

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA *ex rel.* :

ANTI-DISCRIMINATION CENTER OF :

METRO NEW YORK, INC., :

Plaintiff, :

v. :

WESTCHESTER COUNTY, NEW YORK, :

Defendant. :

----- X

No. 06 Civ. 2860
(DLC)
ECF Case

**MONITOR’S SECOND BIENNIAL ASSESSMENT OF
WESTCHESTER COUNTY’S COMPLIANCE**

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I. Introduction

As required by paragraph 15 of the Stipulation and Order of Settlement and Dismissal in this matter entered on August 10, 2009 (“Settlement”), the Monitor hereby submits this assessment of the efforts and progress by Westchester County (“County”) related to the obligations set forth in the Settlement. This is the second biennial assessment (“Second Biennial Assessment” or “Assessment”) required by the Settlement and reports on tasks undertaken by both the executive and legislative branches of County government, the relevant activities of the municipalities and the efforts of experts working under the direction of the Monitor. This Assessment extends beyond 24 months and covers the period January 1, 2012 through March 31, 2014.¹

In addition to tasks explicitly identified in the Settlement, the Second Biennial Assessment reports briefly on the progress of a community-based design and planning initiative that will provide tools for County and local officials as well as developers during the course of the development process, and resources for the Monitor in connection with site review.

Finally, the Second Biennial Assessment sets forth the status of the ongoing dispute between the County and HUD concerning the Analysis of Impediments to Fair

¹ This assessment is primarily based on the following: (1) information contained in the quarterly reports filed by the County in 2012, 2013 and the first quarter of 2014; (2) the responses of the County, the U.S. Department of Housing and Urban Development (“HUD”), and municipal officials to the Monitor’s requests for information; (3) meetings with the County, HUD, and municipal officials, developers, housing advocates, architects, and public experts; and (4) correspondence between the County, HUD, the United States Attorney’s Office for the Southern District of New York, municipalities, and developers.

Housing Choice (“AI”), including litigation before this Court and the County’s subsequent loss of HUD grants for fiscal year 2011.

II. Executive Summary

The Settlement consists of interrelated obligations that could expand opportunities for African Americans and Hispanics to live in integrated communities in Westchester County. The Settlement was not intended to be a mere “bricks and mortar” initiative, but reinforced the County’s obligations to comply with federal law and with commitments the County undertook when it received federal funding under the Housing and Community Development Act to affirmatively further fair housing (“AFFH”) as set forth in 42 U.S.C. § 5304(b)(2). To that end, the Settlement also provided for the appointment of a monitor with investigative and reporting powers to ensure compliance with its terms. One goal of the Settlement was to identify and remove impediments to the development of fair housing in Westchester, by among other things removing regulatory hurdles to development of such housing and causing the County to launch campaigns to decrease local opposition to fair housing through education and marketing both to current residents and those least likely to apply to live in many of the communities.

The Settlement expressly required the County to execute the following tasks:

- Ensure the development of new affordable housing units that meet the terms and conditions set forth in paragraph 7 of the Settlement (“Affordable AFFH Units”), 50% of which would be rental units and 50%

home-ownership units, with no more than 25% of the total intended for occupancy by senior citizens, Settlement, at ¶ 7(d), (e), (f);

- Develop a plan to implement the provisions of the Settlement concerning the development of Affordable AFFH Units, *id.* at ¶ 18;
- Issue a model inclusionary housing ordinance that the County will promote to municipalities to advance fair housing, *id.* at ¶ 25(a);
- Develop a policy to condition the use of public funds and resources by municipalities on commitments that the municipalities shall, *inter alia*, actively further implementation of the Settlement and assist development of affordable housing, *id.* at ¶ 25(d);
- Identify and analyze municipal zoning ordinances to determine whether they contain impediments to fair housing based on race, *id.* at ¶ 32(b);
- Create and fund campaigns to broaden support for fair housing, *id.* at ¶ 33(c);
- Educate realtors, condominium and cooperative boards, and landlords with respect to fair and affordable housing activities, *id.* at ¶ 33(d);
- Affirmatively market affordable housing within the County and in geographic areas with large nonwhite populations outside, but within close proximity to, the County, *id.* at ¶ 33(e);

- Centralize the intake of potential home buyers for affordable housing that AFFH, *id.* at ¶ 33(f);
- Promote, through the County Executive, legislation barring “source-of-income” discrimination in housing, *id.* at ¶ 33(g);
- Engage in public outreach to AFFH, specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities, *id.* at ¶ 33(c), (h); and
- Incorporate the foregoing undertakings into an AI, *id.* at ¶ 33(i).

None of the foregoing tasks is optional. The County has successfully executed some tasks, partially executed others, and either failed or refused to comply with the duties to analyze zoning and to educate the public. The Settlement provided that, by the close of 2013, the County was to provide financing for at least 300 Affordable AFFH Units. Settlement, ¶ 23. The County met that benchmark with 399 units. Westchester County Fair and Affordable Housing Implementation Plan 2013 4Q Quarterly Report (“2013 4Q Quarterly Report”), hereto attached as Ex. 1, at 1. The Settlement also provided that building permits would be issued for 225 Affordable AFFH Units by the end of 2013. Settlement, ¶ 23. Working with developers and municipalities, that benchmark was achieved as well with 380 Affordable AFFH Units for which permits have been issued. Ex. 1 (2013 4Q Quarterly Report) at 1.

The numbers tell only part of the story, though, and this Assessment analyzes, as well, where the Affordable AFFH Units are sited from the perspective of the terms of the Settlement and the locational guidance issued by the Monitor in April 2011. Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the Period of October 25, 2010 through April 25, 2011, filed April 25, 2011 (“Monitor’s April 2011 Report”), at 11-12 (ECF No. 336). As will be explained more fully below, the County made only limited progress toward meeting the Settlement’s goal of “broad and equitable distribution of affordable housing” throughout the County. Settlement, Second Whereas Clause. More work needs to be done.

Compliance with the Settlement is effected by, among other things, three sets of officials in Westchester. The County Executive and his staff, the Board of Legislators (“BOL”) and – though not named as parties – municipal leaders. Each has distinct roles and responsibilities in connection with the Settlement and each has had an impact on the level of compliance. Because their actions are separate and, at times, in sharp conflict, they will be discussed separately throughout this Assessment.

During the assessment period, the County did not submit an AI satisfactory to HUD in fulfillment of its obligation under paragraph 32 of the Settlement. This failure was caused by two disputed issues: (a) the County’s obligation to promote, through the County Executive, legislation to ban discrimination based on source of income; and (b) the County’s obligation to complete a zoning analysis that complies with the standards of

Berenson v. Town of New Castle, 38 N.Y.2d 102 (1975) and *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988).

Until faced with the threat of a motion to hold the County in contempt, County Executive Robert Astorino fought against fulfilling his legal obligation to promote source-of-income legislation, including taking the position that the County Executive could both promote the legislation and still veto it. The Court rejected that argument. Judge Denise L. Cote's Opinion and Order, filed May 3, 2012, at 16 (ECF No. 402). For 34 months following the County Executive's veto, including after the County lost its appeal to the Second Circuit challenging this Court's ruling that the veto was a violation of the Settlement, *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, New York*, 712 F.3d 761 (2d Cir. 2013), the BOL did not move the legislation forward. It was only after the United States Department of Justice threatened the County with a motion for contempt that the legislation was reintroduced and enacted. August 22, 2012 Letter from David J. Kennedy to Robert Meehan, hereto attached as Ex. 2. The County Executive signed the bill on June 26, 2013.

More than four years after the Settlement, the issue of the zoning analysis remains unresolved. The County Executive and the BOL have taken two different tacks with respect to this issue. The County Executive told the parties, before the first submission, that HUD improperly wanted to uproot county zoning regulations and that there were no discriminatory regulations in place. In the wake of these pronouncements, the Office of the County Executive submitted multiple efforts at analysis, including two pursuant to a

methodology that the County had ostensibly adopted by agreement with HUD. Each purported to be a thoroughgoing analysis of zoning. For reasons set forth in the Monitor's report filed on September 13, 2013, that analysis was deficient under *Berenson*. The Monitor's report also highlighted the steps that would need to be taken to address federal concerns under *Huntington*.

HUD has relied on dispositive language in the Settlement giving it sole authority to approve the AI and has insisted on full compliance with the obligation for a thorough AI that examines, among other things, the question of race as an obstacle to the development of affordable housing. To enforce that obligation, HUD has withheld more than \$12 million in funds from the County. The County has challenged this determination in court, without success. *Cnty. of Westchester v. U.S. Dep't of Housing & Urban Dev.*, No. 13-civ-2741, 2013 WL 4400843 (S.D.N.Y. Aug. 14, 2013). For 33 months, the parties have remained at an impasse.

Throughout much of that period, the BOL has deferred to the County Executive. In May 2014, the Chairman of the BOL, Michael B. Kaplowitz, opened discussions with HUD and the Monitor and has proposed a legislative approach that could lead to a completion of the zoning analysis and a resolution of the impasse with HUD. See May 6, 2014 Letter from Michael B. Kaplowitz to Holly M. Leicht, hereto attached as Ex. 3.

Notwithstanding the ongoing zoning dispute, the Monitor has engaged with the leadership of individual municipalities identified in the July 2013 Report on Zoning by

Municipality in Westchester County, New York as having exclusionary zoning. So far, this approach has produced results in the Town of Mamaroneck, which has revised its zoning code after meeting with the Monitor, the County, and HUD. *See* December 11, 2013 Letter from James E. Johnson to Robert P. Astorino, hereto attached as Ex. 4.

Discussions with other municipalities have taken place, and further changes to municipal zoning are anticipated.

Design is of vital importance to building effective and sustainable affordable housing. To address this concern, experts engaged by the Monitor have completed two community design institutes for municipal leaders, planners, affordable housing advocates and developers, as well as a shorter presentation for a smaller group of officials and the press. At the institutes, the participants engaged in real-time planning exercises that relied on physical models and maps as well as computer simulations that showed the effect of design and land use choices on a variety of factors relevant to community decision-making. Among other results of this effort is a planning guide that can be used by municipalities throughout the County as they face tough, but necessary, choices.

Finally, in the years since the parties entered into the Settlement, it has been subjected to misreadings that would eliminate some provisions – *e.g.*, a veto is consistent with promotion – would minimize others, and could reduce the document to that which it is not: a bare commitment to build new affordable units. The most egregious of the claims asserted publicly and repeatedly by County officials will be addressed in detail in this Assessment. Those claims have been made in the press and in correspondence to

municipalities, which are critical to the achievement of the goals of the Settlement. They have undercut the Settlement and sown confusion into efforts at compliance often with no apparent basis in fact. Because these issues go to the core of the County's compliance, the Monitor will request the Court to authorize examination, under oath, of the County Executive, the Deputy County Executive and other personnel within the Office of the County Executive, including, but not limited to, the Chief of Staff, the Director of Communications and the Special Assistant to the County Executive and Director of Real Estate. These depositions would be focused on the County Executive's public statements and the areas of non- or partial compliance noted above.

This case arose out of allegations that County officials were filing false certifications in connection with applications for federal funds. The steps described above would ensure that the Court receives a full and accurate accounting of, among other things, clearly inaccurate statements to the public. Under these circumstances, it is more than reasonable to examine officials under oath. It is necessary.

