ANTI-DISCRIMINATION CENTER, INC.

"ONE COMMUNITY, NO EXCLUSION "

June 5, 2014

VIA EMAIL

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919 Third Avenue
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Re: U.S. ex rel. Anti-Discrimination Center v. Westchester County (06-CV-2860)

Dear Jim:

I write in further response to your letter of May 29th. The methodology you set forth in an attachment to your May 27th letter to the parties does not adequately address either the ways that the restrictive zoning of most Westchester municipalities imposes a disparate impact on African-Americans and Latinos, or the ways that the restrictive zoning perpetuates segregation in those municipalities. I incorporate herein the critiques set out in Cheating On Every Level and in my letters to you dated May 6th and May 30th. This letter is intended to provide brief supplementation to those critiques.

1. Note that most cases are not limited to the *Huntington* circumstance of comparing one area of a town to other areas of that same town. Disparate impact and perpetuation of segregation can occur, of course, when there is one (or a few) parts of a town effectively open to African-Americans, whereas other parts remain closed. (A good example would be where a municipality keeps ultra-white residential zones closed to multiple-family housing, while opening the door to such housing in commercial and business zones. The ultra-white, traditionally residential parts of the municipality will predictably remain ultra-white.) But there are many other ways that both disparate impact analysis and perpetuation of segregation analysis looks beyond the borders of a municipality. *See, e.g., U.S. v. Incorporated Village of Island Park;*[1] *Dews v. Town of Sunnyvale, Tex.;*[2] *MHANY Management, Inc. v. Incorporated Village of Garden City.*[3]

[1] 888 F.Supp. 419 (E.D.N.Y. 1995).

[2] 109 F.Supp.2d 536 (N.D. Tex. 2000).

[3] ___ F.Supp.2d ___, 2013 WL 6334107 (E.D.N.Y. 2013).

2. There need to be separate comparisons performed as between African-Americans and White, non-Latinos in the first instance and as between Latinos and White non-Latinos in the second. While both African-Americans and Latinos experience segregation in Westchester County, their housing patterns are different, and collapsing the two groups artificially understates the segregation of each of the two groups. Where available, data on African-American, non-Latinos should be used to eliminate the problem of double counting (that is, a person who is counted both as an American-American and a Latino).

3. A regional analysis is necessary, and New York City cannot be excluded from the region. Reiterating a point made before, the only reason to exclude New York City (which is part of the housing market and part of the area to which consent decree housing must be marketed) would be to artificially understate both disparate impact and perpetuation of segregation. For example, the more than 120,000 African-American households with household income of from $50,000 to $74,999 living in New York City[4] are part of the market that would be able to afford affordable housing in the Westchester towns and villages where restrictive zoning currently prevents such affordable housing units from being developed.

4. A perpetuation of segregation claim exists independent of and in addition to a standard disparate impact claim. As noted in *Arlington Heights*, the first kind of discriminatory effect involves something facially neutral that "has a greater adverse impact on one racial group than on another."[5] But there is another as well: "The second is the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act *independently of the extent to which it produces a disparate effect on different racial groups*."[6]

This is extraordinarily important. First and foremost, it obliges you to compare the following:

> the racial and national origin composition of those living in the relevant housing market who would be eligible to reside in housing that would be facilitated by a removal of restrictions
>
> WITH
>
> the existing racial and national origin demographics of the municipality in question (20 of which in Westchester have African-American populations of 2 percent or less).

Where the likely makeup of the new housing would differ materially from the existing municipal demographics, the failure to take action to facilitate the construction of such housing perpetuates

[4] American Community Survey 5-year data (2008-2012).

[5] *Metropolitan Housing Development Corp. v. Village of Arlington Heights,* 588 F.2d 1283, 1290 (7th Cir. 1977).

[6] *Id.* (emphasis added).

segregation.[7] That would be true even if the *same* percentage of whites and African-Americans were being excluded by the cost barrier imposed by the status quo (because the percentage of African-Americans eligible for the housing would still be materially higher than the current African-American population of the Westchester municipalities in question).

