The [AI] mentions municipal ordinances as an impediment to fair housing, and states that the County will overcome exclusionary zoning practices by promoting a Model Ordinance, implementing a discretionary funding policy, establishing a bonus provision for awards of CDBG funds, and preparing for legal action to combat exclusionary zoning practices. These are all important first steps that HUD supports, but the plan lacks specifics in terms of a legal strategy.

34. In terms of corrective action, HUD demanded:

[I]dentification of specific zoning issues that the County will challenge, identification of the specific municipalities where the zoning issues exist, and a process for notifying the jurisdictions of the changes that must be made and of the consequences of their failure to do so. The plan must also include a list of the steps that the County will take if the municipalities do not enact the changes within three months of the County's notification. The AI must include a strategy to involve municipal decision makers in leading changes on zoning and land use restrictions and ways in which substantive dialogue and other, more concrete steps will be used in an orderly fashion to achieve changes.

The specific zoning practices which must be addressed by the County include restrictions that limit multifamily housing development, including outright prohibition of such housing, limitation by the size of a development, limitations directed at Section 8 or other affordable housing, and limitations on the number of 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, limitations on townhouse development, and infrastructure barriers related to

zoning such as the absence of sewer systems that are impediments to the development of rental housing or to affordable housing.

35. Specifically regarding source-of-income legislation, HUD described the AI deficiency as follows:

Under the terms of the Settlement, the County agreed to “promote, through the County Executive, legislation currently before the Board of Legislators to ban ‘source-of-income’ discrimination in housing.” In light of the County Executive's veto of legislation prohibiting discrimination based on source of income, the Submission does not detail any steps the County will take to promote source-of-income legislation. Instead, the Submission states only that the County will review data obtained from the Westchester Residential Opportunities, Inc. (WRO) systemic tests to evaluate the future need for source-of-income legislation. (Submission at 150.) This suggests the County will defer its plans until it evaluates such a study. The Submission is substantially incomplete without a discussion of the planned actions by the County to promote passage of an effective source-of-income legislation that is substantively similar to the bill that was before the Board of Legislators as described in the Settlement. (See Settlement at ¶33(g)).

36. In terms of corrective action for source-of-income legislation, HUD demanded:

The County's AI must describe the County's plans to promote source-of-income legislation. The AI must include, at a minimum, the following information: a description or text of proposed legislation to ban source of income discrimination that is substantially similar to the bill introduced before the Board of Legislators and a description of the steps the County will take to promote passage of the legislation with the Board of Legislators and the public, including but not limited to support for passage of strong source of income protections in public forums including the media and the efforts the County will make to ensure the introduction and passage of the legislation including securing support from individual Legislators.

The proposed and enacted legislation must be substantially similar to the bill described in the Settlement and provide protection against housing discrimination on the basis of lawful sources of income such as Section 8 vouchers, Social Security, Supplemental Security Income (SSI), veteran's benefits and pensions. The AI must identify the steps planned or taken by the County to garner support for passage of the ordinance with the legislative body and with the public within the next legislative session. The AI must discuss efforts to inform the public, including elected and appointed decision makers, about the importance of such an ordinance and describe workshops and other community outreach planned to promote passage of the ordinance. The AI must provide assurances that upon the

passage of Source of Income legislation reasonable and necessary to implementation of the Settlement it will be supported by the County Executive.

37. In sum, HUD's May 13, 2011 letter clearly indicates that HUD is attempting to insert its interpretation of the County's Settlement obligations into the federal statutes and regulations that govern HUD's authority to oversee the CPD Fund requirement that the County certify it will AFFH. The Settlement was entered into between the County and the United States in order to resolve certain allegations of past non-compliance with the federal statutes relating to CPD Funds. 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. This action by HUD is arbitrary and capricious, in excess of HUD's regulatory authority, contrary to federal law, and in violation of the U.S. Constitution. *See* 5 U.S.C. § 706.

38. In response to HUD's May letter, the County met with HUD personnel on June 2, 3, and 29, 2011 and submitted a revised AI on July 11, 2011.

39. Nevertheless, *two days later*, by letter dated July 13, 2011, HUD once again rejected the County's AI claiming that it provided "insufficient evidence to support the accuracy of its AFFH certification" because it did "not meet *the Settlement's* requirements for an acceptable AI" (emphasis added). "Specifically, the revised AI did not . . . address deficiencies regarding promotion of source-of-income legislation or plans to overcome exclusionary zoning practices." As a consequence, HUD once again rejected the County's AFFH certification, and disapproved the Consortium's Fiscal Year 2011 Action Plan.

