

June 30, 2014

James E. Johnson
Monitor
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Dear Mr. Johnson:

Along with other fair housing and civil rights allies, we have been closely following the ongoing implementation of the 2009 Consent Decree in *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, No. 1:06-cv-2860 (S.D.N.Y.). Since our last correspondence discussing this implementation in November 2011,¹ actions of the Department of Justice and the Monitor were instrumental in forcing Westchester County's (County) enactment of legislation temporarily banning discrimination based on source of income. In addition, the U.S. Department of Housing and Urban Development (HUD) has very appropriately reallocated funds away from the County based on the County's failure to produce an adequate Analysis of Impediments (AI), and the Monitor has expended extensive resources seeking to facilitate that process. Yet, despite the efforts of HUD and the Monitor, the County still has failed to comply with many key requirements of the Consent Decree, as documented in the recent report submitted to the Court and parties by the Anti-Discrimination Center, "Cheating on Every Level."

We have followed recent activities in the case and understand that you will be engaging in a disparate impact analysis of thirty-one municipalities within the County, due to the County's failure to complete an adequate AI and as an extension of your September 13, 2013 Report on Westchester County's Analysis of Municipal Zoning (September Report). We have reviewed the methodology described in your May 27, 2014 letter to HUD and the Westchester County Board of Legislators (Dkt. No. 474-1). Based on this review, we respectfully submit this letter to indicate our agreement with the Anti-Discrimination Center's June 5, 2014 letter to you and to elaborate on four key areas for strengthening the Proposed Methodology in your May 27 letter. This letter is not intended to respond to the report you filed on June 26, 2014.

We are particularly concerned that the Proposed Methodology does not appear to correct several problematic aspects of the legal analysis that you previously used in your September Report which were inconsistent with established fair housing law. We submit that the Proposed Methodology must be revised in order to determine whether additional jurisdictions in the County, beyond the seven identified in your September Report, have exclusionary zoning practices that deny fair housing opportunities based on race or other protected classifications, in violation of the Fair Housing Act. See *Huntington Branch, NAACP v. Town of Huntington*, 844

¹ See Letter from Joseph Rich, Philip Tegeler, and Shanna Smith to James Johnson (Nov. 29, 2011), http://www.antibiaslaw.com/sites/default/files/files/Letter_to_Monitor_2011_11_29_0.pdf.

F.2d 926 (2d Cir. 1988); 24 C.F.R. § 100.500. In fact, based on the data you cite in that Report, there is strong evidence that other jurisdictions are engaging in such practices. In light of the issues we address in detail below, we are disappointed by HUD's June 19, 2014 letter expressing the agency's uncritical concurrence in the Proposed Methodology.

We urge you to consider the below analysis not only in conducting the new disparate impact study but also as part of the ongoing process of reviewing the County's most recent draft implementation plan. It is important that in a revised plan the County address municipal zoning practices that preclude or substantially limit the availability of new affordable and/or multifamily rental housing opportunities within a municipality's borders; the siting of those few new units in the pipeline in unacceptable locations; and local residency preferences.

1. The Monitor should evaluate municipal zoning policies for both their tendency to disproportionately limit housing opportunities for protected groups as well as their segregative effect.

In applying the Fair Housing Act to discriminatory zoning challenges, courts have recognized two types of disparate impact claims: where a housing practice has a disproportionate adverse effect on members of a protected class, and where a housing practice perpetuates or maintains residential racial segregation. *See, e.g., Huntington*, 844 F.2d at 937-38. Each requires a distinct analysis. The disparate impact discussion in your September Report considers only the latter by limiting its analysis to the potential for racial segregation within an individual jurisdiction, arising out of restrictions on the availability of multifamily housing. For example, you consider whether districts zoned for multi-family housing within an individual jurisdiction have higher concentrations of African Americans and Latinos compared to other zoning districts within that jurisdiction.

While it is important to analyze whether zoning has a segregative effect within an individual municipality, as was the case in *Huntington*, *Huntington* also requires study of whether zoning practices disproportionately deny rental and affordable housing opportunities to protected groups within the regional housing market. The appropriate pool for evaluating the disproportionate effect of restrictive zoning is generally the greater metropolitan area and/or county. *See infra*, Recommendation No. 3.² An analysis of disproportionate effect should therefore examine whether an individual jurisdiction's zoning practices disproportionately restrict or preclude types of housing opportunities for which African Americans and Latinos in the region have a proportionally greater need. At the county and greater metropolitan area levels, these groups are overrepresented among renters, among residents of multifamily housing, and among those who are eligible for rent-restricted affordable housing. *See infra* Recommendation No. 3.³

Thus, zoning practices of an individual municipality within the County that limit rental, multifamily, and/or affordable housing will have a disproportionately harmful effect on these

² In this case, it is essential to include New York City data because New York City and Westchester County are in the same housing market.