III. Public Comment, Public Education, Marketing and Outreach

Implementation of the Settlement involves discussion and consideration of issues of race, ethnicity, integration, and local versus external control and influence. These issues are among the most sensitive and volatile that any community faces and are susceptible to overstatement, misunderstanding and distortion. The Settlement specifically addresses these concerns by imposing on the County a duty to educate the public about the value of mixed-income housing, racial and ethnic integration and the

specific housing opportunities that flow from the Settlement. Those duties are found in the duty of the County to invest \$400,000 in a public education campaign (Settlement, at ¶ 33(c), (h)) and the duty to market affordable housing opportunities to those least likely to apply (*id.* at ¶¶ 25(a)(ii), 33(e)). While steps have been taken on both fronts, the County has also substantially undercut its own efforts. The Office of the County Executive, and the County Executive in particular, have made statements that have confused the public, misstated the terms of the Settlement and signaled ongoing defiance of its terms.

The Settlement calls for the development of 750 Affordable AFFH Units. Settlement, ¶ 7. It also provides that the number of Affordable AFFH Units can be modified in only a limited way by the Monitor. *Id.* at ¶ 15(a)(iv). No party has the authority to increase the number of Affordable AFFH Units the County must develop. The Monitor can only modify that number *down*. *See id.* Nevertheless, the County Executive has asserted in public that HUD, and at times the Monitor, was attempting to impose a new requirement of as many as 10,768 units and allocate sometimes hundreds of units to particular communities. *See, e.g.*, Press Release, Westchester County Executive, *HUD Embraces Need for 10,768 Affordable Housing Units by 2015 and Lists Restrictive Zoning Practices*, Dec. 1, 2013, hereto attached as Ex. 5; Hezi Aris, *Astorino Asserts Federal Monitor's Report Cards Expand Scope of Housing Settlement*, The Westchester Guardian, June 20, 2013, hereto attached as Ex. 6. The County Executive also has argued that the costs of the additional Affordable AFFH Units could exceed one

billion dollars. See Robert P. Astorino, County Executive, *2013 State of the County Address to the People of Westchester*, Apr. 23, 2013, hereto attached as Ex. 7, at 23. Notably, the County has never raised these concerns in Court.

In other instances, the County Executive has asserted, with no apparent basis, that HUD intends to build six-story high rises under the Settlement. Jim Fitzgerald, *NY County Fighting with Feds over Housing and Race*, Associated Press, July 21, 2012, hereto attached as Ex. 8. The County's statements are contained in the exhibits to this report. None of these claims is supported by the record. None can reasonably be said to have increased the support of affordable housing throughout the County. None can be claimed to have increased support for integration. Indeed, one might reasonably conclude that such statements would tend to have the opposite effect.

The terms of the Settlement call for a set of interrelated terms to be undertaken by the County. The County Executive has repeatedly informed the public, incorrectly, that the Settlement calls for nothing more than the building of 750 Affordable AFFH Units. Interview by Errol Louis with Robert P. Astorino, in Westchester County, N.Y., May 15, 2013, transcript hereto attached as Ex. 9; Robert P. Astorino, *Washington's 'Fair Housing' Assault on Local Zoning*, The Wall Street Journal, Sept. 5, 2013, hereto attached as Ex. 10; Ex. 7 (2013 State of the County Address) at 20-23. This position has been echoed by staff. The Settlement calls for the marketing of new Affordable AFFH Units to the least likely to apply in counties contiguous to Westchester. See Settlement, ¶ 33(e). The County Executive has criticized this term and said that he disagreed with

marketing affordable housing outside of Westchester, stating that Westchester residents should not be forced to compete for the housing units with non-residents. Rasheed Oluwa, *County Executive Holds Town Hall Meeting in Pelham*, Pelham Patch, July 19, 2012, hereto attached as Ex. 11. Because the County Executive has the most prominent voice on government matters in Westchester, these statements help shape the context of the implementation of the Settlement. They also form the context in which the County's compliance, on particular as well as general matters, must be assessed.

A. Public Outreach

Paragraph 33(c) of the Settlement requires the County to “create and fund campaigns to broaden support for fair housing and to promote the fair and equitable distribution of affordable housing in all communities, including public outreach specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities.”

The County's public outreach has been aimed at two groups: municipal leaders and the general public. To date, the County's efforts to produce an effective public education campaign to raise awareness about the benefits of diverse and integrated housing patterns in Westchester have, at best, been limited. To fulfill the obligations under paragraph 33(c) of the Settlement, the County has executed a poster campaign and a series of roundtables. The County has implemented a program of providing 11” x 17” fair housing and anti-discrimination posters, created by the National Fair Housing Alliance, HUD, and the Leadership Conference on Civil Rights Education Fund, to local

communities for their posting in public locations, including municipal libraries, clerks' offices, and planning and building department offices. *See* Ex. 12 (2012 4Q Report) at 14. Posters have also been distributed to nonprofit housing agencies and developers for their posting at sites built pursuant to the Settlement. *See* March 31, 2014 Letter from Kevin J. Plunkett to James E. Johnson, hereto attached as Ex. 13.

The County developed materials to be used for this purpose, and in August 2012, enlisted Westchester Residential Opportunities ("WRO") to test the materials on two focus groups. The focus group members advised WRO that the materials were ineffective and, in some cases, offensive. *See, e.g.*, Attachment 1 to August 16, 2012 Letter from Kevin Plunkett to James E. Johnson, hereto attached as Ex. 14, at 5. The County reported a year ago that its graphics professionals had been working on another marketing campaign to educate the Westchester public about the benefits of diverse communities. *See* Ex. 15 (2013 2Q Report) at 13-14.² It had expected to test the campaign with a focus group before it was finalized. *Id.* The County, however, has not reported any progress on this campaign in its subsequent quarterly reports nor in its response to the Monitor's March 17, 2014 request for a description of the County's efforts to establish a public advertising campaign to meet its 33(c) obligations. *See* Ex. 13 (March 31, 2014 Letter) at 4-5.

² Appendix VII of the 2013 2Q Report is not included due to size constraints. The full Appendix is available at: <http://www.westchesterhousingmonitor.org/>

The County has also engaged Pace University Law School's Land Use Law Center as a consultant. Pace's efforts, though laudable, have focused primarily on providing technical assistance to municipal officials in revising land use laws and policies. *See* Attachment 8 to Ex. 13 (March 31, 2014 Letter). As of March 28, 2014, Pace has held: (a) two roundtable discussions with municipal officials; (b) two three-day training programs for "local land use and housing leaders" on developing affordable housing through land use tools and techniques, site design, and collaborative decision-making strategies; (c) three three-hour mini-training sessions on specific topics that arise in developing affordable housing; and (d) three public forums. *Id.* Only the public forums appear to be targeted towards educating existing residents in Westchester on the benefits of affordable housing for the broader community. Although the forums are an important part of a public education campaign, the Settlement contemplates an advertising campaign capable of reaching a broader audience outside of the self-selected group of forum participants.

The County has proceeded along multiple and sometimes contradictory tracks with respect to the education and encouragement of municipal officials. On the one hand, members of the Planning Department staff have met with municipal leaders and emphasized training programs, technical assistance, and the potential opportunities for affordable housing within their municipalities. *See, e.g.,* Ex. 16 (2014 1Q Report) at 10. Planning Department staff has also worked with the Westchester Housing Opportunity Commission to explore new ideas on how to achieve inclusive communities and have

participated in the Pace Land Use Law Center's Executive Roundtable on the Settlement, which serves as a forum to share resources on affordable housing and receive input from local leaders. *Id.*; Attachment 8 to Ex. 13 (March 31, 2014 Letter). The County's Human Rights Commission has also conducted several fair housing training sessions with cooperative board members, realty groups, non-profit agencies, and first-time home-buyers that discuss, among other things, the newly adopted source of income legislation. *See* Ex. 16 (2014 1Q Report) at 15. Information on affordable housing is also provided through the County's participation in forums held by other organizations including the Westchester Municipal Officials Association, Westchester Urban County Council, Westchester Municipal Planning Federation and Northern Westchester Watershed Committee. *Id.*

On the other hand, the County Executive and senior staff have publicly, and quite dramatically, discouraged municipalities from voluntarily cooperating with the Monitor's efforts to gather facts for a zoning analysis. On March 21, 2013, the Monitor requested municipal input on his efforts to analyze whether zoning was exclusionary. *See, e.g.*, March 21, 2013 Letter from James E. Johnson to Peter Porcino (Village of Ardsley), hereto attached as Ex. 17. This effort was undertaken to fill a void. *See* Monitor's Report and Recommendation Regarding Dispute Resolution, filed Nov. 17, 2011, at 13-14 (ECF No. 384); Magistrate Judge Gabriel W. Gorenstein's Opinion and Order, filed March 16, 2012, at 17-18 (ECF No. 396). Among other things, the request asked municipalities about a Rutgers University assessment of affordable housing needs,

commissioned by the County in 2005. Most of the 23 eligible municipalities that responded to the request did so without objection to the reference to the Rutgers University Assessment. Notably, this was the same assessment the County relied on in several of its own AI submissions. *See, e.g.,* Westchester County, Analysis of Impediments to Fair Housing Choice (updated Apr. 2013), at 59-60, hereto attached as Ex. 18; *see also* June 12, 2013 Letter from James E. Johnson to Robert P. Astorino (updated Nov. 15, 2013), hereto attached as Ex. 19 (detailing the development and the County's use of the Rutgers University assessment).

Subsequently, the County Executive called together officials from nine municipalities to complain about the request and to claim that the Monitor was increasing the housing requirements under the Settlement. *See* Press Release, Westchester County Executive, *Federal Monitor's Report Cards Expand Scope of Housing Settlement*, June 11, 2013, hereto attached as Ex. 20. This claim was made in the teeth of the Monitor's written confirmation that he had neither the authority nor the intent to increase the number of housing units required under the Settlement and that the source of the allocation plan was a document prepared by Rutgers at the County's own request. *See* Ex. 19 (June 12, 2013 Letter). When asked to respond to a request that the record be corrected and the draft documents be removed from the website, the County Executive stated that his statements "will not only stay up but I hope and pray that everyone in this county reads them." Associated Press, *Fed Monitor, NY County Exec at Odds Over Housing*, Jun. 12, 2013, hereto attached as Ex. 21, at 1. This posture raises the questions

of the intent of the Office of the County Executive with respect to his communications with the municipalities and the nature of the non-public communications between the County Executive and his staff, on the one hand, and municipal officials on the other.

The County Executive continued in this vein up through last month when he issued a press release attacking HUD for working with the BOL to complete the required zoning analysis. *See* Press Release, Westchester County Executive, *Astorino Fights Rewriting Housing Settlement on HUD's Terms*, June 5, 2014 (updated June 11, 2014), hereto attached as Ex. 22.³

To ensure that the issues raised by these, and other, statements are fully developed and presented to the Court, the Monitor has issued information requests seeking documents from the County, and the Monitor requests that the Court authorize depositions, under oath, of key County personnel.

B. Central Intake System

Pursuant to paragraph 33(e) of the Settlement, the County must “affirmatively market affordable housing within the County and in geographic areas with large non-

³ Ex. 22 (June 5, 2014 Press Release) at 1: “County Executive Robert P. Astorino said Thursday that he would vigorously oppose a plan to rewrite the 2009 federal affordable housing settlement that, if not stopped, would give the federal Department of Housing and Urban Development (HUD) unprecedented power to dismantle local zoning. *Astorino's fundamental objection to the plan by federal monitor James E. Johnson is that it would strip local municipalities of their ‘Home Rule’ authority – guaranteed under the New York State Constitution – and open them up to never ending investigations by the federal government.* Making matters worse, municipalities would be virtually defenseless against any challenges to local zoning because the plan would allow HUD to ‘replace the zoning analysis’ done by the county (which after eight reviews found no evidence of exclusionary zoning based on race or ethnicity) with its own reports and conclusions.” (Emphasis added).

white populations outside, but contiguous or within close proximity to, the County.” In 2010, the County launched its Central Intake System as part of its effort to affirmatively market units built pursuant to the Settlement. The System includes an intake form that is not an application for a rental or ownership unit, but rather an invitation to sign up for updates as such units become available. The user is required to submit his or her name, address, household size and the number of minors, total annual household income, and whether the user is interested in homeownership, rentals, or both. Voluntary information is also requested, including, among other things, current monthly rent or mortgage, current monthly utility bills, race and ethnicity, location of interest in Westchester, and transportation preferences. The intake form is available both in English and Spanish.

