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September 26, 2014

BY E-MAIL AND FIRST CLASS MAIL

The Honorable Helen R. Kanovsky
General Counsel
United States Department of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

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

Dear Ms. Kanovsky:

I write in response to a letter received September 24, 2014 from Glenda L. Fussá, Deputy Regional Counsel for New York and New Jersey, United States Department of Housing and Urban Development (“HUD”). *See* Letter from Glenda L. Fussá to James E. Johnson (the “Letter”), Sept. 24, 2014, attached hereto as Ex. 1.

On May 27, 2014, I agreed to conduct a zoning analysis applying the legal standard set forth in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) at the request of the Chairman of the Westchester County Board of Legislators (“Chairman”) and the HUD Regional Administrator. That request was part of an attempt by the Chairman and the Regional Administrator to resolve the dispute between the County and HUD concerning the adequacy of the County’s Analysis of Impediments (“AI”). *See* Settlement and Order of Stipulation and Dismissal ¶ 32, Aug. 10, 2009, ECF No. 320. Applying a methodology approved by the Chairman and HUD, and engaging the County, municipalities, and HUD in a thoroughgoing fact-finding process, the Monitor completed the first step of the analysis on September 8, 2014, issuing the *Huntington* Analysis of Westchester County Municipal Zoning (“*Huntington* Report”) to the parties along with a request that any party “offer views as to why it should be amended” by September 24, 2014. *See* Letter from James E. Johnson to Robert P. Astorino, Michael B. Kaplowitz, Holly M. Leicht, and David J. Kennedy, Sept. 8, 2014, attached hereto as Ex. 2. The Letter from Ms. Fussá followed.

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The Letter from Ms. Fussá highlights several perceived errors in the *Huntington* Report and requests that portions of it be withdrawn. In the five years of the Monitorship, this is the first time HUD has made the extraordinary request that information or analysis be withdrawn. At this stage of the process, it would not be appropriate to do so.

The Monitor and his team have carefully reviewed the criticisms detailed in the Letter. After due consideration, however, the Monitor considers the criticisms to be inadequately supported. The Letter appears to stem from a misapprehension of the analysis undertaken in the *Huntington* Report. It also contains factual errors and makes a number of inaccurate assumptions.

At times, the Letter appears to misunderstand the purpose of the Report or its import. Ms. Fussá demands that the *Huntington* Report “not receive any deference or [be] given claim preclusive effect in other cases.” Ex. 1, at 10. In so doing, the Letter seeks to create an issue where there is none. The Monitor has repeatedly acknowledged that he cannot bind the parties and has not undertaken to do so. The cover letter to the *Huntington* Report clearly states that the analysis is “not binding on the parties,” and the Report itself declares it is “not the final step in the analysis.” See Ex. 2; *Huntington* Report, at 7. In a matter that is as subject to controversy as this one, there are difficult issues aplenty. There is no need for more to be invented.

Although a more fulsome response to each of the comments in the Letter - should one be necessary - will be left for a later date, two of the Letter’s most fundamental errors are described below:

1. The Analysis Is Consistent. The Letter faults the Monitor for being “inconsistent” in applying the *Huntington* framework to the data, alleging that the *Huntington* Report “reaches different conclusions based upon similar data.” Ex. 1, at 8. The Letter claims that the *Huntington* Report is “contradictory” because it found *prima facie* evidence of disparate impact in Lewisboro, where single-family homes constituted 93.7% of the housing supply, but not Scarsdale, where 94.5% of housing units are single-family dwellings. *Id.* The Letter misreads the Monitor’s analysis. The Letter may take issue with the lack of multifamily housing in Scarsdale, but *Huntington* demands a deeper analysis to parse whether Scarsdale’s zoning is the cause. Consistent with the methodology and *Huntington*, the Monitor analyzed whether each municipality’s zoning code was restricting the development of housing types more frequently used by minority residents. The Letter asserts that Lewisboro and Scarsdale were “similarly situated” and had “nearly identical facts.” *Id.* This assertion is, plainly and demonstrably, wrong. The municipalities’ zoning codes differed in crucial respects. Where Scarsdale zoned seven of

its districts for multifamily housing development as-of-right, Lewisboro zoned just one district for such housing. In addition, Scarsdale allowed two-family housing as-of-right in five districts compared with Lewisboro's two. On the affordable housing front, Scarsdale has adopted most of the provisions of the model zoning ordinance, while Lewisboro has adopted none.

