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## **I. Executive Summary**

This report is being issued to evaluate the response of Westchester County (“the County”) to the Monitor’s information requests concerning municipal zoning in the County. In a series of information requests, and pursuant to the U.S. District Court’s July 27, 2012 Order compelling the County to respond, the Monitor directed the County to conduct an analysis of certain restrictive zoning practices in the 31 communities eligible under the Settlement and Order of Stipulation and Dismissal (“Settlement”) entered in this case on August 10, 2009; to specify a strategy to overcome exclusionary zoning practices, where they exist; and to identify the types of zoning practices that would, if not remedied, require the County to pursue legal action.

The County reached the conclusion that there is no evidence of exclusionary zoning in any of the 31 eligible communities in Westchester County and based its conclusion on its analysis of approximately 780 pages of maps, tables and other data concerning municipal zoning. The U.S. Department of Housing and Urban Development (“HUD”) has reviewed the County’s submissions on zoning to determine whether in light of the County’s analysis of impediments (“AI”) submissions, the County has fulfilled its duty, pursuant to paragraph 32<sup>1</sup> of the Settlement, to submit a satisfactory AI that, among other things, evaluated the exclusionary impact of zoning regulations under federal and state law.

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<sup>1</sup> Unless indicated otherwise, all paragraph citations refer to the Settlement.

Under the Settlement, the AI is to include a review of local zoning codes for each of the 31 municipalities where Affordable AFFH Units may be located under paragraph 7 of the Settlement and an assessment as to whether elements of these zoning codes could pose impediments to fair housing. Settlement, Para. 32. HUD concluded that the County did not meet this requirement and rejected the AI a fifth time.

Rather than take either party's conclusions at face value, the Monitor engaged experts from the Pratt Graduate Center for Planning and the Environment, a team comprised of John Shapiro, Brian Kintish and Alix Fellman (the "Housing Consultants"), to review the County's conclusions and data. This report, representing the fruits of this review, incorporates the Housing Consultants' findings on each of the 31 eligible communities. Ex. 1, Report on Zoning by Municipality in Westchester County, New York Subject to the Settlement, prepared by the Housing Consultants ("Housing Consultant Report"), dated July 31, 2013.<sup>2</sup> See also Ex. 2, Summary Charts of Zoning Data for *Berenson* Analysis.

In conducting this review, the Monitor reviewed the County's data, directed the Housing Consultants to prepare reports on each municipality's zoning regulations and distributed the draft findings to each of the eligible municipalities. Each municipality had an opportunity to correct, comment on or explain the proposed findings. The Monitor explained that each municipality was free to elect whether to respond and asked that

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<sup>2</sup> Unless indicated otherwise, all exhibits delineated by the numbers 1 through 14 are exhibits to this report. Exhibits delineated by the letters A through Q are exhibits to the Housing Consultant Report.

responses be made by April 18, 2013. *See, e.g.*, Ex. A, Letter from James E. Johnson to Paul Rosenberg, Mayor of Rye Brook, dated March 21, 2013. The last response to be considered in connection with this report arrived on July 23, 2013. Ex. H, Town of Ossining Response Letter, dated July 23, 2013.

The Monitor does not have the authority to compel municipalities to respond to any request for information, documents, or interviews. The accuracy of the findings hinge on the thoroughness of the responses received. In total, 23 of the 31 eligible municipalities responded to the Monitor's information request.<sup>3</sup> *See* Ex. H, Municipal Response Letters as of July 24, 2013. The County has also provided its observations on the Housing Consultants' preliminary findings. *See* Ex. 3, Letter from Edward Buroughs to James E. Johnson, dated April 17, 2013. All of these municipal response letters (regardless of when they were received) and the County's letter were reviewed, considered, and incorporated during the process of revising the Housing Consultants' preliminary findings. Several municipal leaders communicated their views directly to the Monitor either in small or large group meetings.

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<sup>3</sup> The following municipalities provided information that is reflected in the Report: Village of Ardsley; Town of Bedford; Village of Bronxville; Village of Buchanan; Town of Cortlandt; Village of Croton-on-Hudson; Village of Hastings-on-Hudson; Village of Irvington; Village of Larchmont; Town of Lewisboro; Town of Mamaroneck; Town of Mount Pleasant; Town of New Castle; Town of North Castle; Town of North Salem; Town of Ossining; Village of Pelham; Village of Pelham Manor; Village of Rye Brook; Village of Scarsdale; Town of Somers; Village of Tarrytown; Village of Tuckahoe. *See* Ex. H, Municipal Response Letters as of July 24, 2013.

On July 23, 2013, the County submitted a new partial analysis of impediments (the “Eighth Zoning Submission”) that focused upon 10 of the 31 eligible municipalities, indicating that further analysis would be done of the remaining 21 municipalities should HUD find the methodology sufficient. Ex. I, Letter from Edward Buroughs to Vincent Hom (“Eighth Zoning Submission”), dated July 23, 2013. This most recent zoning submission provides a more comprehensive analysis than the County’s prior submissions and should narrow the area of dispute between the parties and aid in reaching an agreement. *Id.* This Eighth Zoning Submission was also incorporated into the Monitor’s analysis and the findings of the Housing Consultants’ reports.

After analyzing the data in conjunction with the relevant state and federal law, as well as the feedback received from the eligible municipalities and the County, the Monitor has concluded that the zoning regulations of 24 out of 31 municipalities are not exclusionary. In fact, four municipalities have zoning codes that are commendable in terms of their efforts to provide meaningful opportunities for affordable housing.

The zoning codes of the remaining seven municipalities, however, require more searching analysis. The County’s conclusion that exclusionary zoning does not exist in Westchester County is contradicted by the County’s own submitted data concerning these seven municipalities. As set forth below, the zoning codes for these seven municipalities have several restrictive practices in common that make affordable housing development impractical within their jurisdictions, including:

1. *Restrictions on Multifamily Housing.* Each of the seven municipalities typically has little or no land zoned for as-of-right

multifamily housing development, the touchstone for much of the case law on exclusionary zoning. *See, e.g.*, Ex. 1, Housing Consultant Report on the Town of Ossining, at 6 (Zero acres); *id.* at Housing Consultant Report of the Town and Village on Harrison, at 6 (0.3% of total acreage zoned); *id.* at Housing Consultant Report on the Town of Lewisboro, at 7 (0.8% of total acreage zoned). Where such zones do exist, they are largely built out and have significant restrictions on density that would limit the economic feasibility of developing affordable housing. *See, e.g.*, *id.* at Housing Consultant Report on the Village of Croton-on-Hudson, at 5 (1.9% of land zoned for multifamily as-of-right development but all such land is currently developed); *id.* at Housing Consultant Report of the Village of Pelham Manor, at 5 (2.8% of land zoned for multifamily as-of-right development but all such land is currently developed).

2. *Lack of Incentives and Mandates for Affordable Housing.* Only one of the seven municipalities has adopted the provisions of the County's model zoning ordinance, including mandatory set-asides for new multifamily development and incentives for affordable housing development, such as density bonuses, expedited review, and relief from other zoning restrictions. *See, e.g., id.* at Housing Consultant Report on the Town and Village on Harrison, at 2; *id.* at Housing Consultant Report on the Village of Pelham Manor, at 2.<sup>4</sup>
3. *Restrictions on Alternative Sources of Affordable Housing.* The municipalities generally do not allow for, or significantly restrict, accessory apartments, mixed-use development, and other potential sources of affordable housing.<sup>5</sup>

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<sup>4</sup> The only exception is the Town of Pound Ridge, which recently adopted the model ordinance provisions in May 2013. Ex. 1, Housing Consultant Report on the Town of Pound Ridge, at 2. For the other six municipalities with exclusionary zoning practices, however, where such incentives or mandates were available, there is little or no available land zoned for as-of-right multifamily housing development, limiting the usefulness of incentives and mandates. *See, e.g.*, Ex. 1, Housing Consultant Report on the Town of Ossining, at 5; *id.* at Housing Consultant Report on the Village of Croton-on-Hudson, at 5.

<sup>5</sup> The Town of Mamaroneck allows accessory buildings or trailers for domestic employees in single-family zoning districts. Ex. 1, Housing Consultant Report on the Town of Mamaroneck, at 3. Accessory housing units are not permitted as-of-right. *Id.* Similarly, the Town of Ossining allows accessory apartments only by

4. *Lack of Progress in Meeting Regional Need.* Four of the seven municipalities have not built or approved any affordable housing since 2000. The other three municipalities, the village of Croton on Hudson, the Town of Mamaroneck and the Town of Ossining, have built or approved 17, 10 and 5 units respectively. *Id.* at Housing Consultant Report on the Village of Croton-on-Hudson, at 7; *id.* at Housing Consultant Report on the Town of Mamaroneck, at 8; *id.* at Housing Consultant Report on the Town of Ossining, at 8. As a result, these municipalities have not significantly contributed to efforts to address the regional need.

In sum, these seven municipalities have zoning codes that do not provide meaningful opportunities for affordable housing and, when viewed in light of applicable state and federal law, are exclusionary.

The County has a duty under the Settlement to engage with municipalities whose zoning regimes pose impediments to fair housing—a requirement that is distinct from its duty to build at least 750 units of affordable AFFH housing. Sixth Whereas Clause of Settlement; *see also* Settlement, Para. 7(j). This engagement may encompass a variety of tools, from technical assistance, through litigation as set forth in Paragraph 7(j) of the Settlement. The County may use this report in the following ways: to identify exclusionary zoning; to recognize useful models of solutions through the examples of municipalities whose zoning codes have made strides towards providing for affordable housing in their communities; and to evaluate its own analysis of municipal zoning. Most importantly, the County is required to provide a plan for each of the seven

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special permit in districts that allow single-family homes, in locations where fewer than three accessory units are located within a 500-foot radius. Ex. 1, Housing Consultant Report on the Town of Ossining, at 2.



identified municipalities to remove the identified barriers to affordable housing or explain why these barriers are not, in fact, barriers.