It would still be true in respect to towns and villages where there *isn't* an appreciable difference between the percentage of African-Americans in zones where multiple dwelling housing is permitted and those zones where it is not permitted. The question is the prospective impact of the removal of a cost barrier *today*.[8]

5. There are a variety of ways to show disparate impact. Separate and apart from perpetuation of segregation, there is not a single formula by which disparate impact must be shown. *See Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly* ("no single test controls in measuring disparate impact"; violation can be shown by proof of disparate impact measured in some "plausible way").[9]

These include but are not limited to:

(a) disparities in the percentages of different groups that can afford market-rate housing in the jurisdiction being examined;

(b) disparities in the percentages of different groups excluded by the cost barrier imposed by current zoning;

(c) disparities in the percentages of different groups that would become eligible to live in a jurisdiction were a barrier lifted (just as a barrier can weigh more heavily on a particular group, the removal of a barrier can provide more relief to that group); and

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[7] It is not entirely clear from pages 42 to 43 of your September 2013 report what your definition of materiality is. *Huntington,* of course, did not establish a minimum variance, and you correctly point out that the court in *Dews* found that an approximately two-to-one ratio between the percentage of black and white very low to moderate income households was probative of disparate impact. A smaller effect can also be actionable. *Cf.* the 80-percent rule in the Title VII context.

[8] I should also note that the lack of a difference in African-American population between the two types of zones could be a function of a variety of factors, including, by way of illustration only, an inhibition effect against moving where one is clearly not wanted. There is no reason to suppose that the inhibition effect -- in force through both decades of intentional discrimination and a subsequent period, lasting to the present, where resistance to integration continues to be expressed -- wouldn't be present in connection multiple dwelling housing. In other words, the fact that a difference in population percentage between zones is one indicia of a violation does not mean that the absence of difference is dispositive evidence of the lack of a violation.

[9] 658 F.2d 375 (3rd Cir. 2011).

(d) disparities in the percentages of different groups' utilization of multiple dwelling housing.

An impact could exist when comparing groups within a municipality, within the county, or within the regional housing market.

6. The redevelopment possibilities of single-family zones should not be ignored. You have been willing to look at the redevelopment that might emerge from allowing multiple dwelling housing in commercial and business districts (*see, e.g.,* Mamaroneck). There is much more redevelopment that would emerge from allowing multiple dwelling housing (not huge towers, as suggested by the county executive's flyers, but housing of 3+ units) in single-family and two-family residential districts. Without looking at more dense redevelopment in the context of these restrictive residential zones, it is impossible to appreciate the extent to which current rules pose a barrier to affordable housing choice with desegregation potential.

7. ADC and its demographic expert remain available to consult on specifics. This has been a standing offer since 2009, but I take the opportunity to reiterate it once more.

* * *

A perpetuation of segregation analysis, as well as a disparate impact analysis, so long as they are not constrained by the political desire to avoid identifying "too many" violations, will show Fair Housing Act violations in the overwhelming number of consent decree jurisdictions. This is why a powerful and appropriate enforcement tool for Westchester to have used to help fulfill its paragraph 7(j) obligations would have been (and would still be) the bringing of such claims against the relevant municipalities.

But I would be remiss if I did not point out again that even those barriers that do not rise to the level of actionable disparate impact nevertheless must be confronted. This is so in view of the obligations of paragraph 7(j) and paragraph 32 (*i.e., all* barriers must be addressed).

Berenson and *County of Monroe* are available causes of action not only in conjunction with a Fair Housing Act claim, but also when a Fair Housing Act claim is not available. Barriers to fair housing choice of the type that your housing experts have already identified are contrary to the County's interests (as those interests were made explicit in the decree), and would be actionable by the County under *County of Monroe* (independent of your *Berenson* analysis).

In connection with all these types of claims, Westchester should have been, and must still be, ordered to acquire interests, direct or indirect, in parcels that would have desegregation potential if they were to be rezoned. That would have, and would still, set the stage for the referenced litigation where a municipality will not heed the call to rezone.

Very truly yours,

Craig Gurian

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