2. Regional Data Was Used Throughout The Report. The Letter accuses the Monitor of defying the approved methodology—which calls for a “regional analysis”—and comparing municipal data to County data “only twice” in the entire report. Ex. 1, at 6. Once more, this criticism betrays a fundamental misunderstanding of the *Huntington* Report. Contrary to the Letter's assertion, the Monitor's disparate impact analysis *for each municipality* was predicated on a comparison between municipal and County data. In other words, the Monitor's team followed the analysis 31 times, not just twice. The Monitor relied exclusively on County data to find that minority residents more frequently use multifamily, affordable, and rental housing, and then compared this data to “each municipality's zoning ordinance . . . to identify whether restrictions are placed on the development of such housing types.” *Huntington* Report, at 22.

The flaws in the Letter raise concerns that the Letter does not reflect the considered judgment of the senior legal team of HUD. Furthermore, it is doubtful that the Department of Justice (“DOJ”) had a meaningful opportunity to review the Letter. These apparent process errors matter. The Monitor, at some stage, will file a report with the Court. The Court typically relies upon the DOJ to provide the Court with the benefit of its independent judgment about the legal interests of the United States. There are sound reasons for that: it increases the likelihood that the Federal Government's position is thoroughly reasoned and vetted; and it ensures that, for the benefit of the public, the position is clear. Such clarity is vital, particularly in circumstances like this one where the stakes are high both for Westchester communities needing federal assistance and families seeking an expansion of housing opportunities in the County.

My request is simple: that the Federal Government adopt a considered, unified voice before submitting further comments for my consideration given that they may form the basis of a future court filing.

The *Huntington* Report identified six communities as to which there was *prima facie* evidence of exclusionary zoning. Three of them have already met with the Monitor to explain their zoning and address related issues. We have already begun gathering facts necessary to undertake the next step in the *Huntington* analysis, which is to decide whether there are legitimate governmental justifications for the effect on minority

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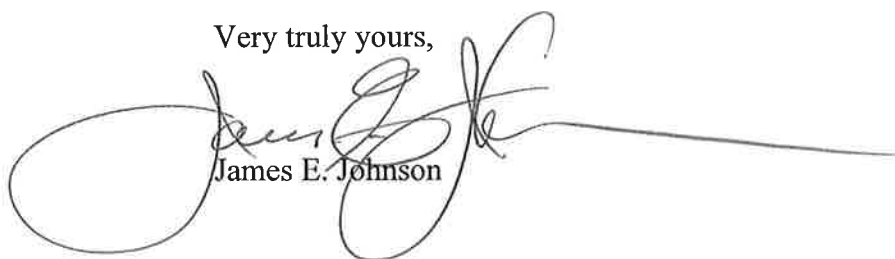
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residents. Given the Letter, I cannot ask these communities to continue their efforts until there is a clear signal from the Federal Government.

I note that the Chairman has asked for additional time for municipalities to submit comments. *See* Letter from Michael B. Kaplowitz to James E. Johnson, Sept. 24, 2014, attached hereto as Ex. 3. Even before I received the Letter, that request seemed sensible. I would hope to receive a response vetted by appropriate officials at HUD and the DOJ by October 15, 2014. I will set a timetable for municipal responses after receiving the Federal Government's response.

Very truly yours,



James E. Johnson

cc: The Honorable Denise L. Cote, U.S. District Judge (S.D.N.Y.)
The Honorable Robert P. Astorino, County Executive
Kevin J. Plunkett, Deputy County Executive
Robert F. Meehan, County Attorney
Mary J. Mahon, Special Assistant to the County Executive
The Honorable Michael B. Kaplowitz, Chairman, County Board of Legislators
Holly M. Leicht, Regional Administrator, HUD
Glenda L. Fussá, Esq., Deputy Regional Counsel, HUD
The Honorable Preet Bharara, United States Attorney (S.D.N.Y.)
David J. Kennedy, Assistant United States Attorney (S.D.N.Y.)
Benjamin J. Torrance, Assistant United States Attorney (S.D.N.Y.)
Lara K. Eshkenazi, Assistant United States Attorney (S.D.N.Y.)