40. To reiterate, HUD once again expressly linked the disapproval of the Consortium's Fiscal Year 2011 Action Plan with HUD's interpretation of the County's obligations under the Settlement.

Monitor Dispute Resolution

41. Reaching an impasse on the issues underlying HUD's rejection of the County's AI required under the Settlement, in September 2011, the County and United States requested, pursuant to paragraph 14(b) of the Settlement, that the Monitor resolve their disputes concerning two issues: (1) source-of-income legislation; and (2) local zoning practices. The County also asked the Monitor to resolve the parties' dispute concerning the adequacy of the County's AI and AFFH certification with respect to the 2011 CPD funds.

42. On November 17, 2011, the Monitor issued his Report & Recommendation (amended) ("R&R"), recommending: (1) that the County had breached its obligation to promote certain source-of-income legislation when County Executive Astorino vetoed the legislation; and (2) that, under the terms of the Settlement, the County should analyze local zoning ordinances in connection with the AI. The Monitor also found that the issue of the adequacy of the County's AI and AFFH certification was "not properly joined for resolution."

43. Regarding source-of-income legislation, the Monitor also recommended, as corrective action, that the County Executive "request[] that the legislature reintroduce the prior legislation, provid[e] information to assist in analyzing the impact of the legislation, and sign[] the legislation passed."

44. Regarding the zoning ordinances, the Monitor recommended that, by February 29, 2012, the County assess the impact of the following restrictive zoning practices (“Zoning Analysis”):

- 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.

45. The Monitor also recommended that the County specify a strategy to overcome any of the restrictive zoning practices listed above that the County found to be exclusionary (“Strategy”); and identify the types of zoning practices that would, if not remedied by a local municipality, require the County to pursue legal action against said municipality.

46. The County sought review of the Monitor’s R&R by U.S. Magistrate Judge Gabriel W. Gorenstein, except as to the Zoning Analysis, which the County agreed to complete by February 29, 2012.

Judge Gorenstein’s Order

47. On March 16, 2012, Judge Gorenstein sustained the County’s objection to the Monitor’s R&R in part. Specifically, Judge Gorenstein held that the County Executive’s veto did not violate the Settlement agreement. Judge Gorenstein also held that the County was required to specify a Strategy to overcome exclusionary zoning practices, and identify the types of municipal zoning practices that would, if not remedied by a municipality, require the County

to pursue legal action against said municipality. Judge Gorenstein also overruled the County's objection regarding the issue of the adequacy of the County's AI.

48. The United States sought review of Judge Gorenstein's ruling regarding source-of-income legislation to Judge Cote. The County did not seek review of Judge Gorenstein's rulings related to zoning, or the adequacy of the County's AI.

Judge Cote's Order & County's Appeal to Second Circuit

49. On May 3, 2012, Judge Cote sustained the Government's objection to Judge Gorenstein's ruling on source-of-income legislation, adopted the Monitor's recommendation, and directed the County Executive to request that the legislature reintroduce the prior legislation, provide information to assist in analyzing the impact of the legislation, and sign the legislation passed.

50. The County appealed Judge Cote's Order to the U.S. Court of Appeals for the Second Circuit on August 10, 2012.

51. On August 31, 2012, the County Executive "requested that the Board of Legislators reintroduce the prior source of income legislation."

52. On April 5, 2013, the Second Circuit affirmed Judge Cote's Order.

53. On April 10, 2013, the County Executive again urged the Board of Legislators to "reintroduce the prior source of income legislation that was passed . . . in 2010." The County Executive also reaffirmed that he would "provide information to assist in analyzing the impact of the legislation as needed and requested" by the Board of Legislators. Finally, the County Executive affirmed that he would "continue to comply with the District Court Order."

54. On April 24, 2013, the County Executive submitted the 2010 source-of-income legislation to the Board of Legislators. That submittal included, among other things, a transmittal letter, a proposed committee report which mirrors the committee report from 2010, and the proposed local law. In his transmittal letter, the County Executive stated that he will sign the legislation when adopted by the Board of Legislators, in accordance with his court-ordered obligations under the Settlement.

COUNTY'S ZONING SUBMISSIONS

55. Since the Monitor's R&R in November of 2011, the County has supplemented the County's previous AI's by providing numerous zoning-related submissions to HUD, including voluminous amounts of data and detailed analyses thereof, in an effort to satisfy HUD's concerns about the County's AFFH certification. All of these submissions, which will be detailed below, have been rejected by HUD as insufficient for approval of the County's AI and AFFH certification for the 2011 CPD funds. Consequently, HUD has refused to approve the Consortium's Fiscal Year 2011 Action Plan, as it is HUD's erroneous view that such approval is inextricably linked to the Settlement. Upon information and belief, HUD has not rejected any other entitlement grant applicant with similarly-detailed AI submissions. In fact, many applicants have been approved to receive their entitlement grants with far less effort and and comparatively little analysis.