## **II. Requirements under the Settlement to Analyze and Address Exclusionary Zoning**

The County's duty to conduct a zoning analysis arises from its duty under paragraph 32 of the Settlement to conduct an analysis of impediments to fair housing choice ("AI"). An AI is a written document required of all grantees of Community Development Block Grants ("CDBG") and other federal funds administered by HUD. *See* 24 C.F.R. § 570.601(a)(2). The AI provides evidence of the grantee's fulfillment of its obligation to identify impediments to fair housing choice and take actions to overcome those impediments. *Id.* In the litigation that led to the Settlement between Westchester County and HUD, the Court found that the County's previous AIs were deficient because they failed to analyze race-based impediments. *See United States ex rel. Anti-Discrimination Ctr. of Metro. New York, Inc. v. Westchester County, New York*, 668 F. Supp. 2d 548, 565 (S.D.N.Y. 2009). Because the legal insufficiency of the County's AI was the centerpiece of the original litigation, the AI was made a key term in the resulting Settlement.

Paragraph 32 provides that within 120 days of the signing of the Settlement, the County was to "complete . . . an AI . . . that complies with the guidance in HUD's Fair Housing Planning Guide" and that is "deemed acceptable by HUD." The Fair Housing Planning Guide specifically discusses the necessity of conducting a review of local zoning codes as part of an acceptable AI, due to the potential for certain provisions of a

zoning code to serve as impediments to fair housing. *See* Ex. 4, HUD, Fair Housing Planning Guide, at Section 5-6 through 5-8 (1996).

In addition to incorporating HUD guidelines in its AI, paragraph 32 provides that the County must:

- (a) commit to collecting data and undertaking other actions necessary to facilitate the implementation of this Stipulation and Order; and
- (b) identify and analyze, *inter alia*:
  - (i) the impediments to fair housing within its jurisdiction, including impediments based on race or municipal resistance to the development of affordable housing;
  - (ii) the appropriate actions the County will take to address and overcome the effects of those impediments; and
  - (iii) the potential need for mobility counseling, and the steps the County will take to provide such counseling as needed.

In relation to its discussion on zoning and site selection, The Fair Housing Planning Guide states:

Clarification of the distinction between AFFH actions and affordable housing activities is often necessary. The two concepts are not equivalent but they are also not entirely separate. When a jurisdiction undertakes to build or rehabilitate housing for low- and moderate-income families, for example, this action is not in and of itself sufficient to affirmatively further fair housing. It may be providing an extremely useful service by increasing the supply of decent, safe, and sanitary affordable housing. Providing adequate housing and improving existing

neighborhoods are vital functions and should always be encouraged.

Additionally, the provision of affordable housing is often important to minority families and to persons with disabilities because they are disproportionately represented among those that would benefit from low-cost housing. When steps are taken to assure that the housing is fully available to all residents of the community, regardless of race, color, national origin, gender, handicap, or familial status, those are the actions that affirmatively further fair housing.

*Id.* at 5-4. The Planning Guide further states that recipients of HUD funding should consider the following questions, among others, concerning local zoning:

- Are there concentrations of low- and moderate-income housing in one or more localities or neighborhoods within the jurisdiction's geographic area?
- Are current zoning and other policies and procedures promoting this pattern or exerting a neutral effect on the existence of such concentrations?
- What is the impact of the jurisdiction's zoning ordinance(s), building codes, and other land use or fiscal policies on the provision of lower-income housing?
- If there is vacant or other land that can be developed within the jurisdiction's geographic area, do zoning regulations permit medium- and high-density residential development for such land, or only low-density housing (and accompanying high cost)?
- Do requirements for minimum street frontage, front yard setbacks, side yard dimensions, or amenities (e.g., landscaping or air conditioning), or for offsite improvements such as restrictions on the level of density that is possible for new housing development limit affordability to higher-income households?
- Should zoning, occupancy or building ordinances, or codes or regulations be changed to provide for more inclusive development

of housing for lower-income people and families, including persons with disabilities?

- Should the jurisdiction adopt incentives to promote mixed-income housing development, such as increasing the number of new units that can be built in a given development in exchange for dedication of a certain percent of the units for low and moderate-income households?

*Id.* at 5-6 to 5-8. Under the Settlement, therefore, the County must analyze zoning restrictions on moderate- and low-income housing development and their relationship to providing inclusive patterns of housing.

### **III. The AI Dispute between HUD and Westchester County**

More than three years have passed since the deadline for completing an acceptable AI, and the parties remain at an impasse, centering on the issue of zoning. HUD had rejected the fifth AI because the County Executive had failed to promote Source of Income legislation. After litigation that included the County's unsuccessful appeal to the Second Circuit Court of Appeals, *see* United States Court of Appeals for the Second Circuit's Decision, No. 12-2047, filed April 5, 2013 (ECF No. 122-1), that dispute was resolved finally with the passage of the Source of Income legislation and the County Executive signing it into law.

The County first brought the AI issue to the Monitor in July of 2011, pursuant to paragraph 14 of the Settlement, which gives the Monitor "authority to resolve disputes between the County and the Government." *See* Ex. 5, Letter from Kevin J. Plunkett to James E. Johnson, dated July 20, 2011. The County requested findings on issues largely related to the propriety of the rejection of the AI by HUD, which was grounded in the

County Executive's veto of Source of Income legislation and HUD's view that he County's zoning analysis was inadequate. The Monitor found that the County's request would require the Monitor to assert powers not granted to him by the Settlement and therefore he declined to do so. *See* Monitor's Report and Recommendation Regarding Dispute Resolution, filed Nov. 17, 2011, at 1-2 (ECF No. 384). The Monitor's finding on that score was later affirmed by Magistrate Judge Gabriel W. Gorenstein on March 16, 2012, who stated that the Settlement vests the authority to determine the adequacy of the AI "exclusively in HUD." *See* Magistrate Judge Gabriel W. Gorenstein's Opinion and Order, filed Mar. 16, 2012, at 17-18 (ECF No. 396). The County did not appeal Judge Gorenstein's ruling.

The Monitor did, however, offer guidance on the matter of zoning. In his November 17, 2011 Report, the Monitor recommended that the County analyze the impact of certain restrictive zoning practices and set a deadline of February 29, 2012 for the County to submit a revised AI to HUD. Monitor's Report and Recommendation Regarding Dispute Resolution, filed Nov. 17, 2011, at 13 (ECF No. 384). Specifically, the Monitor recommended that the County "at a minimum, assess the impact of each of the following zoning practices or explain why the analysis of the listed practices . . . would not be helpful to understanding the impact of the zoning ordinances taken as a whole:

- 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.

*See id.* at 13-14. The Monitor also recommended that the County: (1) “specify a strategy to overcome exclusionary zoning practices” and (2) “identify the types of [municipal] zoning practices that would, if not remedied by the municipality, require the County to pursue legal action.” *See id.* at 11-18.

The County submitted its objections to the Monitor’s Dispute Resolution Report to Magistrate Judge Gabriel W. Gorenstein on December 7, 2011, disputing, among other things, the Monitor’s zoning recommendations. *See County’s Objections to Monitor’s Report & Recommendation*, filed Dec. 7, 2011, at 14-15 (ECF No. 386). On March 16, 2012, Judge Gorenstein overruled the County’s objections regarding zoning, finding, among other things, that the Monitor’s requirement for a strategy to overcome exclusionary zoning was an information request properly tailored to the Settlement. *See Magistrate Judge Gabriel W. Gorenstein’s Opinion and Order*, filed March 16, 2012, at 17-18 (ECF No. 396). The County did not appeal this issue further.

#### **IV. Monitor's Information Requests Concerning Zoning**

The County provided its response to the Monitor's Report and Recommendation in a letter dated February 29, 2012. *See* Ex. F, County Response to Monitor's Report, dated February 29, 2012 ("First Zoning Submission"). The Monitor subsequently concluded that, for two reasons, the County's response did not adequately address the information request: first, the County's submission failed to apply the state and federal law described above to the data it had compiled; and second, the County failed to state a clear strategy to overcome any municipal exclusionary zoning practices. *See* Ex. 6, Letter from James E. Johnson to Robert P. Astorino, at 3-4, dated May 14, 2012.

In a letter dated May 14, 2012, (1) the Monitor provided the legal principles stated above, (2) encouraged the County to seek technical assistance from HUD, and (3) asked that the County provide a revised zoning submission to be completed by July 9, 2012. In a letter dated July 6, 2012 ("Second Zoning Submission"), excerpt attached hereto as Exhibit 7, the County provided its response to the Monitor's May 14, 2012 information requests.

The Monitor found the County's Second Zoning Submission to be deficient, and accordingly supported a request by the U.S. Government ("Government") for judicial intervention to establish a new procedure pursuant to which the County would respond to the Monitor's information requests. In a written declaration filed with the Court, the Monitor detailed a pattern of responses that were tardy and incomplete. *See* Declaration of James E. Johnson, filed in support of the Government's Motion to Compel

Westchester County to Comply with the Court-Appointed Monitor's Requests for Information and Procedures for Future Requests, filed July 20, 2012 (ECF No. 413).

On July 27, 2012, the Court granted the Government's motion to compel, and ordered the County to comply with the Monitor's May 14, 2012 information requests. *See Order*, filed July 27, 2012 at 2-3 (ECF No. 414). Specifically, the Court ordered the County to provide information concerning each municipality's progress in constructing affordable housing, the percentage of developable land in each municipality that is zoned for building multi-family housing as-of-right in each municipality, and the racial and ethnic composition of individual zoning districts. *Id.* In consultation with the Monitor and HUD, the County was also ordered to develop and implement a methodology for analyzing municipal zoning ordinances. *Id.* at 2.