The second part of the Central Intake System was launched on December 21, 2011, adding an interactive map that pinpoints the location of housing developments and their proximity to community resources, including, among other things, public transportation, hospitals, schools, supermarkets, and government services. The map also links to specific information about affordable housing developments and to web pages pertaining to community resources.

Since the County’s Central Intake System for prospective residents was launched at the end of the first quarter of 2014, 4,804 households have registered. *See* Ex. 16 (2014 1Q Report) at 13. The system appears to reach a diverse population of households seeking housing in Westchester County. As of March 31, 2014, of the 69% (3,330) registrants who identified their race, 60% (1,980) identified as African American; 30%

(997) as white; 2% (65) as white and African American; 2% (60) as Other Pacific Islander; 1% (39) as Asian Indian; 1% (32) as American Indian or Alaskan Native; 1% (29) as African American, American Indian, or Alaskan Native; 32% (1,581) households indicated that they were Hispanic. *See id.* at App'x IV-2. As discussed in the Monitor's April 2011 report, the Monitor views this website as an important component of the County's efforts to spread information about new housing opportunities and benefits of the communities where they are located. Monitor's Report dated April 25, 2011, at 5 (ECF No. 336).

IV. Development of Units Required by the Settlement

A. County Efforts to Meet Annual Benchmarks

Paragraph 7 of the Settlement sets forth requirements regarding the development of at least 750 Affordable AFFH Units in municipalities that meet specified demographic criteria. Pursuant to paragraph 23 of the Settlement, by the end of 2013, the County was required to have both: (1) financing in place for at least 300 Affordable AFFH Units; and (2) building permits for at least 225 Affordable AFFH Units. The County had met those targets by the end of 2013, and as of March 31, 2014, the County reported that 399 Affordable AFFH Units have financing in place and 385 of these units have building permits. *See* Ex. 16 (2014 1Q Report) at 3; Ex. 1 (2013 4Q Report) at 3. This represents an increase in the number of units with financing in place of 217 units (119%) from the first biennial assessment and an increase in the number of units with building permits of 277 units (257%) since the first biennial assessment. *See* Ex. 16 (2014 1Q Report) at 3;

Monitor's First Biennial Assessment, Jan. 6, 2012, at 30 (ECF No. 391). The County further reported that 173 units are already completed and occupied, none of which had been reported as occupied by the first biennial assessment. *See* Ex. 16 (2014 1Q Report) at 4; Monitor's First Biennial Assessment, Jan. 6, 2012, at 30-31 (ECF No. 391).

Although the Settlement points toward an equitable distribution of affordable AFFH Units throughout the County, it does not require developers to build units in particular locations. "In the County's facilitation of the development of the Affordable AFFH Units, priority shall be given to sites within qualifying municipalities and census tracts that are located in close proximity to public transportation. No sites, however, shall be excluded from consideration because of lack of public transportation access."

Settlement, ¶ 7(g).

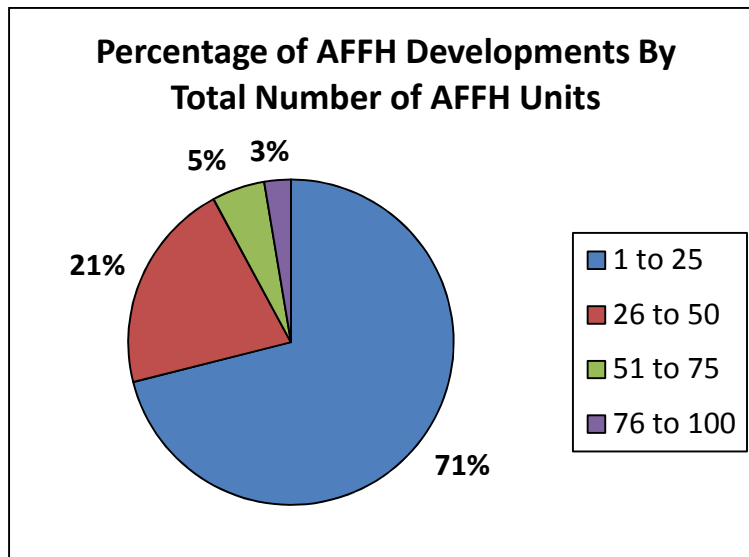
The Monitor's third annual report to the Court raised concerns about the distribution of Affordable AFFH Units among the 31 eligible municipalities. *See* Monitor's Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the 2012 Calendar Year, filed Feb. 25, 2013 ("Monitor's February 2013 Report"), at 9-11 (ECF No. 429). Specifically, the County's 2012 third quarter report indicated that 483 AFFH units out of 691 AFFH units, or 70% of the proposed sites, were to be located in just four communities (Cortlandt, New Castle, North Salem, and Somers), and that there were no units proposed under the Settlement in 12 eligible municipalities. *See id.* at 9 (citing 2012 3Q Report, App. I-1). In meetings and in written correspondence, the County explained that the quarterly reports only identify sites that

are in “public discussion, the local approval process, or under construction,” and that, based on preliminary discussions with developers and municipalities, it anticipated additional proposals in municipalities not already listed in the quarterly reports. *Id.* at 10 (quoting Dec. 20, 2012 Letter from Kevin J. Plunkett to James E. Johnson). In support of its position, the County provided the Monitor with projections regarding the size and location of Affordable AFFH Units anticipated as of early 2015, including a map. *See* Attachment to February 14, 2013 Letter from Kevin J. Plunkett to James E. Johnson, hereto attached as Ex. 23.

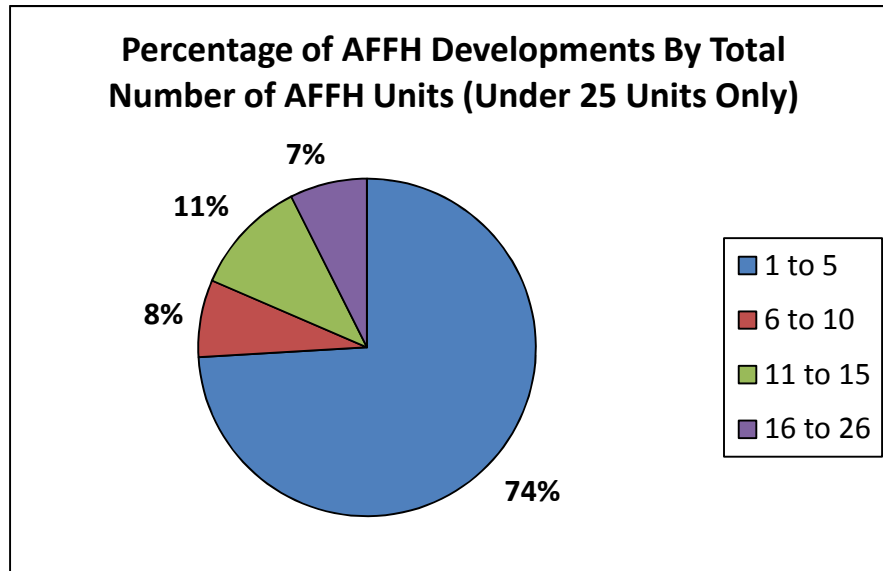
As of the end of March 2014, the distribution of units across municipalities has shifted slightly and become less of a concern: the number of eligible municipalities without proposed units has decreased to eight; and the four municipalities with the highest projected concentration of AFFH units accounted for 369 AFFH units out of a total of 669 AFFH units, or 55% of the proposed units. *See* Ex. 16 (2014 1Q Report) at 4, App’x I-1. In response to the Monitor’s information request, the County also provided a map, which shows a small decrease in concentration of proposed developments in the southeast near Rye Brook, and a slight increase of proposed development in central Westchester, primarily in Pleasantville and New Castle. *Compare* Attachment to Ex. 23 (February 14, 2013 Letter), *with* Ex. 13 (Response to Request # 1, March 31, 2014 Letter).

The size of developments proposed in the last year has also declined, with no new proposal exceeding 42 units. *See* Ex. 16 (2014 1Q Report) at 4, App’x I-1. Based on the

first quarterly report of 2014, there are 38 developments either built, approved, or proposed that do or will include AFFH units. *Id.* at App'x I-1. Of these developments, 27 (71%) are comprised of only one to 25 units in total. *Id.*



Moreover, of these less concentrated developments, 20 (74%) are within developments made up of only one to five units in total. *Id.*



The County has taken the position that units will be more broadly dispersed as proposals currently under review by the County are made public. The issue of unit concentration has become less salient, though there is still room for further progress. The Monitor will continue to review new proposals with due consideration given to increasing the distribution of units among the 31 eligible municipalities. In addition, as discussed above, the record of development over the past year suggests, if trends continue, that new units will be more broadly distributed.

B. County Inquiries and Responses Thereto

During 2012 and 2013, the County submitted funding advisories regarding specific proposed developments to be counted towards the Settlement's 750-unit requirement. The advisories and inquiries received since the filing of the Monitor's 2012 Annual Report are attached hereto as Exhibits 24 to 29 and reflect an increase in 87 units, including the following developments:

- A new 115-unit assisted living development in Scarsdale, of which four units will be affordable. *See* Ex. 24 (April 19, 2013 Letter from Kevin J. Plunkett to James E. Johnson).⁴
- A new 75-unit rental development restricted to seniors 55 years of age and older in the Town of Somers. *See* Ex. 25 (Advisory 16).⁵
- A rehabilitation of a vacant single-family house to create one three-bedroom, two-bathroom home ownership unit in the Village of Buchanan. *See* Ex. 26 (Funding Advisory 17).⁶
- A rehabilitation of a vacant two-family house in the Village of Tarrytown, to create one two-bedroom home ownership unit and one two-bedroom rental unit. *See* Ex. 27 (Funding Advisory 18).⁷

⁴ The four affordable units in this development are single room occupancy units (“SROs”) within two suites. Each unit has its own bathroom and closet space, but shares a living room, kitchenette, foyer and closet space with one other unit. The units will be offered to residents with income at or below 60% Area Median Income (“AMI”) and are not age restricted.

⁵ Sixty-one of the units will be one-bedroom apartments and 14 will be two-bedroom apartments, all of which will remain affordable to those at or below 50% to 60% AMI and will remain affordable for at least 50 years. The units are disabled-adaptable, meet the County’s universal design requirements, have either a balcony or patio, and include amenities such as a community room, laundry room, and lounge area.

⁶ The house would be affordable to families at or below 80% AMI and would remain affordable for 50 years. It is located within walking distance of the district’s elementary school, on a bus line that provides access to local shopping, the railroad station, and downtown Peekskill.

⁷ The units would be affordable to families at or below 80% AMI and would remain affordable for 50 years. The house is located within walking distance of the district’s elementary school, on a bus line that provides access to local shopping, the railroad station, and downtown Peekskill.

- A rehabilitation of an existing two-family house to create one two-bedroom ownership unit and one one-bedroom rental unit in the Town of Eastchester. *See* Ex. 28 (Funding Advisory 19).⁸
- A rehabilitation of a vacant three-family house to create one two-bedroom ownership unit and two one-bedroom rental units in the Village of Pleasantville. *See* Ex. 29 (Funding Advisory 20).⁹

The Monitor has indicated that the units in the developments listed above may count toward the County's 750-unit obligation, subject to the County's full compliance with the Affirmative Fair Housing Marketing Plans approved by the Monitor on December 29, 2012.