56. The additional data and analyses provided by the County in its supplemental zoning submissions include the following:

57. The first submission, a report dated February 29, 2012, included data on all the zoning districts within 43 communities in Westchester County, identifying 31 characteristics in

each of the 853 unique zoning districts, constituting 26,443 data points. The review encompassed all zoning districts, not just residential zones, and data was collected on additional subjects of regulation beyond the six restrictive zoning practices that had been identified by HUD and the Monitor. 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. Notably, with respect to restrictive zoning 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 zoning practice #3 exists in Westchester County. In conducting the analysis of the restrictive practices in each local municipality, the test considered the levels of density, development types, and range of uses permitted under the zoning scheme. The County concluded that, while some of these “practices” might appear in the zoning codes of local municipalities, there was sufficient variation between different districts to accommodate a wide range of uses. Importantly, the County determined that each of the local municipalities has at least one multi-family zoning district and no restrictions on Section 8 housing in any zoning district. Significantly, each municipality has single- and/or two-family zoning districts where affordable housing units could be acquired or developed. The County also noted in its analysis that New York State law permits the development of cluster housing, regardless of local zoning ordinances—a statute which arms developers of AFFH with a potent tool for the planning and construction of AFFH units. Finally, the County noted that 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 AFFH units. Based on the foregoing, the County concluded that none of the six restrictive zoning practices identified by HUD and the Monitor had exclusionary impact or prevented the planning or development of AFFH units.

58. Notwithstanding the foregoing data collection and analysis, on April 20, 2012, HUD rejected the County's February 29, 2012 zoning submission. HUD did not challenge the County's conclusion that none of the six restrictive zoning practices had exclusionary impact, rather, HUD asserted that the County's conclusion was unsupportable because the methodology used by the County was not based upon applicable law, specifically citing *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975) & *Huntington Branch v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988). HUD also outlined specific corrective action that it mandated be taken by the County.

59. Specifically, HUD directed the following corrective action, among other things:

In the Zoning Submission, at p. 13, the County concludes that its "analysis has not identified specific local zoning practices that have exclusionary impacts." As reflected above, however, this conclusion is not supported by the Submission, because the methodology utilized by the County to determine whether a zoning practice is exclusionary is not based on applicable law. And with the exception of a handful of anecdotes, the Zoning Submission does not reflect an examination of any data regarding the impact that the application of these Restrictive Practices is having on housing development within the local jurisdictions, the impact that they are having in the composition of their populations, and whether the local restrictions are properly taking into account regional needs.

The data to be examined includes a review of the types, quantity and quality of housing presently in the local jurisdiction, proposals for developments (those formally submitted, in progress, and those abandoned), interviews with affected parties, demographic data for the various zoning districts within each local jurisdiction, and an examination of the entire region, particularly demographic data for other jurisdictions with different zoning practices, the housing available, and of regional housing needs. An examination of this data is required in order to determine whether local zoning ordinances are having exclusionary impacts and/or segregative effects. An examination of proportional statistics, rather than absolute numbers is required.

If it is determined that there is an adverse impact on a protected[sic] class, the County should examine whether the particular ordinance being examined (1) furthers a legitimate, bona fide governmental interest, and (2) no alternative course of action can be adopted that would enable that interest to be served with less discriminatory impact or segregative effect. *See Huntington* at 939.

The County must also examine whether the ordinance is adversely affecting the local jurisdictions' obligation to meet regional needs.

60. These demands were overbroad, unduly burdensome, arbitrary and unnecessary. First of all, when the zoning dispute was presented to the Monitor, the United States never demanded such a far-reaching and exhaustively-time-consuming analysis. Indeed, none of these corrective actions were even mentioned in HUD's original May 13, 2011 rejection letter. Thus, not even HUD contemplated such an analysis from the inception of this dispute. Rather, these newly-crafted demands demonstrated that HUD was acting arbitrarily and capriciously, that the County's efforts at reaching a satisfactory AI are constantly rendered futile because of HUD's caprice, that the County is chasing a moving target, and that HUD will never be satisfied with the County's AI. In fact, during an October 16, 2012 conference call with HUD, wherein HUD was to provide "technical assistance" to the County, HUD was asked whether a determination by the Monitor that the County's zoning analysis was sufficient would satisfy HUD, wherein a representative of HUD said that such a determination would merely be considered, but not determinative. HUD simply cannot have it both ways. Second, when the Monitor directed the County to conduct its zoning analysis of the six restrictive zoning practices, he set a deadline of the end of February 2012—approximately three months. However, the analysis HUD is now demanding would have simply been virtually impossible to complete in such a timeframe, even if it had been demanded, which it was not. Moreover, such an analysis certainly would have been impossible to complete within HUD's original one-month timeframe, set forth in its May 2011 letter (of course, that assumes the action had been mentioned, which it was not).