The Monitor's team, including planning experts from the Pratt Institute, met with County and HUD representatives on August 1, 2012 and again on August 7, 2012 to reach consensus on a methodology for analyzing zoning. The methodology was developed through a process whereby personnel from both the County Planning Department and HUD had the opportunity to comment on drafts, in an effort to ensure that the analysis would be practically feasible and likely to produce meaningful results. The final draft of the methodology called for Geographic Information Sciences analysis to characterize the amount of "as-of-right" multi-family development potential within each eligible individual municipality, given the current zoning structure in that municipality. *See Ex. 8, Methodology for Considering the Cost and Geographic Implications of the Six Questioned Zoning Practices.* The zoning methodology was



designed to produce data in the form of maps and charts that, when combined with County data from earlier information requests, would provide insight into the effect of the six questioned zoning practices on the availability of multifamily housing in the 31 eligible municipalities.

Citing the foregoing methodology as a basis for its work, the County completed its analysis (“Third Zoning Submission”) and provided it to the Monitor on September 6, 2012. *See* Ex. E, Letter from County Department of Planning to James E. Johnson, dated September 6, 2012. The parties met again on September 18, 2012 to discuss the results of the County’s analysis. Following that meeting, the County supplemented its submission on November 20, 2012 (“Fourth Zoning Submission”), excerpt attached hereto as Exhibit 9. Additional submissions followed.

Most recently, the County submitted its Eighth Zoning submission, by way of letter dated July 23, 2013. *See* Ex. I, Eighth Zoning Submission, dated July 23, 2013. This submission contained analyses of impediments of the zoning ordinances of 10 of the 31 municipalities and indicated that the County would do the same review of the remaining 21 municipalities should HUD find the submission sufficient. *Id.* The County’s new submission is more comprehensive than what it has submitted in the past and may, in fact, go a great distance in narrowing the dispute between the parties.

## **V. Exclusionary Zoning under State and Federal Law**

The County's submissions must be evaluated in light of guidance provided by both New York state and federal courts, considered along with the relevant provisions of HUD's Fair Housing Planning Guide.

Exclusionary zoning can exclude potential residents based on either their socioeconomic status or their membership in a protected class. *See cf.* 42 U.S.C. §§ 3604, 3605 (banning discrimination because of “race, color, religion, sex, familial status, or national origin” in connection with the sale and rental of housing); *see also Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121, 133 (1988) (“Exclusionary Zoning . . . is a form of racial or socioeconomic discrimination which we have repeatedly condemned.”). The analysis of both proceeds on separate, but related, tracks.

### **A. Socioeconomic Exclusion**

Zoning ordinances are enacted pursuant to the states' police powers and are afforded a presumption of constitutionality so long as they are not “arbitrary and unreasonable” and are substantially related to the public health, safety, morals, or general welfare. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 107 (1975); *Cont'l Bldg. Co. v. Town of N. Salem*, 211 A.D.2d 88, 91 (N.Y. App. Div. 3d Dep't 1995). Determining the validity of a municipal zoning ordinance is a fact-specific analysis dependent upon the circumstances present in each municipality. *Berenson*, 38 N.Y.2d at 107, 111. Zoning is generally deemed exclusionary when the ordinance was enacted for an improper purpose or the ordinance was enacted “without giving proper regard to local

and regional housing needs,” which has an exclusionary effect. *Cont’l Bldg. Co.*, 211 A.D.2d at 92.

Exclusionary zoning based on socioeconomic status has the practical effect of “exclud[ing] persons of low or moderate income from the zoning municipality.” *Cont’l Bldg. Co.*, 211 A.D.2d at 95 (quoting 1 ANDERSON, NEW YORK ZONING LAW AND PRACTICE § 8:02, at 360 [3d ed]). Notably, this principle does not mean that each zoning district in a municipality must contain all income levels or all housing types. *Id.* at 91-92. Rather, under the *Berenson* doctrine, the municipality’s zoning ordinance is examined as a whole to determine whether it fosters “a balanced and integrated community.” *Berenson*, 38 N.Y.2d at 109; *Cont’l Bldg. Co.*, 211 A.D.2d at 92. This analysis consists of two prongs, for which the burden of proof beyond a reasonable doubt that the municipality has failed to satisfy either prong is placed on the party challenging the zoning ordinance.<sup>6</sup>

First, the municipality must “provide[] a properly balanced and well-ordered plan for the community.” *Berenson*, 38 N.Y.2d at 110. The plan need not be written, but rather may be evinced through “all available and relevant evidence of the municipality’s land use policies.” *Asian Ams. for Equality*, 72 N.Y.2d at 131. The adequacy of municipal plans is examined by: (1) identifying the types of housing in each municipality; (2) specifying both quantity and quality of the available housing;

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<sup>6</sup> The County, however, has additional recourse to challenge a municipality’s exclusionary zoning provisions under the *Monroe County* doctrine, which carries a potentially less onerous burden of proof. See *infra* Section V.B.

(3) determining whether the housing meets the current local need for affordable housing; and (4) determining whether and what type of new construction is necessary to fulfill future needs in each municipality. *See Berenson*, 38 N.Y.2d at 110. Instances where municipalities have extremely low amounts of acreage zoned for multifamily development as-of-right and the zoning ordinances directly and/or subtly discourage affordable or multi-family housing under pretextual purposes fail to satisfy this prong. *See Cont'l Bldg. Co.*, 211 A.D.2d at 92-93.

Second, municipalities must consider, weigh and balance both local and regional housing needs, due to the ripple effects zoning may have on areas outside a municipality's boundaries. *Berenson*, 38 N.Y.2d at 110 ("There must be a balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional needs be met."); *Triglia v. Town of Cortlandt*, No. 17976/96, 1998 WL 35394393, at \*4 (N.Y. Sup. Ct. Westchester Cnty. Jan. 6, 1998). Under this prong, a party challenging a municipal zoning ordinance must first demonstrate that there is an identifiable regional need for affordable housing. Westchester County has not submitted evidence of regional need. The only available assessment is a study, commissioned by the County in 2005. The study was conducted by the Center for Urban Policy Research of Rutgers University (CUPR), which estimated that Westchester municipalities must collectively build 10,768 new affordable housing units by 2015 to meet the County's growing regional need for affordable housing. *See Westchester County Affordable Housing Needs Assessment*, Rutgers University Center for Urban Policy Research, at 67 (2004) (available at

[http://homes.westchestergov.com/images/stories/pdfs/HOUSING\\_RutgersReport033004.pdf](http://homes.westchestergov.com/images/stories/pdfs/HOUSING_RutgersReport033004.pdf) (last accessed July 13, 2013). The Westchester Housing Opportunity Commission (“HOC”), a body commissioned by the County, has issued recommendations that allocate a share of the regional affordable housing needs to each municipality. *See* HOC, *Affordable Housing Allocation Plan 2000-2015* (2005) (available at [http://homes.westchestergov.com/images/stories/pdfs/HOUSING\\_HOCAllocation05.pdf](http://homes.westchestergov.com/images/stories/pdfs/HOUSING_HOCAllocation05.pdf)) (last accessed July 31, 2013).<sup>7</sup> This allocation plan has been cited by the County in many of its AI submissions, the County relies on it in distributing funds from the County’s Legacy Program, and it is the only needs assessment that has been prepared to date. *See, e.g.,* Ex. D, Westchester County, Analysis of Impediments to Fair Housing Choice (updated April 2013), p. 59-60. *See also* Ex. 10, Letter from James E. Johnson to Robert P. Astorino, dated June 12, 2013. Accordingly, this analysis goes forward with the best, indeed, only available relevant evidence.

Once the regional need is established, the next step in the analysis requires addressing the question whether, on its face, the zoning ordinance fails to allow for “the construction of sufficient housing to meet the [municipality’s] share of the region’s housing needs.” *Blitz v. Town of New Castle*, 94 A.D.2d 92, 99 (N.Y. App. Div. 2d Dep’t 1983). Municipalities commonly facilitate this by identifying, through zoning, areas of a

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<sup>7</sup> The 10,768 unit figure cited by the HOC’s 2005 Allocation Plan is distinct and separate from the County’s obligation to build at least 750 affordable AFFH units under paragraph 7 of the Settlement. Although the figure is relevant to the “regional needs” prong of the *Berenson* analysis, it is cited neither to supplant nor expand the County’s obligations under paragraph 7 of the Settlement.

municipality where multifamily housing may be built as-of-right. *See Cont'l Bldg. Co.*, 211 A.D.2d at 93 (“[M]ultifamily housing, given the nature of its construction and function as a whole, is one of the most affordable types of housing.”).<sup>8</sup> Indeed, municipal zoning ordinances that fail to provide a provision for multifamily housing as-of-right or significantly reduce or limit such housing are facially exclusionary. *Id.* at 94; *Land Master Montg I, LLC*, 821 N.Y.S.2d at 439; *Triglia*, No. 17976/96, 1998 WL 35394393, at \*6.

Since a zoning ordinance merely determines “what *may* or *may not be built*” as opposed to deciding “what will actually be built, in the absence of government subsidies,” the question is not simply whether the zoning ordinance provides for the legal possibility of multifamily housing. *Blitz*, 94 A.D.2d at 99 (emphasis in original). Rather, the analysis must address the question of whether it is both “*physically and economically feasible*” that affordable housing could be built under the present zoning regime. *See id.* (emphasis in original); *Cont'l Bldg. Co.*, 211 A.D.2d at 94 (citation and quotation omitted). For example, in 1995, the Third Department of the Appellate Division found

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<sup>8</sup> While “multi-family housing does not necessarily equal affordable housing . . . multi-family housing has historically been recognized as a barometer in assessing exclusionary zoning claims.” *Land Master Montg I, LLC v. Town of Montgomery*, 821 N.Y.S.2d 432, 439 (N.Y. Sup. Ct. Orange Cnty. 2006) (citing *Berenson and Cont'l Bldg. Co.*, *supra*), *aff'd* 863 N.Y.S.2d 692 (N.Y. App. Div. 2d Dep’t 2008), *appeal dismissed*, 11 N.Y.3d 864. Note that only allowing multifamily housing by permit, “which commit[s] multi-family and affordable housing to the total discretion of Town officials” does not overcome the exclusionary nature of a zoning code that does not provide for multi-family housing construction as-of-right. *See id.* at 440; *see also* Ex. F, First Zoning Submission, at 4, 8, dated February 29, 2012 (discussing as-of-right, special use, and uses subject to site plan review in certain municipalities).

compelling the fact that 98 percent of the total area in the Town of North Salem was designated for residential development on minimum-sized lots ranging from one-half acre to four acres, yet only 0.33 percent of this land was designated for multifamily development as-of-right. *Cont'l Bldg. Co.*, 211 A.D.2d at 92-93.