³ *See also* Michael Allen et al., *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 Harv. C.R.-C.L. L. Rev. 155, 165-69 (2014).

groups' access to housing opportunities.⁴ That effect can be studied through various types of statistical comparisons, such as: (1) a comparison of the proportion of the adversely affected population who are members of the protected class against the proportion of the general population who are members of the protected class (e.g., 50% of those adversely affected are Latino while Latinos make up only 10% of the general population); (2) a comparison of the proportion of all members of the protected class who are adversely affected against the proportion of all persons in the general population who are adversely affected (e.g., 50% of all Latinos are adversely affected while only 10% of the entire population is adversely affected); or (3) a comparison of the proportion of all members of the protected class who are adversely affected against the proportion of persons who are not members of the protected class who are adversely affected (e.g., 50% of all Latinos are adversely affected while only 10% of all non-Latinos are adversely affected).⁵ In this analysis, a group is adversely affected if the challenged practice restricts housing opportunities that members of the group are disproportionately likely to need and occupy.

With respect to the perpetuation of segregation analysis, your September Report fails to address the possibility that policies other than restrictions on multifamily housing may be contributing to segregation within a local jurisdiction. Limiting your analysis of segregative effect to multifamily housing restrictions may obscure the presence of additional practices that are entrenching patterns of segregation throughout the County. The 2010 data you report for the Village of Tarrytown, for example, show a high concentration of African Americans and Latinos in the M-1 district—almost double their representation in the village population as a whole—yet you conclude that there are no impediments to integration because other districts allow for multifamily development. This conclusion ignores the data showing a high level of segregation, and it should prompt further study to determine which additional practices are contributing to the overconcentration of African Americans and Latinos in one district—including limitations on the siting of affordable housing and whether there is sufficient buildable land in other multifamily zoning districts to actually create new housing opportunities.⁶

Related to this point, the methodology in your September Report dilutes strong evidence of segregation within one district in the Village of Tarrytown and three districts in the Town of Mount Pleasant by improperly focusing on a comparison of a weighted average of all multifamily-as-of-right districts and a weighted average of all non-multifamily as-of-right districts to the jurisdiction as a whole. There is no support in any Fair Housing Act precedent for such an approach for measuring segregation.

In its revised AI and final implementation plan, the County should likewise address the interrelated effects of zoning restrictions on how much housing is available to protected groups *as well as* whether those housing opportunities are concentrated in geographically isolated

⁴ Of course, a finding of disproportionate effect does not end the analysis, as discussed below in Recommendation No. 2.

⁵ See Allen et al. at 170-71.

⁶ See Craig Gurian Ltr. to J. Johnson 2-3 (June 5, 2014) (explaining that a failure to facilitate the construction of affordable rental housing in municipalities that have a dearth of such housing perpetuates existing patterns of segregation and may make out a perpetuation of segregation claim under the Fair Housing Act).

locations that may already have higher minority concentrations than the community as a whole. The County's analysis of municipal zoning and its implementation plan should include a study of the specific locations where municipal zoning policies currently allow for multifamily housing as of right and whether those locations would further entrench the stigmatization of affordable housing. Relatedly, affordable units that are provided in locations that do not affirmatively further fair housing should not be counted towards the Consent Decree's numerical targets.

2. The Monitor should study the second and third steps of the disparate impact analysis, in addition to the threshold analysis of discriminatory and segregative effects.

In order to determine whether demonstrated disproportionate or segregative effects are discriminatory, it is necessary to evaluate the individual jurisdictions' justifications for the restrictive zoning practices and the existence or absence of any less discriminatory alternatives. *See Huntington*, 844 F.2d at 936-37; 24 C.F.R. § 100.500(b)-(c). If the jurisdiction cannot demonstrate a substantial, legitimate, nondiscriminatory interest that is furthered by the policy, or if less restrictive policies would achieve the interest, then the policy is discriminatory and must be rejected. This analysis is critical in order to arrive at an accurate assessment of fair housing barriers arising out of exclusionary zoning in Westchester County municipalities.

3. The Monitor should study disproportionate and segregative effects at the local, county, and regional levels.

As noted above, courts have broadly recognized that it is improper to limit a disparate impact analysis to the effect on housing opportunities for people already living in the jurisdiction with the challenged zoning policy. *See Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 568 (E.D. La. 2009) (holding that basing a disparate impact analysis on data for people already living in St. Bernard Parish would be "circular" and would fail to answer the "primary question (which is what is the effect of the [challenged practice] on housing available to different racial groups)"). Courts accordingly consider data from the regional housing market in evaluating disparate impact. *See id.* (relying on plaintiffs' data from the metropolitan statistical area); *see also Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977) (analyzing disproportionate effect of village's zoning based on demographics of the greater metropolitan area); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 458 (D. Md. 2005) (relying on data from the metropolitan statistical area); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 37 n.2 (D. Mass. 2002) (similar); *MHANY Mgmt. Inc. v. Inc. Vill. of Garden City*, ---F. Supp. 2d---, No. 05-CV-2301, 2013 WL 6334107, at *32-33 (E.D.N.Y. Dec. 6, 2013) (considering county-level data).