61. Upon information and belief, HUD has not rejected any other entitlement grant applicant with a zoning analysis that was similarly-detailed to the County's February 29, 2012 analysis, or a similarly-detailed AI generally. In fact, many applicants have been approved to

receive their entitlement grants with far less effort and minimal analysis. Also upon information and belief, HUD has never demanded another entitlement grant applicant to satisfy such far-reaching and exhaustively-time-consuming corrective action to approve its AI.

62. Nevertheless, in response to HUD's April 20, 2012 letter, 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*.

63. Additionally, on August 1 and 7, 2012, the County met with the Monitor, the Monitor's experts and representatives of HUD, in order to establish a methodology ("Methodology") for further analysis of the restrictive zoning practices. The methodology included the creation of numerous maps and overlays in order to consider the cost and geographic implications of the six questioned zoning practices.

64. On August 8, 2012, the County also submitted a table identifying the area and percentage of land zoned for multi-family housing in each of the 31 eligible municipalities. The data identified that 6,335.58 acres in the 31 municipalities are in zoning districts that permit multi-family housing as-of-right. Notably, the 6,335.58 acres is a subset of the table's

identification of 103,567 acres in the 31 municipalities that are in zoning districts that permit multi-family housing as a permitted use.

65. On August 15, 2012, the County also submitted 62 tables identifying the racial and ethnic composition of each zoning district in the 31 eligible municipalities, using both 2000 and 2010 Census data. This data submission demonstrated that the high minority concentration that existed in *Huntington Branch* is simply not present in the County of Westchester. In fact, the data illustrated that the minority populations are adequately balanced among the local zoning districts, and disprove the supposition that the local zoning ordinances perpetuate segregation.

66. On August 27, 2012, the County submitted a 101-page report of tables indicating the presence or absence of each of the six restrictive practices in each zoning district for each of the 31 eligible municipalities—approximately 3,200 data points.

67. On September 6, 2012, the County provided an analysis of cost and geographic implications of the six restrictive practices. This analysis was conducted in accordance with the August 1, 2012 agreed-upon Methodology. This data consisted of:

- One county-wide map identifying the geographic extent of zoning districts in the 31 eligible municipalities that permit multi-family development as a permitted, as-of-right use, excluding when subject to special use provisions. The map shows the wide geographic spread of zoning districts throughout the 31 municipalities that permit multi-family development as-of-right. The map does not show the larger area that has been developed with multi-family housing as much has been created through a special permit process or through clustering.
- One table identifying the total acreage, by eligible municipality, within zoning districts in the 31 eligible municipalities that permit multi-family development as a permitted, as-of-right use, excluding when subject to special use provisions. The data identified that 6,335.58 acres in the 31 municipalities are in zoning districts that permit multi-family housing as-of-right.
- One county-wide map identifying the geographic extent of zoning districts in the 31 eligible municipalities that permit multi-family development as a permitted, as-of-right use, excluding when subject to special use provisions and showing

land that is 1) developed and 2) undeveloped. The map shows a limited extent of undeveloped land in such districts.