If a municipality's zoning ordinance is exclusionary under either or both prongs of the *Berenson* test, there must be a showing that the zoning practices are, in actuality, not exclusionary. *Robert E. Kurzius, Inc. v. Incorporated Vil. of Upper Brookville*, 51 N.Y.2d 338, 345 (N.Y. 1980); *Allen v. Town of N. Hempstead*, 103 A.D.2d 144, 147 (N.Y. App. Div. 2d Dep't 1984). Some examples of zoning provisions that may rebut an initial finding that zoning is exclusionary include incentives such as density bonuses for multifamily or affordable units recognized in *Continental. Cont'l Bldg. Co.*, 211 A.D.2d at 94. These incentives must be carefully crafted with a keen eye to the cost-benefit analysis so as to favor and induce a developer to provide these desired affordable housing developments. *Asian Ams. For Equality*, 72 N.Y.2d at 129. Other incentives that may contribute to affordable housing development include the relaxation of minimum height, bulk and setback requirements, and allowances for shared parking so as to reduce infrastructure costs. See Ex. B, Westchester County Implementation Plan, Appendix D-1(i): Model Ordinance Provisions. A zoning ordinance may even provide for a mandated percentage of affordable units in new residential developments. See *id.*

Although incentives or provisions allowing accessory apartments or multifamily housing development may suggest that a zoning ordinance is not exclusionary, these provisions must not be "intrinsically narrow in scope [such that they] do very little to

genuinely address the established need for multifamily housing.” *Cont’l Bldg. Co.*, 211 A.D.2d at 94; *Land Master Montg I, LLC*, 821 N.Y.S.2d at 440 (citation omitted). For example, limitations on multifamily or accessory apartment development in the form of age restrictions, durational residency requirements or preferences for current municipal residents are “empty” provisions that fail to rebut a finding of exclusionary zoning. See *Cont’l Bldg. Co.*, 211 A.D.2d at 94; *Allen*, 103 A.D.2d at 148; *Triglia*, No. 17976/96, 1998 WL 35394393, at \*6. Similarly, zoning ordinances that provide a wide array of affordable housing opportunities via special permits “create[] the illusion of affordable housing availability,” but vest a large amount of discretion in municipal officials and are therefore insufficient. *Land Master Montg I, LLC*, 821 N.Y.S.2d at 440.

In the 1995 *Continental* decision, the Town of North Salem’s zoning ordinance was challenged as exclusionary. *Cont’l Bldg. Co.*, 211 A.D.2d at 94. The Town argued that several factors weighed against a finding that it was exclusionary: the Town provided for 129 multifamily housing units as-of-right; included provisions in its zoning code for density bonuses, accessory apartments, multifamily housing units for the elderly and handicapped; and it provided the opportunity to develop multifamily housing in two planned development districts. *Id.* Nevertheless, the court held that the Town did too little to genuinely address the established need for multifamily housing as evidenced by the lack of acreage available for multifamily development. *Id.*



**B. Municipal Exclusionary Zoning that Impedes the County's Efforts to Provide for Affordable Housing**

Under the Settlement, the County is required to take steps to ensure that eligible municipalities do not impede its efforts to address the need for affordable housing. *See* Settlement, Sixth Whereas Clause, at p. 2. *See also* Settlement, Para. 7(j). These steps may take several forms, including: (a) offering technical assistance; (b) enforcing the County's Discretionary Funding policy; and (c) taking legal action. *See* Settlement, Para. 7(j). Indeed, Judge Gorenstein made clear that the County has a duty to identify the circumstances under which it would take legal action to overcome municipal resistance. *See* Magistrate Judge Gabriel W. Gorenstein's Opinion and Order, filed March 16, 2012, at 17 (ECF No. 396). *See, e.g., In re Monroe County*, 72 N.Y.2d 338, 340-43 (1988) (discussing a county's cause of action for challenging exclusionary zoning ordinances where they impede that county's ability to meet its relevant objectives, holding that where there is no clear legislative intent to preempt local authority, courts must apply a balancing test to see which of the competing public interests should prevail).

For each of the seven municipalities identified as having exclusionary zoning, the County is directed to identify the steps it will take to ensure that the municipalities make provision for affordable housing, including, but not limited to, modification of certain zoning regulations, and providing incentives or subsidies for the construction or development of affordable housing within those municipalities. It bears noting that this form of information request has already been validated by Judge Gorenstein.

### C. Racial or Ethnic Exclusion

Zoning is also exclusionary when it has a discriminatory effect by adversely impacting a particular minority group or by perpetuating segregation. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988) (citation omitted), *review declined in part and judgment aff'd.*, 488 U.S. 15 (1988); *United States ex rel. Anti-Discrimination Ctr. of Metro. New York, Inc. v. Westchester County, New York* (“*Anti-Discrimination Ctr. I*”), 495 F. Supp. 2d 376, 387 (S.D.N.Y. 2007) (“[The Fair Housing Act] bans practices that are motivated by a racially discriminatory purpose as well as those that ‘disproportionately affect minorities.’”) (quoting *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1100 (2d Cir.1988)). In *Huntington*, the court found that the Town of Huntington’s zoning ordinance restricted multifamily housing to a section of the town that was already largely minority, and would have the effect of perpetuating segregation in the town. *Huntington*, 844 F.2d at 937-38. In reversing the lower court’s decision, the Second Circuit held that the lower court had failed to consider the segregative effect of maintaining a zoning ordinance that restricts private multifamily housing to an area with a high minority concentration. *Id.* The court also held that the town’s refusal to rezone for an affordable housing development had a disparate impact because a disproportionate number of black families in the town needed subsidized housing. *Id.* at 938.

Once there has been a showing that an exclusionary zoning provision establishes a discriminatory effect, the burden shifts and requires a showing that “[a] legally sufficient justification exists where the challenged practice: (i) is necessary to achieve one or more

substantial, legitimate, nondiscriminatory interests” of the local jurisdiction and “(ii) [t]hose interests could not be served by another practice that has a less discriminatory effect.” 24 C.F.R. § 100.500(b) (2013).

In the context of the AI, Judge Cote has noted that race is an essential consideration in any analysis of impediments the County conducts as part of its CDBG certification requirement. In the decision denying the County’s motion to dismiss in this case, Judge Cote stated that impediments include “[p]olicies, practices, or procedures that appear neutral on their face” and that a grantee of CDBG funding “must consider impediments erected by race discrimination” as part of its AFFH obligation. *Anti-Discrimination Ctr. I*, 495 F. Supp. 2d at 387 (quoting HUD guidelines). The Court concluded that “[i]n the face of the clear legislative purpose of the Fair Housing Act . . . an interpretation of ‘affirmatively further fair housing’ that excludes consideration of race would be an absurd result.” *Id.* at 387-88.

#### **D. County and HUD Statements on Legal Principles**

In response to an information request, both HUD and the County set forth their positions on the legal principles concerning exclusionary zoning. *See* Ex. 11, Letter from Glenda L. Fussá to James E. Johnson, dated May 17, 2013; Ex. 12, Letter from Robert F. Meehan to James E. Johnson, dated May 17, 2013; Ex. 13, Letter from Glenda L. Fussá to Kevin J. Plunkett, dated April 20, 2012. Based on their letters, the parties generally agree with characterizations of the legal principles stated above and that there are two bases under which a zoning provision must be analyzed: (1) the *Berenson* line of cases

under New York state law; and (2) the *Huntington* line of cases under federal law. *See* Ex. 11, Letter from Glenda L. Fussá to James E. Johnson, dated May 17, 2013; Ex. 12, Letter from Robert F. Meehan to James E. Johnson, dated May 17, 2013; Ex. 13, Letter from Glenda L. Fussá to Kevin J. Plunkett, dated April 20, 2012.

The County, however, raises three objections to HUD’s characterization of the law on exclusionary zoning: (1) that “HUD is attempting to graft certain aspects of the *Berenson* line of cases on the analysis under federal law, specifically the ‘regional needs’ aspect of that decision;” (2) that the County “completely ignores and distorts the specific qualification set forth in *Berenson*; and (3) that “previous AIs were not found to be deficient in its analysis of the need for ‘affordable housing.’” Ex. 12, Letter from Robert F. Meehan to James E. Johnson, at 2, dated May 17, 2013. On the first point, it is not clear how the County believes HUD is conflating federal and state case law. Both in its letters of April 20, 2012 and May 17, 2013, HUD discusses state and federal case law separately and correctly states the federal standard under *Huntington*, without reference to state law. *See* Ex. 11, Letter from Glenda L. Fussá to James E. Johnson, at 1-2, dated May 17, 2013; Ex. 13, Letter from Glenda L. Fussá to Kevin J. Plunkett, at 3-4, dated April 20, 2012. The County is correct that “regional needs,” as that concept is understood under *Berenson*, is not directly relevant to the analysis under federal law; zoning restrictions that limit affordable housing are relevant, however, under federal law to the extent minorities are disproportionately affected by such limitations. *See Huntington*, 844 F.2d at 938; Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11469-70 (2013) (“[T]he perpetuation of segregation

theory of liability has been utilized by private developers and others to challenge practices that frustrated affordable housing development in nearly all-white communities and thus has aided attempts to promote integration.).