The Monitor has also approved two additional advisories that were submitted in 2012. These advisories were discussed, without conclusion, in the Monitor's 2012 Annual Report, because they raised particular issues that required a more in-depth analysis, which is discussed below.

⁸ The house is located within walking distance of the Eastchester Middle and High Schools, and is within walking distance of a bus line that provides access to nearby shopping, medical services, library, houses of worship, and other amenities.

⁹ The site is located in a mixed-use block with single- and multi-family houses, some of which have been converted to commercial use. It is also located within walking distance to shopping and public transportation and only a few blocks from the center of the Village. The district's elementary, middle, and high schools are all approximately 0.6 miles from the proposed house.

1. Bridleside (Town of North Salem)

The County requested that the Monitor credit, against the 750-unit requirement, a 65-unit rental development in the Town of North Salem called Bridleside, consisting of eight buildings on a 40.2 acre site. *See* Funding Advisory 12, hereto attached as Ex. 30. As proposed, Bridleside would include 20 one-bedroom units, 40 two-bedroom units, and five three-bedroom units. The site is close to the middle and high schools, and would have access to a park, woods, and walking trails. In its request, the County reported that the developer will provide regularly scheduled transportation for residents to local health care facilities, shopping areas, and public transportation at no cost to the tenants.

Both the Monitor and HUD have previously expressed concerns related to the concentration of affordable housing developments in a small number of eligible communities. *See* Monitor's 2012 Annual Report at 9-11 (ECF No. 429); December 10, 2012 Letter from Helen R. Kanovsky to James E. Johnson, hereto attached as Ex. 31. The proposed development in North Salem is included in that number. After a careful review of HUD's letter and the County's response, however, the Monitor concluded that those concerns are outweighed by the potential for this development to further the goals of the Settlement. Bridleside would provide the opportunity for moderate-income families, particularly those with children, to live in a low-density community with high quality schools and access to parks and recreational facilities.

Therefore, the Monitor determined that the units at Bridleside may count toward the County's 750-unit obligation, subject to the County's full compliance with the

Affirmative Fair Housing Marketing Plans approved by the Monitor on December 29, 2012. *See* December 2, 2013 Letter from James E. Johnson to Maurice Jones and Robert P. Astorino, hereto attached as Ex. 32.

2. 525 Ellendale Avenue (Village of Rye Brook)

The County proposed a development consisting of four one-bedroom ownership units located in the Village of Rye Brook. *See* Funding Advisory 13, hereto attached as Ex. 33. The units will be affordable to households at or below 80% AMI and will remain affordable for at least 50 years. The development is located within walking distance of a shopping center, and is within walking distance of two bus lines that provide access to the Port Chester Metro North Train Station. The County also predicted that residents would have employment opportunities in nearby Greenwich and Stamford, Connecticut. The site is located in the Port Chester-Rye Union Free School District, which includes the Port Chester Middle School.

The proposed development has been the subject of dispute between municipal officials from Rye Brook and neighboring Port Chester, a non-eligible community, due to the fact that the site is located in the Port Chester-Rye Union Free School District, which is shared by both municipalities, as opposed to the Blind Brook-Rye Union Free School District, which serves only residents of Rye Brook. *See, e.g.*, December 7, 2011 Letter from Blanca P. Lopez, President, Board of Education, Port Chester-Rye Union Free School District to Judge Denise L. Cote, hereto attached as Ex. 34; December 23, 2011

Letter from Joan L. Feinstein, Mayor of Rye Brook to James E. Johnson, hereto attached as Ex 35.

Specifically, the Board of Education of the Port Chester-Rye Union Free School District argued that its school district is overburdened with twice the enrollment of Blind Brook, substantially lower per pupil spending, and 49% of its students eligible for free school lunches. Ex. 35 (December 7, 2011 Letter). The Board also argued that the Port Chester student population is predominantly Hispanic or Latino, and that building additional affordable housing in the district would do little to promote integration. *Id.* at 2. Rye Brook residents raised similar concerns.

The Mayor of Rye Brook took the opposite position and defended the development as appropriate. She argued that Rye Brook had a strong record of developing affordable housing in both the Blind Brook and Port Chester school districts. She also contended that Rye Brook had maintained a progressive stance towards zoning, including its adoption of certain provisions from the County's Model Zoning Ordinance. Ex. 35 (December 23, 2011 Letter) at 2-3.

The County supported the proposal. Ex. 33 (Funding Advisory 13); *see also* October 22, 2012 Letter from Kevin J. Plunkett to James E. Johnson, hereto attached as Ex. 36 (arguing that the Settlement does not require that otherwise eligible affordable AFFH developments be excluded based on the school district for which the affordable AFFH development would be served). HUD also argued that siting the Ellendale Avenue

proposal in the Port Chester school district is contrary to the intent and purpose of the Settlement to “provide or have the potential to provide access to services and facilities that will promote sustainable, inclusive communities, such as employment and educational opportunities.” January 31, 2013 Letter from Mirza Orriols to James E. Johnson, hereto attached as Ex. 37, at 2 (quoting paragraph 22(a) of the Settlement); *see also* Second Whereas Clause of Settlement (Parties agree that “the broad and equitable distribution of affordable housing promotes sustainable and integrated residential patterns, increases fair and equal access to economic, educational and other opportunities, and advances the health and welfare of the residents.”).

According to the 2011-2012 New York State Report Card, the most recent available, the student population in the Port Chester-Rye Union Free School District is 74% Hispanic or Latino, 6% black or African American, 18% white and 2% Asian. *See* New York State District Report Card for 2011-2012 Academic Year: Port Chester-Rye Union Free School District (*available at*: <https://reportcards.nysed.gov/>). HUD argued that building affordable housing in this district does not promote the Settlement’s goal of increasing fair and equal access to educational opportunities because it does not create a new opportunity for minorities who would be in the same district if they lived in the neighboring non-eligible community, Port Chester. Ex. 37 (January 31, 2013 Letter) at 2. In contrast, developing affordable housing in the Blind Brook-Rye Union Free School District would provide a new educational opportunity because one could not attend Blind Brook schools without living in Rye Brook, an eligible community. *Id.*

The County argued that the demographics of the school district do not determine a site's eligibility under the Settlement. *See* February 13, 2013 Letter from Kevin J. Plunkett to James E. Johnson, hereto attached as Ex. 38. Although factors including educational opportunities "are to be given consideration, . . . [i]t is beyond HUD's authority to change the terms of the Settlement by suggesting that the diversity of school districts carries equivalent weight to a location's racial and ethnic percentages that the Settlement Agreement mandates as criteria for the placement of eligible affordable AFFH units." *Id.* at 2. The County asserted that it had considered proposals in both school districts, and believed the Ellendale proposal had made the most progress towards receiving funding and land use approvals. *See id.* at 2-3.

HUD's argument has considerable force. There is little question that the County should consider increasing educational opportunities in evaluating the suitability of sites developed pursuant to the Settlement. *See* Monitor's April 2011 Report at 11-12 (ECF No. 336). The County does not dispute that educational opportunities are a factor, albeit one among several others, to be considered in deciding where to develop new housing. *See* Settlement ¶ 7(g). The questions therefore are: (a) how much weight should be given educational opportunity in evaluating a site; and (b) under what circumstances might educational issues disqualify a site. These are necessarily fact-specific determinations. In evaluating whether a proposed site is consistent with the goals of the Settlement, the Monitor informed the parties that he would consider the characteristics of the school district in conjunction with the individual characteristics of the development, the

municipality, and the County's overall pattern of site placement to ensure that the County is in fact creating new educational opportunities under the Settlement. *See* Monitor's April 2011 Report, at 11-12 (ECF No. 336).

In the Village of Rye Brook, the concern over site placement is particularly acute because, as noted above, the Village is divided between two school districts, (1) the Port Chester-Rye Union Free School District, which is shared with a non-eligible municipality (Port Chester) and is predominantly Hispanic or Latino, and (2) the Blind Brook-Rye Union Free School District, which is wholly contained within the Village of Rye Brook, is where a majority of the Village's pupils attend, and is predominantly white.¹⁰ Without making any assessment of the quality of the school district itself, the development does not increase access to educational opportunities because it does not create a new opportunity for minorities who would be in the same district if they lived in the neighboring non-eligible community, Port Chester. The potential to circumvent the Settlement's goals of integrating residential patterns and increasing access to new educational opportunities is therefore heightened and must be considered by examining the County's pattern of placement and the characteristics of the development.

¹⁰ The student population in Blind Brook-Rye Union Free School District is 92% white, 5% Asian or Native Hawaiian/Other Pacific Islander, 2% Hispanic or Latino, 0% black or African American, and 0% American Indian or Alaska Native. *See* New York State District Report Card for 2010-2011 Academic Year: Port-Chester-Rye Union Free School District (*available at*: <https://reportcards.nysed.gov/>). Only 1% of the students are eligible for free lunches. *Id.*

To date, the Ellendale Avenue proposal is the first County advisory to raise such concerns about educational opportunities. The development also consists solely of one-bedroom units, which are less likely to be occupied by families with school-age children, and therefore less likely to attract families who would be able to take advantage of new educational opportunities the development might otherwise provide if it were located in the Blind Brook-Rye Free Union School District. As a result, educational concerns are a less significant factor in the context of this development than they would be in the context of a development that includes multi-bedroom units.

Based on the foregoing analysis, the Monitor concluded that the units in Rye Brook may count toward the County's 750-unit obligation, subject to the County's full compliance with the Affirmative Fair Housing Marketing Plans approved by the Monitor on December 29, 2012. *See* January 15, 2014 Letter from James E. Johnson to Robert P. Astorino, hereto attached as Ex. 39.

B. Completed Affordable AFFH Units Have Increased Diversity

For each completed AFFH development as of March 31, 2014, the County provided a report that sets forth demographic data concerning 173 completed units. *See* Ex. 16 (2014 1Q Report) at App'x I-3. The data reflects greater diversity among the new residents than had previously existed in the census block. For example, in Cottage Landings in the City of Rye, where 17 units are occupied, 35% of households identify themselves as black or African American and 17% identified themselves as Hispanic, as compared to the City's general population, which, according to 2010 Census data is 1.6%

black or African American and 10.9% Hispanic. Overall, of the 173 occupied units developed pursuant to the Settlement, 85 (49%) of the head of households identify themselves as white; 60 (35%) identify themselves as black or African American; 7 (4%) indicate that they are multi-racial; 2 identified themselves as black or African American and white; 2 indicated that they are American Indian and Alaska Native and black or African American; 1 indicated that they are American Indian and Alaska Native and white; and 1 indicated that they are Asian. With regard to ethnicity, 36 (21%) identified themselves as Hispanic.

The Monitor will continue to review demographic trends as more developments are completed and occupied.

C. County's Efforts to Identify Sites

Throughout 2012 and 2013, County personnel met with municipal officials, landowners, and developers in order to identify sites and undertook separate efforts in that regard. *See, e.g.*, Ex. 40 (2013 3Q Report) at 8; Ex. 15 (2013 2Q Report) at 8; Ex. 41 (2013 1Q Report) at 8; Ex. 12 (2012 4Q Report) at 8. The County described its efforts to identify new properties through realtors and municipalities who apprise the County of parcels that may be feasible as they come to market, regardless of their current zoning use. *See, e.g.*, Ex. 40 (2013 3Q Report) at 9. The County reported that potential sites were evaluated based on proximity to schools and other community resources, the developer's qualifications, and an underwriting analysis. *Id.* at 9-10.

As stated above, the County should continue to focus on the site selection criteria discussed in the Monitor's April 2011 report when evaluating potential developments. *See* Monitor's April 2011 Report at 11-12 (ECF No. 336).