- One table identifying the total acreage, by eligible municipality, within zoning districts in the 31 eligible municipalities that permit multi-family development as a permitted, as-of-right use, excluding when subject to special use provisions and showing total acreage for land in those districts that is 1) developed and 2) undeveloped.
- 31 maps, one for each eligible municipality, identifying developed acreage, undeveloped acreage that is constrained and undeveloped acreage that is not constrained in zoning districts in each of the 31 eligible municipalities where multi-family housing is permitted excluding when subject to special use provisions. The Methodology defines constrained land has steep slopes greater than 25 percent, is identified as wetlands and is within 100 year flood plains; the extent of these three features are shown on the maps. The maps also identify numeric totals for the number of undeveloped parcels and the total theoretical build-out of multi-family units as required by a separate part of the Methodology. Each map has eight data layers, overlain, of zoning and physical land characteristics.
- One four-page table that identifies undeveloped acreage within each zoning district, by each of the 31 eligible municipalities, that permit multi-family development as a permitted, as-of-right use, excluding when subject to special use provisions, and identifies as subsets the acreage of constrained and not constrained land. The table presents 186 data points. In totals, the table identified that of the 411.3 acres of undeveloped land, 78.23 acres is environmentally constrained and 333.07 acres is not constrained land.
- One four-page table that utilizes data from above so as to identify the undeveloped acreage (in zoning districts in each of the 31 eligible municipalities where multi-family housing is permitted excluding when subject to special use provisions) that is not constrained reduced by an 80% build-out factor, shown by zoning district with a municipal total. The table presents 186 data points. In totals, the table identified that of the 411.3 acres of undeveloped, not constrained land, 266.46 acres would be available for development when reduced by a build-out factor of 80 percent.
- One three-page table that identifies the theoretical number of multi-family units that can be developed on undeveloped, not constrained acreage reduced by an 80% build-out factor in each zoning district in each of the 31 eligible municipalities where multi-family housing is permitted excluding when subject to special use provisions. The table lists the 64 zoning districts that permit multi-family housing excluding when subject to special use provisions and the not constrained undeveloped land in each district reduced by an 80% build-out factor. The table identifies the key zoning regulations that establish density in each district and then presents a theoretical build-out number of new dwelling units that could be built on the identified land area. In total, the table presents 704 data points and identifies a theoretical build-out potential of 2,070 dwelling units for the 31 municipalities combined.

- One county-wide map identifying undeveloped parcels (in zoning districts in each of the 31 eligible municipalities where multi-family housing is permitted excluding when subject to special use provisions) that are outside of areas served by public and private water suppliers. The data gathered illustrated a total of 16 undeveloped parcels not served by public and private water suppliers.
- One county-wide map identifying undeveloped parcels (in zoning districts in each of the 31 eligible municipalities where multi-family housing is permitted excluding when subject to special use provisions) that are outside of areas served by Westchester County sewer district facilities. The data gathered illustrated a total of 62 undeveloped parcels not served by Westchester County sewer district facilities.
- One table identifying the prevailing market rate for multi-family units in each of the 31 eligible municipalities based on data provided by the Hudson Gateway Association of Realtors. The data illustrated the average selling price of a condominium unit in 27 of the 31 eligible municipalities and the average selling price of a cooperative apartment in 20 of the 31 eligible municipalities for the period July 1, 2011 to June 30, 2012. The number of sales of units that the average was based was less than 10 in 12 municipalities for condominiums and less than 10 in 19 municipalities for cooperatives.
- One table identifying the multi-family unit value and land value per unit by quartile in each eligible municipality based on the formula and format provided in the Methodology by the Monitor's expert. The table provides 124 data points; however, based on the low number of sales reported in the table prepared above, the information in this table is of questionable value for the 28 of the 31 municipalities with condominium sales and the 21 of the 31 municipalities with cooperative apartment sales.
- One table indentifying the cost of construction of Westchester County-funded multi-family units by prototypes as defined in the Methodology by the Monitor's expert. The data gathered created a total of 152 data points. The table illustrates that the cost of new construction for one affordable housing unit (based on 12 County-funded developments) ranges between \$361,000 for condominium home ownership to \$380,000 for multi-family rental or townhouse-type. The cost of rehabilitation to deliver an affordable unit ranges from \$173,000 to \$379,000 (based on 6 County-funded developments).
- One seven-page table identifying density incentives within zoning ordinances in each of the 31 eligible municipalities for multi-family development for affordable housing. The table identified that 13 of the 31 eligible municipalities do not have incentive density provisions. It also identifies the diversity of the provisions in the other 18 municipalities.
- One table indentifying the area and percentage of land zoned to permit building of multi-family housing in each of the 31 eligible municipalities. This table, previously submitted as Item(c) in the Third Zoning Analysis, identified that 6,335.58 acres in the 31 municipalities are in zoning districts that permit multi-family housing as-of-right. This table also identified 103,567 acres in the 31 municipalities are in zoning districts that permit multi-family housing as a permitted use.

- One four-page table identifying any provisions for a streamline approval process for approving housing that includes affordable housing within zoning ordinances in each of the 31 eligible municipalities. The table identified that 23 of the 31 eligible municipalities do not have provisions for a streamline approval process for approving housing that includes affordable housing.

68. On October 5, 2012, the County also provided Excel files and a revised version of previously-submitted tables to include demographic data for “single-race white.” The tables were also expanded to indicate which of the six questioned zoning practices are present in each district. The final revised set of table consists of 65 pages with data on 538 distinct zoning districts. The data gathered created a total of 11,298 data points. The racial and ethnic composition (black, Hispanic and white) data does not indicate that changes in zoning district have a disparate impact on minorities as most districts within a municipality have similar population characteristics, with the occasional exception of districts with a very low number of residents, where anomalies are to be expected. The assessment of the six questioned zoning practices does not identify any new information that conflicts with the findings of the County’s report of February 29, 2012.