The County also states that HUD ignored an important qualification to the second prong of the *Berenson* test, which states that “in enacting a zoning ordinance, consideration must be given to regional needs and requirements” for affordable housing. *Berenson*, 38 N.Y.2d at 110. The County asserts that “under the second prong of the *Berenson* test, municipalities may consider housing opportunities that are being supplied by all neighboring communities in Westchester, whether such communities are characterized as ‘eligible’ or ‘ineligible’ under the Settlement Agreement, as well as the housing which is being supplied by all communities within the region, whether within or outside the boundaries of Westchester County.” Ex. 12, Letter from Robert F. Meehan to James E. Johnson, at 2, dated May 17, 2013 (citing April 18, 2013 Letter from Kevin J. Plunkett, at 3).

To the extent that the County is implying that a municipality’s zoning ordinance is, as a matter of law, not exclusionary so long as some other community in the region provides for affordable housing in its zoning code, the County misstates the law. As the County correctly notes, the *Berenson* court states, “So long as the regional and local needs for [multifamily housing] were supplied by either the local community *or by other accessible areas in the community at large*, it cannot be said, as a matter of law, that such an ordinance had no substantial relation to the public health, safety, morals or general welfare.” *Id.* (quoting *Berenson*, 38 N.Y.2d at 111 (emphasis added)). The *Berenson*

Court explains further by way of example: “if New Castle’s neighbors supply enough multiple-dwelling units or land to build such units to satisfy New Castle’s need as well as their own, there would be no obligation on New Castle’s part to provide more, assuming there is no overriding regional need.” *Berenson*, 38 N.Y.2d at 111. The County’s asserted qualification, therefore, is useful only insofar as: (1) regional need is fully met; and (2) the other community is both “accessible” (a factual inquiry, related to the transportation needs of the residents) and has fully met its own community’s need for affordable housing.

The County has not asserted that regional need for affordable housing in Westchester has been met. Indeed, there is no basis for such an assertion. As discussed above, the most recent study to assess such need estimated the outstanding regional need for affordable housing in Westchester County at 10,768 units. *See Westchester County Affordable Housing Needs Assessment, supra* at 18-19. The County has objected to the use of this study, yet has relied on it in its submissions to HUD and in its communications to municipalities. *See, e.g.,* Ex. D, Westchester County, Analysis of Impediments to Fair Housing Choice (updated April 2013), p. 59-60. *See also* Ex. 10, Letter from James E. Johnson to Robert P. Astorino, dated June 12, 2013. *Berenson* requires evidence of need and the County’s objection, even if it were credible, is not evidence.

As a practical matter, a municipality that seeks to rely on housing opportunities in another community, and thereby does not consider opportunities for affordable housing in its own community, may run afoul of the Fair Housing Act if its zoning code serves to perpetuate segregative housing patterns. *Huntington*, 844 F.2d at 937 (2d Cir. 1988). For

example, even if a municipality that provides no opportunities for affordable housing within its borders, but neighbors an integrated community, the municipality's zoning code might still violate the Fair Housing Act if its zoning code served to perpetuate segregated housing patterns within the Westchester County region. Its reliance on the availability of affordable housing in the other community would fail.

Finally, the County argues that because the Court in this case did not find its "previous AIs to be deficient in its analysis of the need for 'affordable' housing," that its then current analysis is sufficient in regards to exclusionary zoning on the basis of income. Ex. 12, Letter from Robert F. Meehan to James E. Johnson, at 2, dated May 17, 2013. In support of this proposition, the County states, "the County's argument that that type of analysis was sufficient, which was the basis of those prior AIs, was rejected by the District Court on the basis that the County did not show 'that it analyzed whether there were race-based impediments to housing choice *independent of the problem of low income*, and as such, it did not comply with the requirement to AFFH.'" *Id.* (quoting *United States ex rel Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 668 F. Supp. 2d at 565 (emphasis added)). The County mistakes the Court's rejection of the County's AI that failed to explicitly consider race-based impediments as a tacit endorsement of the sufficiency of the County's analysis of income-based impediments. The Court made no such findings.

## **VI. Housing Consultants' Analysis**

The Monitor's housing consultants—a team of experts led by John Shapiro, Chairperson of Pratt's Graduate Center for Planning and the Environment—reviewed the County's first four zoning submissions, which included approximately 780 pages of tables, maps, and other data, and conducted its own research to assess the zoning practices in each of the 31 eligible municipalities.

Under the Monitor's supervision, the team has compiled and analyzed information concerning the following aspects of each municipality's zoning ordinances: (1) the effect of the six restrictive zoning practices on the development of affordable housing in the Monitor's Report and Recommendation Regarding Dispute Resolution, filed Nov. 17, 2011, at 13 (ECF No. 384), *see supra* Section III; (2) incentives and mandates to include affordable housing units in new development; (3) the amount of developable land zoned for multifamily housing as-of-right; (4) the cost of building multifamily housing; (5) the number of units that could be produced based on existing zoning restrictions; (6) the percentage of minority population in particular zoning districts; (7) adoption of the model zoning ordinance; and (8) progress in meeting the best available assessment of regional need, the benchmark set forth in the Westchester County Housing Opportunity Commission's Affordable Housing Allocation Plan of 2005.<sup>9</sup>

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<sup>9</sup> The HOC's 2005 Allocation Plan is distinct and separate from the County's obligation to build at least 750 affordable AFFH units under paragraph 7 of the Settlement. Although the figure is relevant to the "regional needs" prong of the *Berenson* analysis, it is cited neither to supplant nor expand the County's obligations under paragraph 7 and of the Settlement.



In March of 2013, the Housing Consultants completed their preliminary findings on each of the municipal zoning codes for the 31 eligible municipalities. In an effort to provide municipalities with an opportunity to provide feedback on the reports, including additional data and corrections, the Monitor provided the reports to the 31 eligible

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As described by the HOC, the “County Planning Board’s basic policy document (‘Patterns [for] Westchester’) recognizes that all of the County’s municipalities need ‘guidance, including recommended allocations, to assist (them) in meeting a share of the need for affordable housing.’ Building on its more than a decade of experience, the Commission undertook the study of an allocation plan for the period 2000-2015 based on the five sub-regions delineated in ‘Patterns’.” HOC’s 2005 Affordable Housing Allocation Plan, at 1; Westchester County Planning Board, *Patterns for Westchester*, at 53 (1996) (available at: <http://planning.westchestergov.com/publications>). The Allocation Plan allocates affordable housing responsibilities to each of the County’s 43 municipalities by means of a formula which gives equal weight to five factors:

1. The land area of the municipality after deducting 13 categories of undevelopable land, including the aggregate area of interior water bodies, New York City-owned watershed lands, dedicated park lands and cemeteries;
2. Growth in employment within the municipality during the previous decade;
3. That portion of the aggregate 1989 household income of the municipality that exceeds the amount resulting from multiplying the total number of households by 80% of the median income in the County;
4. The number of overcrowded units (occupied by more than one person per room) in the municipality; and
5. Availability of public transportation.

*Id.* at 3-4. The HOC considered, but found it impossible to quantify, the impact of the New York City Watershed Agreement on land that is developable, but constrained by watershed restrictions. *Id.* at 4. The HOC recommended that the County Planning Department consider such claims on a case-by-case basis, and relieve municipalities of their obligations accordingly. *Id.* The HOC also calculated sub-regional allocations, anticipating that municipalities within sub-regions could negotiate their allocations with each other, implicitly acknowledging the County’s qualification discussed above on the second prong of *Berenson*. *Id.* A more detailed description of the HOC’s methodology is available in the HOC 2005 Allocation Plan itself.

municipalities, requesting that they respond, voluntarily, with any comments, corrections or questions by April 18, 2013. *See, e.g.*, Ex. A, Letter from James E. Johnson to Paul Rosenberg, Mayor of Rye Brook, dated March 21, 2013. Although the information requests were voluntary, 23 of 31 eligible municipalities responded with corrections, additional data, and insight into the practical realities of building affordable housing in their communities. *See* Ex. H, Municipal Response Letters. The Monitor continued to receive these municipal response letters through as late as July 23, 2013. Ex H, Town of Ossining Response Letter, dated July 23, 2013. The Monitor also heard from municipal leaders in small group and larger meetings. The additional data from the municipalities were reviewed and incorporated into each municipality's zoning report. The County has also provided its observations on Housing Consultants' preliminary findings. *See* Ex. 3, Letter from Edward Buroughs to James E. Johnson, dated April 17, 2013.

In an effort to provide full transparency, the Housing Consultants' findings on the 31 eligible municipalities and the source data used will be posted on the Monitor's website (available at: <http://www.westchesterhousingmonitor.org/zoning>). *See* Ex. 1, Housing Consultant Report, dated July 31, 2013. *See also* Ex. 2, Summary Charts of Zoning Data for *Berenson* Analysis.

## **VII. Review of the County's Zoning Submissions**

As stated in the case law cited in Section III, a municipality's zoning ordinance may be deemed exclusionary because it excludes persons based on socioeconomic status or based on race or ethnicity. Under state law, the municipality's zoning ordinance must

provide for the municipality's local need; and the municipality's fair share of unmet regional need of affordable housing. Under federal law, the zoning provisions must not have disparate impact on a protected class, regardless of intent. Evidence of each type of exclusion is reviewed separately below.

**A. Socioeconomic Exclusion**

Under the *Berenson* doctrine, municipalities must consider both local and regional housing needs and weigh both sets of needs to be addressed by the municipality as a whole. *Berenson*, 38 N.Y.2d at 110. Where regional need for affordable housing is unmet, as it is in Westchester County, the question is not simply whether the zoning ordinance provides for the legal possibility of multifamily housing. Rather, the analysis must address the question whether it is both “physically and economically feasible” that affordable housing could be built under the present zoning regime. *See Cont'l Bldg. Co.*, 211 A.D.2d at 94 (citation and quotation omitted).