Consideration of the demographics of the County and the relevant metropolitan statistical area should lead to the clear conclusion that restrictive zoning policies which restrict the availability of multifamily and affordable housing disproportionately limit housing opportunities for African Americans and Latinos. Readily available statistical data demonstrate that both within Westchester County itself and within the New York-Northern New Jersey-Long Island Metropolitan Statistical Area that encompasses the County, African Americans and Latinos are (1) disproportionately likely to live in rental housing; (2) disproportionately likely to live in multifamily housing; and (3) disproportionately likely to qualify for income-restricted subsidized

housing. These data indicate that the restrictive zoning policies identified in your report disproportionately affect members of these protected groups, and many municipalities will continue to be more segregated than they would be in the absence of existing zoning barriers.

4. The Monitor should include a study of the potentially discriminatory and segregative effects of local residency preferences.

The widespread implementation of residency preferences by numerous municipalities throughout the County further erodes the County’s progress towards achieving the Consent Decree’s fair housing goals. As you rightly observed in rejecting the County’s first proposed Model Ordinance, which allowed for residency preferences, such preferences “preserve the demographic status quo, directly cutting against the County’s obligation to AFFH.”⁷ Local residency preferences that have a disparate impact on the basis of race or national origin violate the Fair Housing Act.⁸ A regulation promulgated by HUD further makes clear that even where a residency preference does not have an unlawful adverse impact, it “must be based on local housing needs and priorities as determined by” the public housing agency based on “generally accepted data sources.”⁹

At least six Westchester County municipalities, five of which have adopted parts of the Model Ordinance, currently maintain local residency preferences.¹⁰ The predictable effect of such residency preferences in these overwhelmingly white jurisdictions is to limit housing opportunities for racial minorities. It is imperative to analyze these preferences, in addition to the other types of zoning restrictions listed in your Proposed Methodology, for any disproportionate and/or segregative effects.¹¹

* * * *

In conclusion, we make one final overarching observation. While we appreciate your extensive efforts to facilitate an agreement between HUD and the County concerning the exclusionary zoning analysis required for the AI, we emphasize that since entering into the Consent Decree, the County’s conduct has been characterized by defiance—defiance of its

⁷ Monitor’s Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the Period of February 11, 2010 through July 6, 2010 at 13-14, *U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v Westchester Cty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

⁸ *Comer v. Cisneros*, 37 F.3d 775, 795 (2d Cir. 1994).

⁹ 24 C.F.R. § 960.206(a)(1).

¹⁰ The Housing Consultant identified discriminatory residency preferences in the Villages of Briarcliff Manor and Tuckahoe. Alix Fellman et al., Report on Zoning by Municipality in Westchester County, New York 30, 258 (2013). In addition, the Towns of Bedford, North Salem, Pound Ridge, and North Castle all have residency preferences. Town of Bedford, N.Y., Code § 125-56(E); Town of North Salem, N.Y., Code § 250-123(B)(1)(b); Town of Pound Ridge, N.Y., Code 113-99(c); Town of North Castle, N.Y., Code § 213-22.I.12(4).

¹¹ You identified among those zoning policies you intend to study limitations on townhouse development. Townhouses are typically owner-occupied and market rate. Because African Americans and Latinos in the relevant housing market are overrepresented among renters and among those in need of affordable housing, townhouse development must include rental units and subsidized units in order meaningfully to expand housing opportunities for these groups.

obligations under the Consent Decree, defiance of the basic tenets of fair housing, defiance of the Court and your role in overseeing the County's implementation of the settlement, and defiance of its duties as a recipient of continuing federal funding from HUD. Despite your ongoing efforts and those of HUD to require a compliant AI, Westchester still is in violation of paragraph 32 of the Consent Decree more than four years after its deadline. Moreover, there remain substantial and pervasive barriers to fair housing choice throughout Westchester, in contravention of the mandate in Paragraph 7(j) of the Consent Decree that the County "use all available means" to promote the fair housing objectives of the settlement and to counteract municipal actions that hinder those objectives. As you observed in your May 27 letter, the County has taken "no steps to further [its deficient zoning] analysis, the impasse between the County and HUD has continued, and many municipalities . . . have been denied access to much needed federal funds." While any jurisdiction in the country risks losing federal funding if it fails to meet the obligations imposed by HUD, the Fair Housing Act, and other federal laws and regulations, Westchester has additional obligations imposed by the Consent Decree, and these obligations must be specifically enforced. It is incumbent on you to recommend that the Department of Justice and Court take appropriate action to compel the County's full and immediate compliance with the Consent Decree.

Sincerely,

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