V. Costs Associated with Settlement

A. Costs of Developing Housing

The Settlement made available a total of \$51.6 million for the development of the Affordable AFFH Units. *See* ¶¶ 2, 5. By the end of the first quarter of 2014, approximately \$34.2 million had been obligated. *See* Ex. 16 (2014 1Q Report) at 2. Further, the Settlement requires the County to set aside \$400,000 to pay for consultants and public education, outreach, and advertising to AFFH. *See* Settlement, at ¶ 33(h). By the end of the first quarter, \$226,000 had been obligated from this funding stream. *See* Ex. 16 (2014 1Q Report) at App'x VI-1.

The County reported that \$883,765 of the \$21.6 million in the County's Community Development Block Grant ("CDBG") line of credit was obligated during the first quarter of 2014, for a total obligation of approximately \$20 million from this funding stream. *Id.* at 20. The County further reported that approximately \$14.2 million of the \$30 million it is required to spend for the development of Affordable AFFH housing under paragraph 5 of the Settlement was obligated as of the end of the first quarter. *See id.*

The County's per-unit subsidy has decreased from \$98,162 as of the end of third quarter 2012 to \$79,860 by the end of first quarter 2014. *Id.* at 22. The County's

reported strategy for staying within its budgeted \$51.6 million, however, estimates an average subsidy of \$68,814 for 750 units. *See id.* at App’x VI-2. According to the County, it anticipates reducing its per-unit subsidy, in part, by building a number of units on County land, thereby eliminating land acquisition cost, and through mandatory set-asides of affordable AFFH units in market-rate multifamily developments. *See id.*

Although the County’s financial projections assume substantially lower costs than it has realized to date, there is now support for the validity of those assumptions. For the first time since the Settlement was signed, the County has listed mandatory set-aside units in its site progress list amounting to seven potential units of affordable AFFH housing at no cost to the County. *See id.* at App’x I-1. In a meeting between the Monitor, County, and HUD, held on December 16, 2013, the County also discussed yet to be publicized plans for a 28-unit development to be built on County-owned land, which would significantly reduce the County’s per-unit expenditures.

B. Analysis of Impediments

Paragraph 32 of the Settlement requires the County to complete an AI “within its jurisdiction that complies with the guidance in HUD’s Fair Housing Planning Guide, *see* U.S. Dept. of HUD, Fair Housing Planning Guide (1996),” and is “deemed acceptable by HUD.” 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.

The Settlement also required the County Executive to promote legislation that would ban source-of-income discrimination as a potential impediment to fair housing. *See* Paragraph 33(g).

At the beginning of the reporting period, the parties were in dispute over two issues: (a) the analysis of municipal zoning under state and federal law and (b) the passage of legislation that would ban discrimination against renters based on the source of the rental applicant's income ("source-of-income legislation"). As described in full below, after litigating the source-of-income legislation dispute in this Court and on a subsequent appeal to the U.S. Court of Appeals for the Second Circuit, the County eventually enacted the required legislation. The parties, however, remain at an impasse over the County's zoning analysis. As a result, the County permanently lost its fiscal year 2011 allocation, \$7.4 million, in community planning and development formula grants from HUD ("CPD Funds"), and risks losing its 2012 allocation, \$5.2 million, if the issue is not resolved in the coming months.

1. County Adoption of Source of Income Legislation

Paragraph 33(g) of the Settlement required that the County “promote, through the County Executive, legislation currently before the BOL to ban ‘source-of-income’ discrimination in housing.” The purpose of such legislation would be to bar landlords from discriminating against otherwise qualified renters based on the source of their income, including from government programs such as Social Security, disability benefits, or Section 8 housing vouchers. As more fully described in the Monitor’s Dispute Resolution Report, on June 14, 2010 (ECF No. 384), the Westchester County BOL passed Local Law 3-2010, an amended version of the Source of Income legislation pending at the time the Settlement was entered. County Executive Astorino vetoed that legislation on June 25, 2010. This decision eventually became the subject of a dispute that the parties presented to the Monitor.

In the Dispute Resolution Report, the Monitor found that the County Executive had a duty to promote the legislation. *See* Monitor’s Report and Recommendation Regarding Dispute Resolution at 2-11 (ECF No. 384). The Monitor concluded that the County Executive’s conduct – both his failure to promote the legislation and the subsequent veto – was a breach of the Settlement. On May 3, 2012, the District Court upheld both of the Monitor’s findings. *See* Opinion & Order, filed May 3, 2012, at 12-27 (ECF No. 402). The District Court adopted the recommendation of the Monitor that to discharge its duty, the County Executive should “[request] that the legislature reintroduce the prior legislation, [provide] information to assist in analyzing the impact of the legislation, and [sign] the legislation passed.” *See id.* at 16-17.

The County subsequently appealed the District Court's decision to the Court of Appeals for the Second Circuit. In the interim, the County requested a stay pending appeal, which this Court denied on May 17, 2012 (ECF No. 409) and the Second Circuit denied on August 3, 2012 (ECF No. 70). Despite the denial of its motion, the County Executive initially took the position that he would not make a request to the legislature to reintroduce source-of-income legislation until the Second Circuit issued its decision. *See* August 17, 2012 Letter from Kevin J. Plunkett to James E. Johnson and David J. Kennedy, hereto attached as Ex. 42. After the Government objected in a letter dated August 22, 2012, the County reversed its position. *See* Ex. 2 (August 22, 2012 Letter). In an August 31, 2012 letter to the Chairman of the Westchester County BOL, the County Executive requested that the BOL reintroduce prior source-of-income legislation. *See* August 23, 2012 Letter from Robert P. Astorino to James E. Johnson, hereto attached as Ex. 43; August 31, 2012 Letter from Robert P. Astorino to Kenneth W. Jenkins, hereto attached as Ex. 44. The BOL did not reintroduce any source-of-income legislation in the months that followed. On April 5, 2013, the Court of Appeals for the Second Circuit affirmed this Court's decision (ECF No. 122-1).

As early as May of 2012, the Monitor has used his authority, pursuant to paragraph 13(b) of the Settlement, to request information and documents from the County, to increase transparency of the County's efforts to promote source-of-income legislation, and bring the parties closer to resolution on the issue. On May 14, 2012, following the District Court's ruling, the Monitor requested that the County Executive and the Chairman of the BOL describe what steps each intended to take to implement the

Court's order. *See* May 14, 2012 Letter from James E. Johnson to Robert P. Astorino and Kenneth W. Jenkins, hereto attached as Ex. 45. On May 21, 2012, the County responded that it had filed an appeal and stay of the District Court's decision, and that pending the Second Circuit's decision, it would be premature to provide this information. *See* May 21, 2012 Letter from Robert P. Astorino to James E. Johnson, hereto attached as Ex. 46. Following the Second Circuit's denial of the County's motion for a stay, the Monitor repeated its request for the steps the County intended to take to implement the District Court's order. *See* August 3, 2012 Letter from James E. Johnson to Robert P. Astorino, hereto attached as Ex. 47. The County responded by requesting that the BOL reintroduce the source-of-income legislation previously proposed, but made no commitment to signing such legislation if passed. *See* Ex. 43 (August 23, 2012 Letter); Ex. 44 (August 31, 2012).

The BOL, however, took no steps to reintroduce the legislation, instead insisting that the County Executive himself reintroduce the legislation. As a result of the impasse between the BOL and the County Executive, legislation was not re-introduced until April 24, 2013 when, following the Second Circuit's final decision, and under threat of contempt by the U.S. Attorney's Office for the Southern District of New York ("USAO"), the County Executive finally submitted the 2010 source-of-income legislation and stated his intention to sign the legislation if passed. *See* April 24, 2013 Letter from Robert P. Astorino to Westchester County BOL, hereto attached as Ex. 48.¹¹

¹¹ Immediately following the Second Circuit's decision, on April 5, 2013, the USAO requested that the County Executive identify the steps the County intended to take to comply with the Court's order to promote source-of-income legislation. April 19, 2013 Letter from David J. Kennedy to Robert

Again, concerned about the delays posed by both the County Executive and the BOL in re-introducing and promoting source-of-income legislation, the Monitor issued another information request to the County on April 25, 2013, seeking communications between the County Executive's staff and the BOL and a log of all internal communications among the County Executive and his staff, and requesting an interview of the County Executive following production of the requested documents. *See* April 25, 2013 Letter from James E. Johnson to Kevin J. Plunkett and Robert Meehan, hereto attached as Ex. 49.

Eventually, on June 17, 2013, the BOL passed a revised version of the 2010 Legislation, and it was signed into law by the County Executive on June 26, 2013. *See* Local Law 6057-2013, hereto attached as Ex. 51. With the legislation finally enacted, the request for an interview of the County Executive was withdrawn.

2. HUD and County Dispute Regarding Zoning Analysis

The County's duty to conduct a zoning analysis arises from its duty under paragraph 32 of the Settlement to submit an AI that "complies with the guidance in HUD's Fair Housing Planning Guide, *see* U.S. Dept. of HUD, Fair Housing Planning Guide (1996)." 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

Meehan, hereto attached as Ex. 50, at 1. The County responded by email on April 10, 2013, in which the County Executive reiterated its request that the BOL reintroduce source-of-income legislation, and committed to providing information relating to the proposed legislation. *Id.* The USAO replied that the Second Circuit's decision required that the County Executive himself submit source-of-income legislation to the BOL and to agree to sign it if passed. *Id.* at 2.

potential for certain provisions of a zoning code to serve as impediments to fair housing. *See* HUD, Fair Housing Planning Guide, hereto attached as Ex. 52, at Sections 5-6 through 5-8 (1996). To date, the County has yet to develop a zoning analysis deemed acceptable to HUD.

In January 2011, Astorino received a report that detailed discrimination in rental housing. Astorino acknowledged the clear evidence of housing discrimination and welcomed apparent improvement. *See* Press Release, Westchester County Executive, *Housing Bias Report: County Has Made Significant Improvement*, Jan. 23, 2011, hereto attached as Ex. 53. By July of that year, however, the County Executive had taken an emphatic public position that there was no exclusionary zoning in Westchester County. “People have the right to live anywhere they like in Westchester and it's a right I stand ready to enforce to the full extent of the law. Where people live depends on the home they can afford. There are lots of homes in Westchester I would like to own, but can't afford. That's not discrimination. That's economics.” Robert P. Astorino, *HUD's Overreaching Goes Far Beyond the Terms of the Housing Settlement*, The Journal News Editorial, July 18, 2011, hereto attached as Ex. 54.

In a September 8, 2011 appearance on Sean Hannity's Fox News Channel program, Astorino was asked about the dispute with HUD:

ASTORINO: They are trying to say Westchester has a pattern of segregation, discrimination in its housing policies. We don't do that.

HANNITY: Has any African-American, has any Hispanic-American been denied access to your housing?

ASTORINO: None that I know of, look, does racism, discrimination exist in this world? Of course, it does. But they are saying Westchester is segregated, has been and continues to be. The facts don't bear that out.

Fox News's Sean Hannity, *Feds Accusing NYC Suburb of Segregation?*, Sept. 7, 2011, hereto attached as Ex. 55 (video available at: <http://www.foxnews.com/on-air/hannity/transcript/2011/09/08/feds-accusing-nyc-suburb-segregation?page=1>). The County Executive took this position before the analysis was complete. Notably, the statement betrayed ignorance of the actual findings of discrimination in the report he had personally announced earlier that same year. *Id.*

After these statements, the zoning issue was first submitted by the County to the Monitor for resolution on October 7, 2011 as part of the AI dispute. The Monitor's subsequent Dispute Resolution Report directed the County to conduct an analysis of municipal zoning ordinances and to provide a strategy for overcoming zoning practices deemed exclusionary. *See* Monitor's Report and Recommendation Regarding Dispute Resolution at 13-16 (ECF No. 384). The County submitted its objections to the Monitor's Dispute Resolution Report to Magistrate Judge Gabriel W. Gorenstein on December 7, 2011 (ECF No. 386), but on March 16, 2012, Judge Gorenstein overruled the County's objections, finding that the Settlement vests the authority to determine the adequacy of the AI "exclusively in HUD" and 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 Mar. 16, 2012, at 17-18 (ECF No. 396). The County did not appeal this issue further.