The Housing Consultants' analysis led to the conclusion that seven of the municipalities had zoning ordinances that limited affordable housing or made the development of affordable housing practically infeasible. Applying the two-prong *Berenson* analysis, such zoning is legally deficient if as whole the municipality's zoning ordinance fails either (1) to “provide[] a properly balanced and well-ordered plan for the community,” *Berenson*, 38 N.Y.2d at 110; or (2) to consider, weigh and balance both local and regional housing needs, *id.*; and (3) there is insufficient evidence that, in practice, its zoning is not exclusionary, *see Robert E. Kurzius, Inc. v. Incorporated Vil. of*

*Upper Brookville*, 51 N.Y.2d 338, 345 (N.Y. 1980); *Allen v. Town of N. Hempstead*, 103 A.D.2d 144, 147 (N.Y. App. Div. 2d Dep’t 1984). Should a municipality fail to meet either prong one or two of the *Berenson* analysis and no other factors indicate a strong case for rebuttal, the municipality is deemed to have exclusionary zoning based on socioeconomic status.

The charts in Exhibit 2 summarize the application of each prong of the analysis to each of the municipalities. The findings can be grouped into three broad categories:

1. Municipalities whose zoning ordinances meet prong one and prong two of the *Berenson* analysis and are therefore not exclusionary;
2. Municipalities whose zoning ordinances do not necessarily meet either prong of the *Berenson* analysis, but certain other factors provide a rebuttal to the presumption that their ordinances are exclusionary; and
3. Municipalities whose zoning ordinances fail either prong one or two of the *Berenson* analysis and where there are insufficient factors to provide for a viable rebuttal against a finding of exclusionary zoning.

The distribution of municipalities into the three categories are as follows:

<b><u>Category 1</u></b>	<b><u>Category 2</u></b>	<b><u>Category 3</u></b>
Hastings-on-Hudson	Ardsley	Croton-on-Hudson
North Salem	Bedford	Harrison
Tarrytown	Bronxville	Lewisboro
Yorktown	Buchanan	Mamaroneck
	Cortlandt	Ossining
	Dobbs Ferry	Pelham Manor
	Eastchester	Pound Ridge
	Irvington	
	Mount Pleasant	
	New Castle	
	North Castle	

Pelham  
Pleasantville  
Scarsdale  
Somers  
Rye  
Rye Brook  
Tuckahoe  
Briarcliff Manor  
Larchmont

The third category provides the strongest evidence that exclusionary zoning on the basis of socioeconomic status exists among the eligible municipalities. Although each municipality's zoning code is different, the seven municipalities shared several common zoning impediments to developing affordable housing:

1. *Restrictions on Multifamily Housing.* Each of the seven municipalities typically has little or no land zoned for as-of-right multifamily housing development, the touchstone for much of the case law on exclusionary zoning. *See, e.g.*, Ex. 1, Housing Consultant Report on the Town of Ossining, at 6 (Zero acres); *id.* at Housing Consultant Report of the Town and Village on Harrison, at 6 (0.3% of total acreage zoned); *id.* at Housing Consultant Report on the Town of Lewisboro, at 7 (0.8% of total acreage zoned). Where such zones do exist, they are largely built-out and have significant restrictions on density that would limit the economic feasibility of developing affordable housing. *See, e.g.*, *id.* at Housing Consultant Report on the Village of Croton-on-Hudson, at 5 (1.9% of land zoned for multifamily as-of-right development, but all such land is currently developed); *id.* at Housing Consultant Report of the Village of Pelham Manor, at 5 (2.8% of land zoned for multifamily as-of-right development but all such land is currently developed).
2. *Lack of Incentives and Mandates for Affordable Housing.* Only one of the seven municipalities has adopted provisions of the County's model zoning ordinance, including mandatory set-asides for new multifamily development and incentives for affordable

housing development, such as density bonuses, expedited review, and relief from other zoning restrictions. *See, e.g., id.* at Housing Consultant Report on the Town and Village on Harrison, at 3; *id.* at Housing Consultant Report on the Village of Pelham Manor, at 2.<sup>10</sup>

3. *Restrictions on Alternative Sources of Affordable Housing.* The municipalities generally do not allow for, or significantly restrict, accessory apartments, mixed-use development, and other potential sources of affordable housing.<sup>11</sup>
4. *Lack of Progress in Meeting Regional Need.* Four of the seven municipalities have not built or approved any affordable housing since 2000. The other three municipalities, the village of Croton on Hudson, the Town of Mamaroneck and the Town of Ossining, have built or approved 17, 10 and 5 units respectively. *See id.* at Housing Consultant Report on the Village of Croton-on-Hudson, at 7; *id.* at Housing Consultant Report on the Town of Mamaroneck, at 8; *id.* at Housing Consultant Report on the Town of Ossining, at 8. As a result, these municipalities have not significantly contributed to efforts to address the regional need.

Although a confluence of factors might limit the ability for a municipality to provide for multifamily housing in its zoning code, including, as the Town of Lewisboro rightly points out, the municipality's location in the New York City Watershed, that does

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<sup>10</sup> The only exception is the Town of Pound Ridge, which recently adopted the model ordinance provisions in May 2013. Ex. 1, Housing Consultant Report on the Town of Pound Ridge, at 2. For the other six municipalities with exclusionary zoning practices, however, where such incentives or mandates were available, there is little or no available land zoned for as-of-right multifamily housing development, limiting the usefulness of incentives and mandates. *See, e.g.,* Ex. 1, Housing Consultant Report on the Town of Ossining, at 5; *id.* at Housing Consultant Report on the Village of Croton-on-Hudson, at 5.

<sup>11</sup> The Town of Mamaroneck allows accessory buildings or trailers for domestic employees in single-family zoning districts. Ex. 1, Housing Consultant Report on the Town of Mamaroneck, at 3. Accessory housing units are not permitted as-of-right. *Id.* Similarly, the Town of Ossining allows accessory apartments only by special permit in districts that allow single-family homes, in locations where fewer than three accessory units are located within a 500-foot radius. Ex. 1, Housing Consultant Report on the Town of Ossining, at 2.

not alleviate the municipality's responsibility under state or federal law to remove impediments to affordable housing posed by factors that are within its control.

For example, the Town of Yorktown, which is also located in the New York City Watershed and in the northern region of Westchester County, has an exemplary zoning code in terms of providing opportunities for affordable housing. Yorktown has only zoned 1.5 percent of its land for as-of-right multifamily development, yet there is sufficient quantity of undeveloped land in those zones to build almost 500 units of multifamily housing under the current zoning regime. Ex. 1, Housing Consultant Report on the Town of Yorktown, at 1. The Town also provides incentives and mandates that will ensure that a substantial portion of those units will be affordable, including a 10 percent mandatory set-aside for residential subdivisions and multifamily developments of 30 units or less; developments of more than 30 units would be required to set aside 15 percent as affordable. *Id.* at 3. As a result, the Town of Yorktown has made significant progress towards meeting the regional need for affordable housing. *Id.* at 8. Although Yorktown could make additional changes to its zoning code to assure further progress towards meeting regional need, Yorktown demonstrates that progress can be made despite Watershed and other physical limitations posed by municipalities located in the northern region of Westchester.

The Town of North Salem is another example of a municipality in the northern region that provides a similarly exemplary zoning code with regard to providing opportunities for affordable housing. *See generally id.* at Housing Consultant Report on the Town of North Salem.

By contrast, the Town of Lewisboro, also located within the region affected by the watershed, has approximately 0.8 percent of its total acreage zoned for as-of-right multifamily housing development. *See id.* at Housing Consultant Report on the Town of Lewisboro, at 7. Of that land, only 5.6 acres are undeveloped accounting for 0.03 percent of the Lewisboro’s total acreage, which could roughly be expected to produce 18 units of multifamily housing under the Town’s zoning regime.<sup>12</sup> *Id.* Lewisboro also restricts accessory apartments by only making them available by special permit and only to families of four people or less. *Id.* at 1. Lewisboro has not adopted the model zoning ordinance; provides no mandatory set-asides of affordable housing for new development; limits incentives for “middle income” housing to one almost completely built-out zoning district; and has failed to report development of any affordable housing since the year 2000. *Id.* at 2. The Town of Lewisboro may wish to look to the experience of other municipalities similarly challenged by watershed and related issues.

The Town of Ossining, located in the Hudson River region of the County, has another example of a zoning regime that can appropriately be described as exclusionary. Similar to the case in *Berenson*, the Town of Ossining has no land zoned for as-of-right development of multifamily housing. *See id.* at Housing Consultant Report on the Town of Ossining, at 1. Although the Town of Ossining has adopted certain provisions of the

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<sup>12</sup> This is comparable to the post-*Berenson* case *Continental Building Co.*, where in finding exclusionary zoning in the Town of North Salem, the court found that only in 0.33 percent of this land was designated for multifamily development as of right, amounting to approximately 43 acres out of the Town’s total land area of 14,000 acres. *See Cont’l Bldg. Co.*, 211 A.D.2d at 92-93.



County's model zoning ordinance, including the provision for a 10 percent set aside in new multifamily development, so long as multifamily development is only provided by special permit, the utility of this provision is significantly limited. *Id.* Accessory apartments are also not permitted. *Id.* at 2. As a result, the Town has only built or approved 5 affordable units since the year 2000, despite having an estimated share of regional housing need of over 100 units. *Id.* at 8.

This stands in stark contrast to another Hudson River community, the Village of Hastings-on-Hudson. Almost seven percent of the Village is zoned for as-of-right multifamily housing, containing undeveloped land capable of producing roughly 70 units of multifamily housing under the Village's zoning regime. *Id.* at Housing Consultant Report on Village of Hastings-on-Hudson, at 6. Hastings has also adopted provisions of the County's model ordinance, including mandatory set-asides on new multifamily development and incentives, including density bonuses and reduced parking requirements. *Id.* at 1. As a result, roughly 14 percent of the Village's residential acreage is occupied by multifamily housing and the Village has built 21 units of affordable housing since 2000, with another 17 proposed. *Id.* at 1-2.

The Village of Tarrytown is another example of a Hudson River community whose zoning code provides substantial opportunities for affordable housing development. *See generally id.* at Housing Consultant Report on the Village of Tarrytown.

In short, the County's assertion that exclusionary zoning is absent from Westchester is strongly contradicted by its own data. Seven municipalities have zoning

codes that can reasonably be characterized as exclusionary under *Berenson*. The experience of other municipalities shows that progress is achievable in even the most challenging of circumstances.