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

70. Notwithstanding the County’s numerous and voluminous zoning submissions, and nearly four months after the County’s last zoning submission, on March 13, 2013, HUD informed the County by letter that its zoning submissions were still insufficient to support the accuracy of the County’s certification to AFFH.

71. Specifically, HUD asserted 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. In this regard, the County refuses to apply established legal precedent in examining whether a zoning ordinance has a discriminatory or segregative impact. In addition, the County failed to analyze five out of the six restrictive zoning practices identified by the Monitor for examination.” Essentially, HUD took the position that the County had still failed to adequately analyze its local zoning ordinances under the *Berenson* and *Huntington Branch, NAACP* cases. Importantly, in HUD’s rejection of the County’s zoning analysis, as with each and every previous rejection, HUD could not dispute the accuracy of the County’s conclusions, nor could HUD demonstrate a single municipality in Westchester County that had a zoning ordinance with discriminatory or segregative impact. As HUD could not legitimately dispute the conclusions reached by the County, HUD simply rejected the analysis, continuing to move the target beyond the County’s reach.

72. Upon information and belief, HUD has not rejected any other entitlement grant applicant with such a similarly-detailed and comprehensive zoning analysis, or a similarly-detailed AI generally. In fact, many applicants have been approved to receive their entitlement grants with far less effort and minimal analysis. Also upon information and belief, HUD has never demanded that another entitlement grant applicant satisfy such far-reaching and exhaustively-time-consuming corrective action to approve its AI and AFFH certification.

**HUD INFORMS COUNTY THAT IT WILL REALLOCATE
FISCAL YEAR 2011 CPD FUNDS**

73. Less than two weeks after HUD’s March 13, 2013 letter, on March 25, HUD informed the County that it intended to reallocate approximately \$7.5 million in CPD Funds that

had been allocated to Westchester for the 2011 fiscal year. According to HUD, the 2011 CPD Funds are time-limited and will expire on September 30, 2013 if they are not reallocated. As such, HUD informed the County that, absent “substantive assurance that the County will comply with its civil rights obligations” by April 25, 2013, HUD will begin the process of reallocating Westchester County’s entitlement CPD Funds to other eligible jurisdictions, whereupon the Funds will no longer be available for administration by the County.

74. As its basis for reallocation, HUD again generally cited the County’s failure to provide a “satisfactory” “certification that it will comply with its obligation to [AFFH].” HUD asserted that “the County’s revised AI did not meet *Settlement* requirements” because the “County did not incorporate a plan to promote source-of-income legislation or plans to overcome exclusionary zoning practices” (emphasis added). HUD again outlined certain actions it deems necessary for the County’s AFFH certification to be approved.

75. Specifically, “HUD offered to approve the CPD grants for FY 2011 and FY 2012 if the County provided assurances: (i) to submit a plan to overcome exclusionary zoning practices, in compliance with the direction provided in a letter from HUD’s Office of General Counsel dated April 20, 2012 and update its AI accordingly, and (ii) to abide by the District Court’s ruling on the parties’ dispute, and to update its AI as appropriate to describe the County’s plans to promote such legislation consistent with that ruling when provided.”

76. HUD’s March 25, 2013 letter once again clearly indicates that HUD is attempting to graft its notion of the County’s *Settlement* obligations into the federal statutes and regulations that govern the CPD Fund requirement that the County certify it will AFFH. 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. This action by HUD is arbitrary and capricious, in excess of HUD's regulatory authority, contrary to federal law, and in violation of the U.S. Constitution. *See* 5 U.S.C. § 706.

77. On April 4, 2013, HUD sent a letter to the New York State Office of Community Renewal ("NYSOCR") regarding Hurricane Sandy disaster relief funds appropriated under the Disaster Relief Appropriations Act of 2013 ("CDBG-DR funds"). In the letter, HUD informed NYSOCR that the County was being designated as a "most impacted and distressed" county for the purposes of allocating funds. However, HUD then informed NYSOCR that the State could not provide these CDBG-DR funds to the County to administer, due to "HUD's serious civil rights compliance concerns with Westchester County." However, HUD provided no opportunity for comment, nor an actual substantive discussion of what these alleged "concerns" were. In fact, despite the fact that HUD was making inflammatory allegations regarding the County and specifically prohibiting the administration of CDBG-DR funds by the County, HUD did not even provide the County with a copy of the letter. This demonstrates HUD's continued use of monies, in this case disaster relief funds meant to alleviate the destruction caused by Hurricane Sandy, to bully the County into complying with its ever-changing interpretation of the Settlement, despite the fact that neither Federal law, nor the terms of the Settlement, provide HUD with the authority to arbitrarily and capriciously withhold funds outside of the Settlement.