In the interim, the County provided a revised zoning analysis on February 29, 2012. The zoning analysis conformed to the position the County Executive had already taken in the press. HUD reviewed the County's submission but found it to be both legally and factually deficient, and provided the County with steps it should take to produce an acceptable AI. *See* April 20, 2012 Letter from Glenda L. Fussá to Kevin J. Plunkett, hereto attached as Ex. 56. Specifically, HUD requested that the County:

- Examine relevant data for exclusionary impacts and segregative effects including “a review of the types, quantity, and quality of housing presently in the local jurisdiction, proposals for developments (those formally submitted, in progress, and those abandoned), interviews with affected parties, demographic data for the various zoning districts within each local jurisdiction, and an examination of the entire region, particularly demographic data for other jurisdictions with different zoning practices, the housing available, and of regional housing needs;”
- Examine whether a particular ordinance having an adverse impact on a protected class “(1) furthers a legitimate, bona fide governmental interest, and (2) no alternative course of action can be adopted that would enable that interest to be served with less discriminatory impact or segregative effect;”
- Examine whether a particular “ordinance is adversely affecting the local jurisdictions’ obligation to meet regional needs;” and

- “Once specific exclusionary zoning practices are identified, . . . develop a process for notifying municipalities of zoning issues that hinder the County’s obligations under the Settlement and changes that must be made, and if not made, the consequences of municipalities’ failure to make them; develop a process to involve municipal decision-makers in consultation regarding changes in zoning and land use restrictions; provide a description of how these requirements will be included in future contracts or other written agreements between the County and municipalities; and identify the types of zoning practices that would, if not remedied by the municipality, lead the County to pursue legal action.”

Id. at 11-12. Notably, HUD made a request for a deeper inquiry and did not, as the County Executive had argued, presume a particular outcome to the inquiry.

Due to the ongoing source-of-income dispute and the deficient zoning analysis, HUD informed the County of its disapproval of the County’s FY2011 AFFH certification and Annual Action Plan, both requirements for receiving CPD Funds, and its intent to reject the same for FY2012. *See* April 20, 2012 Letter from Vincent Hom to Robert P. Astorino, hereto attached as Ex. 57. The County responded in a letter dated April 26, 2012, hereto attached as Ex. 58, disputing HUD’s findings and failing to indicate its intent to take the corrective actions identified by HUD. As a result, on April 27, 2012, HUD rejected the County’s FY2012 AFFH certification and Action Plan. *See* April 27, 2012 Letter from Vincent Hom to Robert P. Astorino, hereto attached as Ex. 59.

Following the County's February 29, 2012 zoning submission, the Monitor issued a series of information requests related to zoning in an attempt to build a factual record that might resolve the zoning dispute.¹² The Monitor reviewed these submissions and incorporated them into a report filed with the Court on September 13, 2013, the findings of which are discussed in greater detail below. HUD also reviewed the County's submissions to assess whether the County's responses addressed the corrective actions listed in HUD's April 20, 2012 letter. Ultimately, HUD found that the County had still failed to provide sufficient evidence to support its AFFH certification. *See* March 13, 2013 Letter from Glenda L. Fussá to Kevin J. Plunkett, hereto attached as Ex. 60. On March 25, 2013, HUD warned the County that if the County did not provide substantive assurances by April 25, 2013 that it would revise its AI in accordance with HUD's guidance, HUD would begin the process of reallocating to other jurisdictions \$7.4 million in CPD Funds that had been allocated to the County for FY2011. *See* March 25, 2013 Letter from Vincent Hom to Robert P. Astorino, hereto attached as Ex. 61. HUD set an ultimatum for the County's compliance because under federal law, HUD would be forced to relinquish the funds to the U.S. Treasury unless it reallocated the funds prior to September 30, 2013, and it required sufficient time to find a recipient before that date.

Id.

The County responded on April 4, 2013, arguing that it had complied with all of HUD's procedural requirements and requested a hearing with HUD before the FY2011

¹² The County objected or failed to adequately respond to several of the Monitor's information requests. The dispute was resolved by this Court, as fully discussed in the Monitor's February 2013 Report to the Court, at 15-19 (ECF No. 429).

CPD Funds were reallocated. *See* April 4, 2013 Letter from Robert P. Astorino to Secretary Shaun Donovan, hereto attached as Ex. 62. On April 16, 2013, HUD rejected the County's arguments and denied its request for a hearing. *See* April 16, 2013 Letter from Glenda L. Fussá to Robert P. Astorino, hereto attached as Ex. 63. The letter indicated HUD's intent to precede with reallocation of the County's FY2011 funds. *Id.*

On April 24, 2013, the County filed a complaint with the Court seeking review of HUD's April 16, 2013 decision to reallocate the County's funds. *See* Complaint, *Cnty. of Westchester v. HUD*, 1:13-cv-02741 (ECF No. 1). That same day, the County submitted a revised AI to HUD. On April 26, 2013, the Court denied the County's application for a temporary restraining order and declined to grant the County's application for a preliminary injunction. *See* Order, filed Apr. 26, 2013 (ECF No. 26). HUD filed a motion to dismiss on June 26, 2013, which was granted on August 14, 2013. Opinion & Order, filed Aug. 14, 2013 (ECF No. 27). The Court found that HUD's decision was not a reviewable administrative decision and that it did not otherwise violate any statutory or regulatory provisions, or any constitutional standards. *Id.* at 7-14. The County appealed the Court's decision to the U.S. Court of Appeals for the Second Circuit on August 16, 2013. *See* First Notice of Appeal, filed Aug. 16, 2013 (ECF No. 29). The Second Circuit denied the County's motion for a temporary restraining order and a preliminary injunction on September 20, 2013, removing any legal impediments to HUD reallocating its FY2011 funds. *See* Order, 13-3087, filed Sept. 20, 2013 (ECF No. 57).

VI. Monitor's Report on Zoning and Municipal Engagement

After receiving a series of County submissions to the Monitor's information requests, and in an effort to resolve the impasse concerning zoning, the Monitor issued the Report on Westchester County's Analysis of Municipal Zoning to the County and HUD on July 31, 2013 (the "July 31 Report"). The substance of the July 31 Report was incorporated into the Final Report filed with the Court on September 13, 2013, together with the County's response and the Monitor's reply thereto (the "Final Zoning Report") (ECF No. 452).¹³

A. Purpose of and Process Behind the Final Zoning Report

The Final Zoning Report was issued to evaluate the County's response 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, *see* Order, filed July 27, 2012 at 2-3 (ECF No. 414), the Monitor directed the County to conduct an analysis of certain restrictive zoning practices in the 31 communities eligible under the 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. More specifically, the Monitor recommended that the County "at a minimum, assess the impact of each of the following zoning

¹³ Both parties were given more than five weeks to respond to the July 31 Report. The County's response is attached to and summarized in the Final Zoning Report. HUD did not submit a response.

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 Monitor’s Report and Recommendation Regarding Dispute Resolution, filed Nov. 17, 2011, at 13-14 (ECF No. 384). In order to submit a sufficient AI, in consultation with the Monitor and HUD, the County was also ordered to develop and implement a methodology for analyzing municipal zoning ordinances. *See* Order, filed July 27, 2012 at 2 (ECF No. 414).

The Monitor’s team, including planning experts John Shapiro and Brian Kintish of 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* Methodology for Considering the Cost and Geographic Implications of the Six Questioned Zoning Practices, hereto attached as Ex. 64. 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.

The County completed five more rounds of zoning submissions. *See* Third Zoning Submission, dated Sept. 6, 2012, hereto attached as Ex. 65; Fourth Zoning Submission, dated Nov. 20, 2012, hereto attached as Ex. 66 (CD-ROM enclosure not included); Fifth Zoning Submission, dated Oct. 5, 2012 and Nov. 20, 2012, hereto attached as Ex. 67 (CD-ROM enclosure not attached); Sixth Zoning Submission, dated Apr. 23, 2013, hereto attached as Ex. 68; Seventh Zoning Submission, dated June 13, 2013, hereto attached as Ex. 69; Eighth Zoning Submission, dated July 23, 2013, hereto attached as Ex. 70. In all of them, the County reached the conclusion that there is no evidence of exclusionary zoning in any of the 31 eligible communities in Westchester County. As discussed above, HUD reviewed the County’s submissions and concluded that the County’s analysis remained deficient and that it had failed to fulfill its duty,

pursuant to paragraph 32 of the Settlement, to submit a satisfactory AI that, among other things, evaluated the exclusionary impact of zoning regulations under federal and state law.

Rather than take either party's conclusions at face value, the Monitor tasked Shapiro, Kintish and Alix Fellman (the "housing consultants"), to review the County's conclusions and data. The Monitor's housing consultants reviewed the County's first four zoning submissions, which included approximately 780 pages of tables, maps, and other data, and conducted their own research to assess the zoning practices in each of the 31 eligible municipalities.

Under the Monitor's supervision, the team compiled and analyzed information concerning the following aspects of each municipality's zoning ordinance: (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); (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 allocations set forth in the Westchester County Housing Opportunity Commission's Affordable Housing Allocation Plan of 2005.

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 municipalities, requesting that they respond, voluntarily, with any comments, corrections or questions by April 18, 2013. *See, e.g.*, March 21, 2013 Letter from James E. Johnson to Paul Rosenberg, Mayor of Rye Brook, hereto attached as Ex. 71. 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. The Monitor also heard from municipal leaders in small groups and larger meetings. The additional data from the municipalities were reviewed and incorporated into each municipality's zoning report. The County also provided its observations on the housing consultants' preliminary findings. April 17, 2013 Letter from Edward Buroughs to James E. Johnson, hereto attached as Ex. 72.

Following that letter, the County Executive announced that he would hold a press conference in which he would criticize the draft reports. He also asserted, incorrectly, that the Monitor was imposing a new set of requirements on the municipalities.

Before the County Executive's press conference, the Monitor wrote the County Executive and explained that the draft reports were not a change of requirements and asked the County Executive not to mislead the public about the nature of the reports. The Monitor stated that the 10,768 figure presented in the Westchester Housing Opportunity Commission's report "neither expand[s] nor supplant[s] the County's obligation under

paragraph 7 of the Settlement,” and that “[t]he Monitor does not have unilateral authority to upwardly revise the number of units required by paragraph 7 of the Settlement.” Ex. 19 (June 12, 2013 Letter). The County Executive refused the request and went forward with the press conference.

At the press conference, the County Executive claimed that the Monitor was imposing a new requirement on the municipalities that could require the County to build 10,768 units of new housing. *See* Ex. 22 (June 5, 2013 Press Release); *see also* Town of Bedford Town Hall Presentation, *Ask Astorino*, hereto attached as Ex. 73, at 24-25 (stating that the “new target” for units built under the settlement was 10,768 and would cost the County \$1 billion).

B. Conclusions of the Zoning Analysis

Notwithstanding the County Executive’s statements, the Housing Consultants continued their work and concluded that seven of the 31 municipalities eligible under the Settlement had zoning ordinances that limited affordable housing or made the development of affordable housing practically infeasible.¹⁴ *See* Exhibit 1 to the Final Zoning Report, Report on Zoning by Municipality in Westchester County, New York Subject to the Settlement, prepared by the Housing Consultants (“Housing Consultant Report”) (ECF No. 452). Applying the two-prong analysis, set forth in *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975), a municipal zoning ordinance is legally deficient if as a whole the ordinance fails either (1) to “provide[] a properly balanced and

¹⁴ In an effort to provide full transparency, the housing consultants’ findings on the 31 eligible municipalities and the source data used have been posted on the Monitor’s website (*available at*: <http://www.westchesterhousingmonitor.org/zoning>).