## **B. Exclusion Based on Race and Ethnicity**

While the analysis under *Berenson* concludes that several municipalities have exclusionary zoning on the basis of socioeconomic status, it does not answer the question of whether these municipalities exclude on the basis of race or ethnicity. This analysis is vital to a comprehensive conclusion as to whether a municipality's zoning ordinance is exclusionary. The data provided by the County and available online via the U.S. Census Bureau suffer from gaps and a lack of precision which hinder a thoroughgoing review of each municipality's zoning ordinances. Accordingly, the following discussion of race and ethnicity provides only an initial step in identifying whether the municipal zoning ordinances are such that they may impede integration by placing a barrier on the ability to build affordable housing. To the extent that the zoning ordinances appear to impose such a barrier, this report identifies further analytical steps in that inquiry.

Under federal law, zoning is exclusionary when it has a discriminatory effect by perpetuating segregation or by adversely impacting a particular minority group. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988) (citation omitted), *review declined in part and judgment aff'd.*, 488 U.S. 15 (1988); *Anti-Discrimination Ctr. I*, 495 F. Supp. 2d at 387 (“[The Fair Housing Act] bans practices that are motivated by a racially discriminatory purpose as well as those that

‘disproportionately affect minorities.’”) (quoting *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1100 (2d Cir.1988)); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 648 F. Supp. 2d 805, 808-09 (E.D. La. 2009); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 531, 565-69 (N.D. Tex. 2000); *Summerchase Ltd. P’ship I. v. City of Gonzales*, 970 F. Supp. 522, 528-30 (M.D. La. 1997). In *Huntington*, the court found that the zoning ordinance of the Town of Huntington, New York violated the Fair Housing Act in two ways: (1) the zoning ordinance restricted multifamily housing to a section of the town that was already largely minority, and would have the effect of perpetuating segregation in the town; and (2) the town’s refusal to rezone for an affordable housing development had a disparate impact because a disproportionately large number of African American families in the town needed subsidized housing. *Huntington*, 844 F.2d at 937-38.<sup>13</sup>

The *Huntington* line of cases does not provide a definitive threshold percentage of minority populations that must either be within a certain portion of a town or must be adversely impacted by a town’s restrictive zoning practice that would constitute exclusionary zoning based on race. *See id.* at 928-30. The cases do suggest, however, that greater percentages, such as the 52 percent of the black population within the restricted multifamily housing neighborhood that led to a finding of a segregative effect

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<sup>13</sup> The facts at issue in *Huntington* involve subsidized multifamily housing, not the affordable housing this report seeks to address. *Huntington*, 844 F.2d at 937-38. Thus, the import of *Huntington* here is not to increase subsidized housing, but rather to identify the types of housing that appear to correspond to the preferences of blacks and Hispanics in the community and whether such housing is then restricted to one or two small segments of that community.

in *Huntington*, may be sufficient to support a finding of a *Huntington* violation, though such data are not dispositive. *Id.* at 928, 937-38; *see also Greater New Orleans Fair Hous. Action Ctr.*, 648 F. Supp. 2d at 808-09 (holding that the acts preventing the proposed rental development had a disparate racial impact on African-Americans, evidenced by the expected racial breakdown for the renter population of the development of 50 percent African-American, 25 percent other minority, and 25 percent Caucasian); *Dews*, 109 F. Supp. 2d at 565-69 (holding Sunnyvale’s ban on apartments to have a disparate impact on African Americans because : (1) only 14.24 percent of the total occupied housing units in Dallas County were occupied by African Americans, versus 77.01 percent occupied by whites and others, while 24% of renter occupied units in Dallas County were occupied by blacks and 65 percent were occupied by whites; and (2) the ban limited the availability of subsidized housing, which (a) was disproportionately needed by 24 percent of black households versus 7 percent of all households; (b) 45.72 percent of black households could be described as “very low [] to moderate income [levels] with housing problems,” while only 22.86 percent of white households could be described this way; and (c) black households in 1985 constituted 38.39 percent of the total households in assisted housing in Dallas County and increased to 52 percent of those households in 1989, while the racial composition of the county was 60.4 percent white, 19.8 percent black, and 13 percent Hispanic in 1985 and 68.4 percent white, 17.8 percent black, and 11.2 percent Hispanic in 1989). *But see Summerchase Ltd. P’ship I*, 970 F. Supp. at 528-30 (granting summary judgment to defendants holding that since the eligible residents for the proposed development were 77.9 percent white, 20 percent black and 2.1

percent were of other races, there was no disparate impact on minorities). Thus, for the purposes of this analysis, the following municipalities were chosen because they crossed numerical thresholds informed by *Huntington* and its progeny.

The data, alone, will not lead inexorably to a finding that certain zoning ordinances are exclusionary based on race. For example, on first blush, the data provided for the Village of Tarrytown’s zoning practices, which as discussed above are commendable under the *Berenson* test, *see supra* Section VII.A, suggest that the ordinance may have a segregative effect. More searching analysis reveals the concerns to be unfounded. Tarrytown has one district, M-1, which has consistently been comprised of a higher percentage of minorities than the Village as a whole:

<b>Percent Minority Populations in the Village of Tarrytown</b>		
	<b>M-1 District</b>	<b>Village as a Whole</b>
<b>2000 Census</b>	<b>51%</b> (12.8% Black; 38.1% Hispanic)	<b>23%</b> (7.1% Black; 16.2% Hispanic)
<b>2010 Census</b>	<b>53%</b> (14.6% Black; 38.6% Hispanic)	<b>28%</b> (7.8% Black; 20% Hispanic)

*See* Ex. 1, Housing Consultant Report on the Village of Tarrytown, at 7. If the M-1 district was the only district, or even perhaps one of very few districts, which provided the opportunity to build multifamily housing as-of-right, these percentages would suggest a lack of integration within the Village.

Within Tarrytown, however, there are seven other districts that allow for multifamily development as-of-right that are located in different areas throughout much of the Village. *Id.* at 2. Further, the eight multifamily districts within the Village cover

18.4 percent of the Village’s total land area. *Id.* at 6. When the M-1 District is combined with these other multifamily districts, the contrasts between the proportion of minorities in districts that allow for multifamily development as-of-right and (a) those districts that do not permit multifamily development as-of-right; and (b) the Village as a whole, are not as stark:

<b>Percent Minority Populations in the Village of Tarrytown</b>			
	<b>Weighted Average of All Multifamily As-of-Right Zoning Districts</b>	<b>Weighted Average of All Non-Multifamily As-of-Right Zoning Districts</b>	<b>Village as a Whole</b>
<b>2000 Census</b>	<b>34%</b> (10.2% Black; 23.3% Hispanic)	<b>21%</b> (7.7% Black; 12.9% Hispanic)	<b>23%</b> (7.1% Black; 16.2% Hispanic)
<b>2010 Census</b>	<b>40%</b> (11.2% Black; 29.1% Hispanic)	<b>22%</b> (6.1% Black; 15.7% Hispanic)	<b>28%</b> (7.8% Black; 20% Hispanic)

*See id.* at 7. Given that there are several other zoning districts affording opportunities to build multifamily developments as-of-right and these other districts have lesser concentrations of blacks and Hispanics than the irregular M-1 District, Tarrytown’s zoning ordinance cannot be said to present a barrier to multifamily development such that it impedes racial integration within the Village.

Even if Tarrytown’s zoning practices did not afford these opportunities for multifamily development, any restriction the zoning ordinance may have would likely not have a disparate impact on minority populations. According to the five-year estimates of the 2007-2011 American Community Survey, 35.76% percent of the black and African-American population in Tarrytown’s county subdivision and likewise 35.31 percent of

the white and not Hispanic population live in multifamily housing.<sup>14</sup> *See* Units in Structure Tables, 2007-2011 American Community Survey 5-Year Estimates.<sup>15</sup> Since the zoning ordinance appears not to violate the principles of *Huntington*, further analysis should be done to better understand the factors that may be accounting for these variances in the demographic data.

The data, however, are less conclusive for other municipalities. For example, in the Town of Mount Pleasant, a *Berenson* test Category 2 municipality under the analysis described above, *see supra* Section VII.A, there are three multifamily as-of-right districts that have reportedly had disproportionately high numbers of black and Hispanic populations:

<b>Percent Minority Populations in Select Multifamily Districts in the Town of Mount Pleasant</b>			
<b>Multifamily District</b>	<b>OB2 District</b>	<b>OB5 District</b>	<b>OB6 District</b>
<b>2000 &amp; 2010 Census<sup>16</sup></b>	<b>64%</b> (50.7% Black; 1.8% Hispanic)	<b>59%</b> (47.1% Black; 11.9% Hispanic)	<b>57%</b> (44.9% Black; 11.9% Hispanic)

<sup>14</sup> Tarrytown is within the Greenburgh county subdivision used by the US Census Bureau, which is comprised of Greenburgh, Elmsford, Ardsley, Tarrytown, Irvington, Dobbs Ferry and Hasting-on-Hudson. *See* Ex. 14, Map of Westchester County, NY, Towns, Cities, Indian Reservations and Incorporated Villages, created by Cornell Program on Applied Demographics, March 2012. Thus, definitive conclusions about the Village of Tarrytown alone cannot be derived from this data.

<sup>15</sup> Based on the available data, multifamily housing is defined for this section as structures including three or more units, mobile homes, boats, RVs and vans. *See* Units in Structure Tables, 2007-2011 American Community Survey 5-Year Estimates.

<sup>16</sup> The data provided by the County, based on U.S. Census data, was the same for these districts within Mount Pleasant for both the 2000 and 2010 Census. *See* Ex. 1, Housing Consultant Report on the Town of Mount Pleasant, at 6-7. *See also* Ex. K, Racial Composition Table, Town of Mount Pleasant – 2000 & 2010 Census Data (submitted Aug. 15, 2012).