78. Also on April 4, 2013, the County responded to HUD's March 25, 2013 letter, and requested a hearing before the 2011 CPD Funds were reallocated. This reasonable request was summarily rejected by HUD.

79. In its letter, the County argued that it had satisfied all of the statutory obligations to receive CPD funds, and that HUD was abusing its role and exceeding its authority by mandating requirements that are not statutorily required.

80. Regarding the zoning analysis, the County pointed out that, utilizing the *Berenson* decision, it had determined through its various zoning submissions 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 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, the County 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 the County's analysis invalid, improper, or insufficient.

81. Furthermore, the County argued that HUD could not condition the disbursement of entitlement CPD funds upon a "*Huntington* 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.

82. But even if demanding a *Huntington* analysis was proper, the voluminous zoning data previously submitted by the County clearly indicated that the high minority concentration that existed in the Town of Huntington is simply not present in the County of Westchester. *See, e.g.*, August 15, 2012 Submission Regarding Racial and Ethnic Composition of Westchester Zoning Districts. On the contrary, the data illustrate that the minority populations are adequately balanced among the local zoning districts, and disprove the notion that the local zoning ordinances perpetuate segregation. *See generally Id.* Additionally, the County's numerous data submissions indicate that local zoning ordinances in Westchester County do not have an adverse impact on minorities. This was memorialized, for example, in the County's November 21, 2012 submission under the heading "Qualitative Analysis." Therein, the County disproved any causal link between minimum-lot-size zoning restrictions and racial composition. Notably, if Westchester County were a state, it would have a higher percentage of Hispanics than 44 states, and would have a higher percentage of Blacks than 37 states. Within New York State, Westchester is the fourth most diverse county in terms of percentage of Blacks and Hispanics in its population, tied with New York county (Manhattan).

83. Regarding the source-of-income issue, the County argued that HUD could not condition disbursement of 2011 CPD Funds upon an assurance from the 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." This is simply not required for approving the County's FY 2011 certification that it

will AFFH. In fact, this requirement is arbitrary and capricious, and contrary to federal law. *See* 5 U.S.C. § 706(2).

84. 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. This is another example of HUD 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.

85. Second, HUD's actions are also 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 with the jurisdiction's duly established authority, and (2) not in violation of any Federal law.

86. 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.

87. Lastly, there are many states and municipalities across the country that do not have source-of-income legislation, but nevertheless receive CPD Funds. On information and belief, 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."). As such, HUD's actions in this regard are arbitrary and capricious.

88. On April 16, 2013, HUD rejected the County's arguments and denied the County a hearing. Thus, the County has fully complied with all procedural requirements of HUD, including appeal to Secretary Donovan, and no further right of review or appeal or other remedy is available to the County before HUD. Accordingly, HUD's April 16, 2013 determination was a final agency action.

COUNT I – Injunctive Relief

89. Plaintiff hereby realleges and incorporate by reference all of the foregoing paragraphs and further alleges as follows:

90. 5 U.S.C. § 705 authorizes this court to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

91. If an injunction does not issue enjoining Defendants from reallocating the County's 2011 CPD Funds, Plaintiff will be irreparably harmed.

92. According to HUD, the 2011 CPD Funds are federal appropriations that are time-limited, and will expire on September 30, 2013 if they are not reallocated. As such, HUD informed the County that, absent “substantive assurance that the County will comply with its civil rights obligations” by April 25, 2013, HUD will begin the process of reallocating Westchester County’s entitlement CPD Funds to other eligible jurisdictions, whereupon the Funds will no longer be available for administration by the County.

93. Plaintiff has no plain, speedy, and adequate remedy at law.

94. Accordingly, injunctive relief pending a resolution of this action is appropriate.

COUNT II – Administrative Procedures Act

95. Plaintiff hereby realleges and incorporate by reference all of the foregoing paragraphs and further alleges as follows:

96. Plaintiff has met all the statutory requirements for HUD to approve its AFFH certification.

97. The County has conducted a thorough analysis to identify impediments to fair housing choice within the County, identified appropriate actions to overcome the effects of any impediments identified through that analysis, and maintains records reflecting the analysis and actions in this regard.