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).¹⁵ Should a municipality fail to meet either prong 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 housing consultants’ findings were 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.

As of the date the Final Zoning Report was filed, September 13, 2013, the distribution of municipalities into the three categories was as follows:

<u>Category 1</u>	<u>Category 2</u>	<u>Category 3</u>
Hastings-on-Hudson	Ardsley	Croton-on-Hudson

¹⁵ For a more detailed description of the legal principles, *see* Section IV of the Final Zoning Report (ECF No. 452).

North Salem	Bedford	Harrison
Tarrytown	Bronxville	Lewisboro
Yorktown	Buchanan	Mamaroneck ¹⁶
	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 was comprised of those municipalities where the evidence supported a conclusion that the zoning was exclusionary on the basis of socioeconomic status. Although each municipality's zoning code is different, the original seven municipalities shared several common zoning impediments to developing affordable housing: (1) restrictions on multifamily housing; (2) lack of incentives and mandates for affordable housing; (3) restrictions on alternative sources of affordable housing; and (4) lack of progress in meeting regional need.¹⁷

¹⁶ The Town of Mamaroneck has since been removed from Category 3 and now falls within Category 2. *See infra* Section VI.D; First Zoning Analysis Progress Report (ECF No. 463).

¹⁷ For a more detailed analysis leading to the housing consultant's conclusions and categorizations of the municipal zoning ordinance, *see* Exhibit 1 to the Final Zoning Report, Housing Consultant Report (ECF No. 452).

C. Municipal Engagement

Since the initial release of the zoning report in July 2013, the Monitor has met at least once with five of the seven municipalities identified in the Final Zoning Report as having exclusionary zoning ordinances, including the Village of Croton-on-Hudson, the Town of Lewisboro, the Town of Mamaroneck, the Town of Ossining, and the Town of Pound Ridge. Notably, all of the municipalities, including those who joined the County Executive at the press conference, have taken steps to work with the Monitor to address zoning issues. Two additional communities have also recently reached out to the Monitor team to discuss their zoning.

In the meetings, municipalities have had the opportunity to raise objections to the findings in the Report, provide additional information and data on the municipalities' zoning ordinances, and provide insight into community efforts to promote affordable housing.¹⁸ Following each of these meetings, the Monitor offered to convene a follow-up technical meeting, including representatives from the Monitor's team of housing consultants, the County, and HUD, to address specific steps that could be taken to address exclusionary zoning in those communities. Thus far, three follow-up meetings have been held with the Town of Ossining, the Town of Mamaroneck, and the Village of Croton-on-Hudson. Both HUD and the County participated in these meetings. The meetings have been productive and serve as an important starting point for a

¹⁸ Following the release of the Report in July 2013, three municipalities submitted letters with additional information concerning zoning, including the Town of Mount Pleasant, the Village of Croton-on-Hudson, and the Town of Somers. Where appropriate, these letters were incorporated in a revised version of the Housing Consultant Report. *See* Exhibit 1 to the Final Zoning Report, Housing Consultant Report (ECF No. 452).

collaborative process designed to improve opportunities for affordable housing development, while remaining cognizant of the unique circumstances present in each of the individual municipalities.

D. Municipal Progress

The analysis in the Final Zoning Report provided a snapshot of the municipal zoning ordinances and practices at the time the Final Zoning Report was filed and may be amended over time to reflect the progress the municipalities make to foster affordable housing development.

Since the Final Zoning Report was filed, the Town of Mamaroneck has enacted two amendments to its zoning ordinance that could increase the opportunities for affordable housing development and its ability to meet the most recent and best available estimate of its share of regional affordable housing. First Zoning Analysis Progress Report, filed Feb. 10, 2014, at 4-8 (ECF No. 463). After meeting with representatives from the Town of Mamaroneck, the County, HUD, and the Monitor's Housing Consultants, the Monitor concluded that the Town of Mamaroneck should no longer be included in the third exclusionary category of municipalities. *See id.* at Exhibit M-1 (Dec. 11, 2013 Letter from James E. Johnson to Robert P. Astorino) (ECF No. 463). The Monitor requested that the County perform an updated analysis and provide the Monitor with current data in order for the Monitor to conduct a comprehensive review and file a formal supplemental report evaluating the Town's new zoning ordinance. *Id.*

The County promptly submitted the revised analysis of the Town of Mamaroneck on January 14, 2014. *See id.* at Exhibit M-2 (Jan. 14, 2014 Letter from Edward Burroughs to James E. Johnson) (ECF No. 463). Subsequently, the Monitor filed the First Zoning Analysis Progress Report on February 10, 2014, formally removing the Town of Mamaroneck from the list of exclusionary municipalities, and placing it in the second category. *See id.* at 8.

VII. Board of Legislators Seeks to Break Impasse

On April 23, 2014, HUD notified the County of its intent to reallocate FY 2012 grants unless the County provided assurances that it would: (a) acknowledge a duty to AFFH in compliance with the 2009 Settlement; (b) adopt the findings in the Monitor's Final Zoning Report; (c) submit a revised zoning submission consistent with HUD's previous guidance; and (d) commit to a strategy to overcome exclusionary zoning where it exists. *See* April 23, 2014 Letter from Mark Johnston to Robert P. Astorino, hereto attached as Ex. 74.

Subsequently, the Chairman of the BOL engaged with HUD in an effort to resolve the impasse. In a letter dated May 6, 2014, the Chairman represented that the BOL had the "necessary authority" to provide the requested assurances to HUD, and provided the legal justification for doing so. *See* Ex. 3 (May 6, 2014 Letter) at 1. On May 8, 2014, HUD requested that the Chairman provide HUD with: (1) a timeline and benchmarks for enacting a local law that commits the County to providing the necessary assurances; (2) a "plan for completing the required zoning analysis;" and (3) an "explanation of the

Board's authority to subsume traditional executive functions necessary to implement" a strategy to overcome exclusionary zoning practices. May 8 2014 Letter from Holly M. Leicht to Michael B Kaplowitz, at 1, hereto attached as Ex. 75. The May 6 and May 8 letters were filed with the Court on May 9, 2014 (ECF 471).

As part of its effort to revise the County's AI, the BOL asked the Monitor to task his housing experts to conduct an evaluation of the 31 eligible municipality's zoning ordinances under the federal standard for exclusionary zoning. *See* May 27, 2014 Letter from James E Johnson to Holly M. Leicht, Michael B. Kaplowitz, and Robert F. Meehan, hereto attached as Ex. 76. The Monitor agreed to oversee the analysis, and provided HUD, the BOL, and the County Executive with the proposed methodology to be used in conducting the analysis, and requested that the parties notify him with any objections.

The County Executive has opposed this approach. In a press release issued on June 5, 2014, he characterized the Monitor's letter as "a plan to rewrite the 2009 federal affordable housing settlement" in such a way that would give HUD "unprecedented power to dismantle local zoning." Ex. 22 (June 5, 2014 Press Release) at 1. The County Executive also sent a letter to the 31 eligible municipalities stating that the alleged "changes to the Settlement" would result "in the loss of Home Rule, your authority to control local land use – as guaranteed by the New York State Constitution," and that "HUD could dictate local zoning changes and open your municipality to never-ending investigations by the federal government." Second Attachment to June 5, 2014 Letter from Michael B. Kaplowitz to James E. Johnson, hereto attached as Ex. 77, at 1.

The County Executive's statements are consistent with the earlier statements in opposition to efforts to ensure compliance. They serve to underscore the need for a thoroughgoing exploration of his communications to other officials concerning the misrepresentation of the terms of the decree.¹⁹

VIII. Dispute Regarding Chappaqua Station Development

Over the last two years, the Monitor has participated in the review of a proposal for affordable housing called Chappaqua Station to be built in the Town of New Castle. Since its first public hearings in July 2012, the proposal has faced opposition from residents, and more recently, newly-elected town officials. It is now the subject of an administrative complaint filed by the developer with HUD, alleging discrimination.

According to submissions made by the Town of New Castle and Conifer Realty ("Conifer"), the developer for Chappaqua Station, Conifer was first made aware of the proposed site located at 54 Hunts Lane in April of 2010 by Town officials who were interested in seeing the site developed. *See* June 15, 2012 Letter from Susan E. Carpenter to James E. Johnson, hereto attached as Ex. 79; July 12, 2012 Letter from Andrew V. Bodewes to James E. Johnson, hereto attached as Ex. 80. The site, located near the Chappaqua Metro North railroad station, had recently been rezoned to allow for transit-

¹⁹ The County Executive has also attempted to unilaterally withdraw from participation in HUD's CPD funding programs for the three fiscal years 2015-2017. *See* Second Attachment to June 6, 2014 Letter from Michael B. Kaplowitz to Holly M. Leicht, hereto attached as Ex. 78. The Chairman advised HUD that the County Executive did not have the legal authority to withdraw from participation in the programs without BOL approval, since such an election to withdraw "may only be effective in the same manner as the county elected to participate, i.e., by Act of the Legislature." *Id.* at 1. The Chairman, therefore, asserted that the automatic renewal provision in the original legislative act remained in effect and that the County remains eligible for future CPD grants. *Id.*

oriented workforce housing and Town officials believed the site to be suitable. Ex. 80 (July 12, 2012 Letter) at 1. The Town endorsed Conifer's 36-unit proposal and requested New York State to provide financing for the project. In September 2010, Conifer purchased the site. *Id.* at 2. The County also indicated its support for the project and in a letter informed New York State of the County's intention to provide \$100,000 per unit in project funding. *See* Attachment to *id.* (Feb. 7, 2011 Letter from Edward Burroughs to Brian Lawlor). In October 2011, the State awarded financing for the Hunts Lane Project. *Id.* at 2.

In February 2012, the County, the Town of New Castle and Conifer asked the Monitor to visit a proposed site in the early stages of development and offer guidance as to whether units developed on the site could count against the County's obligation to develop at least 750 Affordable AFFH Units under the terms of the Settlement. In a letter to Conifer, the Monitor noted that the site presented significant challenges and questioned whether the development, as proposed, would further the goals of the Settlement. *See* April 12, 2012 Letter from James E. Johnson to Andrew Bodewes, hereto attached as Ex. 81; July 12, 2012 Letter from James E. Johnson to Andrew Bodewes, hereto attached as Ex. 82. Specifically, the Monitor raised concerns regarding site location and configuration – the proposed building would be located on a small parcel of land, between a major highway, a bridge, and railway tracks. The Monitor also questioned whether the architectural design and aesthetics were well-integrated into the architecture of the surrounding community.

On July 31, 2012, Conifer met with the Monitor and architects from WXY Studio, a New York-based architecture and design firm, to discuss potential adjustments to the plan. The Monitor did not urge changes to Conifer's plan; the Monitor and the team of architects did share certain observations and suggestions for meeting what appeared to be widespread concerns about the aesthetics and functions of the proposed development. As a result of these meetings and through further consultations with municipal officials, Conifer continued to revise its plan.

On September 7, 2012, the Monitor indicated that Conifer had made sufficient changes to the design to overcome concerns the Monitor had previously raised concerning integration and potential stigma to future residents. Among other things, Conifer had made efforts to integrate the architectural and aesthetic design into the fabric of the community; it created public space within the building that made it a community asset; and it adjusted the plan to remediate pedestrian and traffic concerns. The Monitor indicated that the proposal furthered the goals of the Settlement and would count against Settlement requirements, and if presented in substantially similar form following municipal review. *See* September 7, 2012 Letter from James E. Johnson to Andrew V. Bodewes, hereto attached as Ex. 83. The most recently revised plans for the Chappaqua Station development were submitted to the Monitor on January 10, 2014 and are attached, hereto as Ex. 84.