See Ex. 1, Housing Consultant Report on the Town of Mount Pleasant, at 7-8. Similar to the Village of Tarrytown, Mount Pleasant has seven other zoning districts that allow for multifamily development as-of-right—potentially enough districts to rebut suggestions of segregation in the Town that focus only on these three districts with disproportionately high minority populations. *Id.* at 2. These multifamily districts include 6.6% of the Town’s total land area, or 1,014.8 acres – a significant amount of land. *Id.* at 6. Even though the minority population within all of the districts that permit multifamily development as-of-right is higher than the minority population within the Town as a whole, the difference here is not material:

<b>Percent Minority Population in the Town of Mount Pleasant</b>			
	<b>Town as a Whole</b>	<b>Weighted Average of All Multifamily As-of-Right Zoning Districts</b>	<b>Weighted Average of All Non-Multifamily As-of-Right Zoning Districts</b>
<b>2000 &amp; 2010 Census<sup>17</sup></b>	<b>11%</b> (5.7% Black; 5.2% Hispanic)	<b>24%</b> (5.5% Black; 18% Hispanic)	<b>9%</b> (4.2% Black; 4.8% Hispanic)

*Id.* The difference between the proportion of minority populations in multifamily districts and non-multifamily districts is also not as pronounced. *Id.* In light of the softening effect the other multifamily as-of-right districts have on the racial divergence, Mount Pleasant’s zoning ordinance does not appear to create a barrier that impedes

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<sup>17</sup> The data provided by the County, based on U.S. Census data, was the same for these districts within Mount Pleasant for both the 2000 and 2010 Census. See Ex. 1, Housing Consultant Report on the Town of Mount Pleasant, at 6-7; see also Ex. K, Racial Composition Table, Town of Mount Pleasant – 2000 & 2010 Census Data (submitted Aug. 15, 2012).



integration in violation of *Huntington* and is likely not the source of the lack of integration in certain areas of the Town.

To the extent that Mount Pleasant's zoning ordinance places restrictions on affordable multifamily development, however, these restrictions could have a disproportionate effect upon minority populations. As reported in the 2007-2011 American Community Survey five-year estimates, 67.7 percent of the black or African-American population lives in multifamily housing within Mount Pleasant's county subdivision, whereas only 13.47 percent of the white, non-Hispanic population lives in multifamily housing.<sup>18</sup> See Units in Structure Tables, 2007-2011 American Community Survey 5-Year Estimates.<sup>19</sup> Under the *Berenson* line of cases, Mount Pleasant's zoning code is likely not exclusionary based on socioeconomic status, *see supra* Section VII.A, but also is not exemplary in the opportunities it provides for affordable housing development. See generally Ex. 1, Housing Consultant Report on the Town of Mount Pleasant. The Town of Mount Pleasant's zoning ordinance does not raise concerns under the first prong of *Huntington*. The data are inadequate to resolve the question of whether

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<sup>18</sup> The Town of Mount Pleasant's county subdivision used by the U.S. Census Bureau is comprised of Mount Pleasant, Pleasantville and Sleepy Hollow. See Ex. 14, Map of Westchester County, NY, Towns, Cities, Indian Reservations and Incorporated Villages, created by Cornell Program on Applied Demographics, March 2012. Thus, definitive conclusions about the Town of Mount Pleasant alone cannot be derived from this data.

<sup>19</sup> Based on the available data, multifamily housing is defined for this section as structures including three or more units, mobile homes, boats, RVs and vans. See Units in Structure Tables, 2007-2011 American Community Survey 5-Year Estimates.

Mount Pleasant's potentially restrictive zoning provisions have a disparate impact upon minorities in violation of *Huntington's* second test.

Similarly, Tuckahoe, which as noted above falls within Category 2 under the *Berenson* line of cases, *see supra* Section VII.A, has only two zoning districts that permit multifamily housing development as-of-right, currently accounting for 11 percent of the Village's total land area. *See* Ex. 1, Housing Consultant Report on the Village of Tuckahoe, at 4. Of these two districts, one district, the B/R district, consisted of a 59 percent combined black and Hispanic population in 2000 and a 55 percent combined black and Hispanic population in 2010. *See id.* at 8. These percentages are more than double the combined black and Hispanic populations of 19 percent in 2000 and 23 percent in 2010 within the Village as a whole. *See id.* This district is not the only district in which multi-family housing is permitted as-of-right. A second such district has a substantially lower percentage of blacks and Hispanics which suggests that zoning alone is not responsible for the opportunities afforded to and the resulting decisions that Tuckahoe's citizens make about where to live. Indeed, based on the data at hand, the combined black and Hispanic population within the two districts permitting multifamily development as-of-right appears to be only moderately higher than the combined black and Hispanic population within the total population of Tuckahoe:

<b>Percent Minority Population in the Village of Tuckahoe</b>			
	<b>Village as a Whole</b>	<b>Weighted Average of All Multifamily As-of-Right Zoning Districts</b>	<b>Weighted Average of All Non-Multifamily As-of-Right Zoning Districts</b>
2000 Census	<b>19%</b> (10.1% Black; 8.9% Hispanic)	<b>34%</b> (20.2% Black; 13.8% Hispanic)	<b>14%</b> (6.7% Black; 7.2% Hispanic)
2010 Census	<b>23%</b> (11% Black; 12.1% Hispanic)	<b>35%</b> (20.4% Black; 14.9% Hispanic)	<b>18%</b> (7.2% Black; 10.9% Hispanic)

*See id.*

Further, to the extent that Tuckahoe’s zoning ordinance limits affordable multifamily development, the ordinance may have a disparate impact upon minority populations. *See generally id.* Based on the 2007-2011 American Community Survey data, approximately 73.47 percent of the black or African-American population within Tuckahoe’s county subdivision live in multifamily housing. *See Units in Structure Tables, 2007-2011 American Community Survey 5-Year Estimates.*<sup>20</sup> By contrast, 45.21 percent of the white and not Hispanic population within the same county subdivision lives in multifamily housing. *Id.* Since African Americans are more likely to live in multifamily housing and such housing is restricted, it may support the conclusion that there is a disparate impact. These data, however, are not specific to Tuckahoe. The lack of precision impedes firm conclusions relating to disparate impact. This analysis

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<sup>20</sup> The Village of Tuckahoe falls within the Eastchester county subdivision used by the U.S. Census Bureau, which is comprised of Eastchester, Tuckahoe and Bronxville. *See Ex. 14, Map of Westchester County, NY, Towns, Cities, Indian Reservations and Incorporated Villages, created by Cornell Program on Applied Demographics, March 2012.* Thus, definitive conclusions about the Village of Tuckahoe alone cannot be derived from this data.

does suggest, however, that further information should be collected to determine whether the zoning ordinance violates *Huntington*.

The Town of Mamaroneck falls in Category 3 under *Berenson*. It also raises concerns under *Huntington*. The Town has approximately 13 zoning districts, only four of which permit multifamily development as of right. TOWN OF MAMARONECK CODE §§ 240-21 - 24-27. All in, given current zoning, just 1.7 percent of its total land permits multifamily development; all of that land has been built out and is unavailable for future developments. *See* Ex. 1, Housing Consultant Report on the Town of Mamaroneck, at 6. The racial concentration within these four multifamily districts, though higher than the concentration within the Town as a whole, is likely not so disproportionate as to support a conclusion that the Town's zoning ordinance creates a barrier that impedes integration in violation of *Huntington*. *Id.* at 7.

As noted above, *Huntington* also demands that municipalities consider the housing needs of black and Hispanic residents as manifest by the types of housing in which they live. Here, the data show that a higher percentage of blacks and Hispanics live in multifamily dwellings. Approximately 73.54 percent of the black or African-American population lives in multifamily housing, whereas only 33.83 percent of the white and not Hispanic population lives in multifamily housing.<sup>21</sup> *See* Units in Structure

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<sup>21</sup> The Mamaroneck county subdivision is comprised of the Town of Mamaroneck and the Village of Larchmont. *See* Ex. 14, Map of Westchester County, NY, Towns, Cities, Indian Reservations and Incorporated Villages, created by Cornell Program on Applied Demographics, March 2012. Thus, definitive conclusions about the Town of Mamaroneck alone cannot be derived from this data.

Tables, 2007-2011 American Community Survey 5-Year Estimates. Accordingly, the Town's restrictions on multifamily housing development, *see supra* Section VII.A, could have a disproportionate impact on these minority groups and, therefore, may constitute exclusionary zoning under *Huntington*. *See id.*

### **VIII. Conclusions**

Twenty-four out of 31 municipalities provide opportunities to develop affordable housing and four of these municipalities have zoning codes that provide sufficient opportunities for affordable housing to meet regional need and are exemplary in terms of their efforts to provide opportunities for affordable housing. Seven municipalities, however, have restrictions on multifamily housing and other sources of affordable housing that would meet the definition of exclusionary under the *Berenson* line of cases. Additionally, some municipalities, whether likely to be deemed exclusionary under *Berenson* or not, have evidence that limitations on multifamily zoning might have a disparate impact on certain minority groups, suggesting that they might be deemed exclusionary under *Huntington*. Therefore, the County's conclusion that exclusionary zoning does not exist anywhere in Westchester is not supported by its own data.

With respect to the following seven municipalities – Croton-on-Hudson, Harrison, Lewisboro, Mamaroneck, Ossining, Pelham Manor and Pound Ridge – the County is directed to identify steps it will take to ensure that these municipalities take steps to provide opportunity for affordable housing. These steps may include the provision of technical assistance, enforcement of the County's Discretionary Funding policy and

litigation. The County should identify what it considers priority steps the municipalities should undertake to provide sufficient opportunities for affordable housing and report back to the Monitor on the County's plan to see that those steps are implemented. These steps may include, but need not be limited to, the passage of the model zoning ordinance, the development of incentives and density bonuses, and the provision of subsidies for the development of affordable housing. The County is directed to respond to this information request by August 27, 2013. Both the County and HUD will have until that date to comment on this report. The report will be filed with the Court no later than August 30, 2013.

Dated: July 31, 2013  
New York, New York

Respectfully submitted,

/s/ James E. Johnson

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