98. Upon information and belief, HUD has not rejected any other entitlement grant applicant with a similarly-detailed zoning analysis, or a similarly-detailed AI generally.

99. In fact, many applicants have been approved to receive their entitlement grants with far less effort and analysis.

100. Also upon information and belief, HUD has never demanded another entitlement grant applicant to satisfy such far-reaching and exhaustively-time-consuming corrective action to approve its AI.

101. Accordingly, the April 16, 2013 decision was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law and must be set aside under the Administrative Procedure Act, 5 U.S.C. § 706.

COUNT III – Administrative Procedures Act

102. Plaintiff hereby realleges and incorporate by reference all of the foregoing paragraphs and further alleges as follows:

103. The April 16, 2013 decision was based on HUD's interpretation of, and allegation of non-compliance with, the Settlement. The Settlement was entered into to resolve allegations of past non-compliance with the CPD Program. HUD has never asserted that the County's use of the 2011 CPD Funds would be improper. Thus, HUD's April 16, 2013 determination was not based on the appropriate implementing statutes and regulations. Instead, HUD impermissibly conditioned the receipt of 2011 CPD Funds upon resolution of issues relating to the Settlement, *i.e.*, allegations of past non-compliance.

104. A hearing before an administrative law judge was a condition precedent to HUD's conditioning of the County's receipt of CPD Funds on the County's compliance with disputes arising out of the Settlement. *See* 42 U.S.C. § 5311.

105. Accordingly, the April 16, 2013 decision was arbitrary, capricious, an abuse of discretion, and otherwise contrary to law and must be set aside under the Administrative Procedure Act, 5 U.S.C. § 706.

COUNT IV - 42 U.S.C. § 12711

106. Plaintiff hereby realleges and incorporate by reference all of the foregoing paragraphs and further alleges as follows:

107. Defendants have conditioned 2011 CPD Funds upon the County's adoption of source-of-income legislation.

108. The absence of source-of-income legislation does not violate federal law.

109. Therefore, Defendants' decision to condition 2011 CPD Funds on the County's enactment of source-of-income legislation violates 42 U.S.C. § 12711.

COUNT V - Due Process Clause of the Fifth Amendment

110. Plaintiff hereby realleges and incorporate by reference all of the foregoing paragraphs and further alleges as follows:

111. The CPD Program is an entitlement grant program. Plaintiff is considered an entitlement community and, therefore, is entitled to CPD Funds pursuant to federal law. Thus, Plaintiff has a protected property interest in the 2011 CPD Funds.

112. Defendants' rejection of Plaintiff's AI and AFFH certification, and its determination to reallocate the 2011 CPD Funds, without an opportunity for a hearing, denied Plaintiffs due process of law under the Fifth Amendment to the United States Constitution.

COUNT VI - Equal Protection Under the Fifth Amendment

113. Plaintiff hereby realleges and incorporate by reference all of the foregoing paragraphs and further alleges as follows:

114. The County has conducted a thorough analysis to identify impediments to fair housing choice within the County, identified appropriate actions to overcome the effects of any impediments identified through that analysis, and maintains records reflecting the analysis and actions in this regard.

115. Upon information and belief, HUD has not rejected any other entitlement grant applicant with a similarly-detailed zoning analysis, or a similarly-detailed AI generally.

116. In fact, many applicants have been approved to receive their entitlement grants with far less effort and analysis.

117. Also upon information and belief, HUD has never demanded another entitlement grant applicant to satisfy such far-reaching and exhaustively-time-consuming corrective action to approve its AI.

118. Accordingly, Defendants have treated Plaintiff different than similarly situated CPD Fund recipients. Defendants treatment has occurred without a rational basis, and is irrational and wholly arbitrary.

119. Under these circumstances, Defendants' rejection of Plaintiff's AI and AFFH certification, and its determination to reallocate the 2011 CPD Funds, has denied Plaintiffs equal protection under the laws in violation of the Fifth Amendment to the United States Constitution.

WHEREFORE, the County respectfully requests that the Court:

1. Enjoin the reallocation and expiration of the County's 2011 CPD Funds, pending the ultimate judgment in this action;
2. Declare that the Defendants' rejection of the County's AI and AFFH certification violates the Administrative Procedure Act;
3. Declare that the Defendants' rejection of the County's AI and AFFH certification violates 42 U.S.C. § 12711;
4. Declare that the Defendants' rejection of the County's AI and AFFH certification violates the Fifth Amendment to the United States Constitution;
5. Order Defendants to approve the Consortium's Fiscal Year 2011 Action Plan.

Dated: White Plains, New York
April 24, 2013


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