In July 2012, the Town opened public hearings on the project. Several residents voiced concerns about the proposed site. Town officials, who were not involved in introducing Conifer to the site in 2010, also voiced concerns about safety, traffic, and

potential stigmatization of the residents who would live there, given the physical constraints and design of the site. The Monitor sought more information to clarify the history on site selection. The Monitor also met with Conifer and municipal officials, including meetings with Conifer on March 1, 2012 and Town of New Castle officials on September 28, 2012. *See* May 14, 2012 Letter from Andrew V. Bodewes to James E. Johnson, hereto attached as Ex. 85; May 21, 2012 Letter from James E. Johnson to Susan E. Carpenter, hereto attached as Ex. 86; Ex. 79 (June 15, 2012 Letter); July 12, 2012 Letter from Andrew V. Bodewes to James E. Johnson, hereto attached as Ex. 87; October 12, 2012 Letter from James E. Johnson to Andrew V. Bodewes and Susan E. Carpenter, hereto attached as Ex. 88. Conifer continued to modify its design and Chappaqua Station eventually received municipal approval on September 10, 2013.

The approval process is currently stalled. Conifer has been seeking, without success, New York State building code approval. At a December 10, 2013 hearing held in Cortlandt Manor, New York, residents and town officials, including the newly-elected Town Supervisor, voiced renewed opposition to the proposal, including concerns related to fire safety. A second hearing before the New York State Department of State Southern Regional-Hudson Valley Board of Review (“State Board of Review”) was held on April 9, 2014. The Board’s decision is pending.

The County has also expressed new reservations concerning Chappaqua Station. On December 16, 2013, the BOL voted to reject funding for the proposal, citing the ongoing safety concerns raised before the State Board of Review. The BOL has

indicated, however, that it would revisit the issue following a determination by the State Board of Review.

Following the initial proceedings before the State Board of Review and the BOL's vote to reject funding for Chappaqua Station, Conifer filed a Fair Housing Complaint with HUD alleging discrimination by the Town Supervisor, Building Inspector, and First Assistant Chief of the Chappaqua Fire Department, and requesting HUD seek a temporary restraining order against the State Board of Review, to maintain the status quo until HUD has completed its investigation. *See* February 3, 2014 Complaint, attached to February 3, 2014 Letter from Randolph M. McLaughlin to Robert Norrington, hereto attached as Ex. 89. Conifer alleged that town officials had made "efforts . . . to derail an Affordable AFFH project by pretext, unsubstantiated fears about safety, stigmatization and nature of the project." *Id.* at 2. In support of its claim, Conifer cited statements allegedly made by town officials at public hearings before the Town Board, the BOL, and State Board of Review, including that the development would be a "potential death trap," "a stigmatized ghetto, that the children who live there would be ostracized by children who live in the Village, and that the project would be where the 'blacks and Hispanics' live." *Id.* (quoting and paraphrasing statements made by town officials and residents). At the December 10, 2013, the Town Supervisor allegedly told the State Board of Review that "the elephant in the room is affordable housing," and stated that the State Board of Review was "our last line of defense." *Id.*

While the alleged statements are troubling, the Monitor will reserve judgment until the matter is fully adjudicated. Putting aside the specific allegations of

discrimination, the history of the Chappaqua Station approval process provides a case study of the potential difficulty of building affordable housing in Westchester, whether it be pursuant to the Settlement or not. The site for the Conifer proposal poses several physical challenges, but the developer has worked diligently over a two-year period to meet the concerns of the resident, town officials, and the Monitor. In response to the concerns, Conifer substantially altered the design. While the County and municipal officials initially indicated their support for the proposal, that support has wavered considerably, adding to the uncertainty and expense of the project. The uncertainty and costs not only threaten the viability of the Conifer development, but may serve to deter other potential developers who could be considering building affordable housing in the Town of New Castle and elsewhere in Westchester County.

IX. Promotion of the Model Ordinance

The Settlement recognizes the potential for zoning and the municipal approval process to pose barriers to housing integration on the basis of race. Paragraph 32 of the Settlement requires the County to conduct an Analysis of Impediments that includes a review of local zoning and the approval process. *See supra* Section V.B. Paragraph 25 of the Settlement requires the County to promote a “model ordinance” to local municipalities that includes “standards for expedited review of proposals for affordable housing that AFFH including procedures for streamlining the approval process for the design, permitting, and development of these units.”

As of March 31, 2014, 17 of the 31 municipalities have failed to adopt a version of the model ordinance. *See* Ex. 16 (2014 Q1 Report) at 17. Paragraph 33(c) of the Settlement requires the County to “create and fund campaigns to broaden support for fair housing . . . including public outreach specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities.” A concerted public education campaign directed at existing Westchester residents would raise awareness and reduce the potential for the local approval process to be used as a vehicle for racial animus. The County has yet to fulfill this obligation under the Settlement. *See supra* Section III.A.

X. Design Initiative

Good design is vital to the sustainability of affordable housing and is often of critical concern to members of the community where the housing has been built. The Monitor, working with design experts, has led an effort to develop a series of design workshops and a design workbook with the ultimate goal of assisting municipalities, developers and community members with a stake in the location and look of affordable housing. As first described in the Monitor’s February 2013 Report to the Court, an initial impetus for the design institute came from the Monitor’s experience reviewing the proposed development in New Castle described above. *See* Monitor’s February 2013 Report, at 35 (ECF No. 429). As part of that process, Conifer met with the Monitor and architects from WXY Studio, a New York-based architecture and design firm, to discuss potential adjustments to the proposal to meet concerns raised by the municipality. The

process helped the developer and municipal officials address concerns about the aesthetics and functions of the proposed development.

Based on this process, the Monitor concluded that developers, municipalities, and other stakeholders could benefit from technical assistance and written resources specific to Westchester communities that would aid in the development of particular projects. Before the first of these initiatives, the County Attorney raised concerns about what could be a new requirement. *See* March 8, 2013 Letter from Kevin J. Plunkett to James E. Johnson, hereto attached as Ex. 90. The initiative subsequently went forward without significant support from County government. As a result of this work, more than 100 people, from at least 20 communities, including municipal officials, attended two design workshops. In these workshops, the participants engaged in collaborative problem solving to understand and resolve issues facing two types of actual sites in Westchester: an underused corporate office site, known as a greyfield; and a town center affected by watershed challenges.

The architectural team is preparing a practical workbook based on that experience. A detailed report on that process and the workbook itself will be the subject of a subsequent report.

XI. Expenditures in Support of the Settlement

A. County Planning Department Costs

Over the course of the Settlement, the County has decreased the size of the Planning Department and changed its structure. *See* Ex. 13 (Response to Request #7

attached to March 31, 2014 Letter). In 2010, the County added two areas of focus for the Planning Department's Housing branch: (1) "housing studies/plans;" and (2) "fair housing marketing/education and housing outreach." *Id.* at C-163. As of 2011, the Planning Department also combined its Land Use and Development branch with its Environmental branch. *Id.* at C-163. Also in 2011, the budget suggests that the County sought to create a special Section 8 Housing Program, but it appears to have never made it to fruition. *Id.*

The Planning Department has lost personnel and budget authority since the Settlement was first entered. In early 2009, the County Planning Department consisted of 35 salaried employees, with an allowed budget of \$2,789,564 for annual regular salaries, and an allowed budget of \$5,599,613 for total expenditures. *Id.* at C-164. Based on the 2014 budget, the Department is allowed to consist of 26 employees, allowed \$2,452,909 for annual regular salaries, and allowed \$4,470,491 for total expenditures. *Id.* at C-164. This is an approximate 26% decrease in personnel, though apparently largely in administrative staff, a 12% decrease in the amount allowed for personnel salaries, and an almost 20% decrease in the budget for total expenditures.

B. Monitor Costs

While the budget for the County Planning Department appears to have decreased over the course of the Settlement, the costs to the Monitor and his team have increased. The County has only born a fraction of those costs and only at the ceiling fixed by the Settlement. Paragraph 17(b) of the Settlement provides for an annual budget for the fees

and expenses of the Monitor: \$250,000 annually for each of the first two years following approval of the Settlement, then \$175,000 annually thereafter. Over the course of the first four years of the Monitorship, the Monitor's team accrued \$4,274,853.50 in fees and incurred \$228,327.31 in costs and expenses, totaling \$4,503,180.81. The \$850,000 budgeted to the Monitor for those four years accounted for approximately 19% of the cost of the Settlement to the Monitor. The balance, nearly \$3.7 million in time and expenses, has been contributed by the firm of Debevoise & Plimpton LLP at no cost to Westchester County.

For the current year of the Settlement, beginning on September 1, 2013 and ending on August 31, 2014, the Monitor advised the Court of his intention to handle the matter on a pro bono basis and to allocate a larger portion of the Monitor's current budget to the use of expert consultants, including those assisting with the development of a toolkit for the design of affordable housing, as described in more detail *supra*, Section X. *See also* October 28, 2013 Letter from James E. Johnson to Hon. Denise L. Cote, hereto attached as Ex. 91 (ECF No.457).

As of the end of April 2014, the Monitor has incurred and paid approximately \$274,981 in outside consultant fees, an amount that constitutes approximately 84% of the costs incurred by the Monitor, aside from the Monitor's internal team's accrued fees, since the inception of the Settlement. Moreover, at least \$80,000 of these outside consultant fees has accrued since November 2013 in relation to the development of the design toolkit. The re-allocation of the Monitor's budget, proposed in the fall of 2013, funds these initiatives.

C. Costs of Dispute Over Analysis of Impediments

As a result of the continuing dispute between the parties over the submission of a sufficient AI, *see infra* Section V.B, the County lost over \$7.4 million in federal funding for community planning and development allocated to it for fiscal year 2011. *See* Ex. 61 (March 25, 2013 Letter); August 16, 2013 Letter from Mark Johnston, Deputy Ass't Sec., HUD to Robert P. Astorino, hereto attached as Ex. 92.

More specifically, in failing to comply with the terms of the Settlement requiring a sufficient AI the County deprived itself of: (1) \$5,378,557 in CDBG funds, which the County uses with 40 participating communities to undertake essential community development activities such as public works, neighborhood revitalization, housing rehabilitation, flood control improvements, and administrative support to public service organization; (2) \$1,655,688 in funds pursuant to the federal HOME Program, which provides grants for new construction, rehabilitation, and home ownership assistance to private owners and not-for-profit organizations to develop housing for very low income families as authorized by the National Affordable Housing Act of 1990; and (3) \$405,939 in Emergency Shelter Grant ("ESG") funds, which may be used for projects that assist communities and not-for-profit organizations in providing housing and programs for the homeless. *Id.* This is a loss that affects not only the eligible communities under the Settlement, but also the other municipalities in the County that were never deemed to be in violation of federal law and in turn were never meant to be subject to the obligations under the Settlement.

Since the dispute remains open, the County is also exposing itself to the potential loss of federal funds that it was to be allocated for the fiscal year 2012 – funds that HUD has already advised would be re-allocated if the County continued to fail to comply with the Settlement. *See* Ex. 74 (April 23, 2014 Letter). If the parties are unable to resolve this dispute, the County will lose an additional \$3,915,674 in CDBG funds, \$846,884 in HOME funds, and \$465,789 in ESG funds, a total of \$5,228,327 in funds that would aid the County in furthering the purposes of the Settlement as well as bettering its community. *Id.*

Dated: June 26, 2014
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Respectfully submitted,

/s/ James E. Johnson

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