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April 20, 2012

Via Email

Kevin J. Plunkett
Deputy County Executive
Westchester County
148 Martine Avenue, 9th Floor
White Plains, NY 10601

Re: United States ex rel Anti-Discrimination Center of Metro New York, Inc. v.
Westchester County, New York, 06 Civ. 2860 – Zoning Submission

Dear Mr. Plunkett:

We are in receipt of your February 29, 2012 letter and submission entitled "Review and Analysis of Municipal Zoning Ordinances in Westchester County" (the "*Zoning Submission*"). Your letter states that the *Zoning Submission* was prepared in response to the direction in the Monitor's Report and Recommendation Regarding Dispute Resolution (Amended), dated November 17, 2011 (the "*Monitor's Report*"), at pages 13-14, that:

The County should, at a minimum, assess the impact of each of the following zoning practices or explain why the analysis of the listed practices ("Restrictive 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;

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- 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.

Significantly, your letter does not state that the *Zoning Submission* addressed that section of the *Monitor's Report* that called for the County to develop a clear strategy to overcome municipal exclusionary zoning practices, as follows:

In developing its strategy, the County should first identify specific exclusionary zoning practices, as noted above. The County should also, at a minimum:

- 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; and
- Provide a description of how these requirements will be included in future contracts or other written agreements between the County and municipalities.

Monitor's Report at pages 15-16.

The County also did not purport to comply with the Monitor's direction that "the County must identify the types of zoning practices that would, if not remedied by the municipality, lead the County to pursue legal action." *Id.* at 18.

While the County filed an objection with Magistrate Judge Gabriel Gorenstein to those portions of the *Monitor's Report* that called for the development of a strategy to overcome exclusionary zoning practices, including taking legal action, in an opinion and order dated March 16, 2012, pp. 16 and 17, Judge Gorenstein rejected that objection.

As stated in the July 13, 2011 letter from HUD's New York Director of Community Planning and Development, the County's failure to develop a strategy to overcome exclusionary zoning practices, including litigation, is one of the bases for HUD's disapproval of the County's FY 2011 Annual Action Plan and rejection of the County's certification that it will affirmatively further fair housing ("AFFH").

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Even though the *Zoning Submission* has been represented by the County not to be in compliance with the Monitor's and HUD requirements in that it does not include a strategy to overcome exclusionary zoning practices, HUD nevertheless undertook its review, for the purpose of determining whether it provides a basis for HUD to reconsider its rejection of the County's AFFH certification and disapproval of the County's FY 2011 Annual Action Plan.

SCOPE OF AN EXCLUSIONARY ZONING ANALYSIS

Zoning is illegally exclusionary when one or more of its exclusions violate some fundamental constitutional principle or some provision of federal or state law.

The Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (the "Act"), prohibits a broad range of discriminatory activities, including discrimination based on race, color, religion, sex, familial status, disability or national origin in the sale, rental or financing of housing or the provision of brokerage or realtor services.

A zoning ordinance has a discriminatory effect where it either has a negative disparate impact on members of one of these protected classes or where it creates, perpetuates, or increases segregation. *See, e.g., Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 937 (2d Cir.), *review declined in part and judgment aff'd.*, 488 U.S. 15 (1988) ("*Huntington*"); *Metropolitan Housing Development Corp. v. Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). A zoning ordinance with a discriminatory effect violates the Fair Housing Act unless the municipality can prove that its actions "furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Huntington*, 844 F.2d at 936 (citations omitted).

While no single test controls for measuring a discriminatory effect, statistics are often used to show that a policy either has a disparate impact on members of a protected class or creates, perpetuates, or increases segregation.¹

A zoning ordinance may also be declared exclusionary (and unconstitutional) where it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Berenson v. New Castle*, 38 N.Y.2d 102, 107 (1975) (citations omitted). *Berenson* holds that zoning ordinances must consider regional needs and requirements,

¹ In *Huntington*, for example, the town's refusal to rezone a parcel of land in order to allow for construction of an affordable housing project had a disparate impact in violation of the Act because 24 percent of black families in the town needed subsidized housing while only 7 percent of all Huntington families needed such housing. 844 F.2d at 938. The town's zoning ordinance also had a segregative effect in violation of the Act because it limited multifamily housing to a predominantly minority area and the affordable housing project, in which a "significant percentage of the tenants" would have been minorities, would have begun desegregating a neighborhood which was 98 percent white. *Id.* at 937.

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which would include the County's need for affordable housing. This case law is incorporated in the Settlement, in the first paragraph of page 2.

In *Berenson*, the New York Court of Appeals established a two-prong analysis for determining the validity of a zoning ordinance. First, the zoning ordinance must represent a "properly balanced and well-ordered plan for the community." *Id.* at 110. The Court suggests that a case-by-case analysis of the types of housing presently in the municipality, quantity and quality of that housing, and whether the distribution adequately meets the needs of the municipality are necessary. *Id.* Secondly, consideration must be given to the regional housing needs. *Id.* The *Berenson* decision, which concerned the zoning ordinance for the Town of New Castle, defined the region as Westchester County and the New York City metropolitan area. The Court held that a valid ordinance must reflect "a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met." *Id.* This regional approach is "necessary to ensure the interest of the public by counterbalancing the parochial tendency of local planning boards to insulate their communities from an influx of 'less desirable' residents." *Suffolk Housing Services v. Brookhaven*, 70 N.Y.2d 122, 131 (1987).

As the New York Court of Appeals has stated:

Exclusionary zoning may occur either because the municipality has limited the permissible uses within a community to exclude certain groups ..., or has imposed restrictions so stringent that their practical effect is to prevent all but the wealthy from living there. ... It is a form of racial or socioeconomic discrimination which we have repeatedly condemned. ... If the party attacking the ordinance establishes that it was enacted for an exclusionary purpose or has an exclusionary effect, then the ordinance will be annulled."

Asian Ams. for Equality v Koch, 72 NY2d 121, 133 (1988) (citations omitted).

A 2004 report of a detailed study of Westchester County's affordable housing need for the years 2000 to 2015, commissioned by the County, determined the existence of an unmet need of 10,768 new affordable housing units by 2015. *Westchester County Affordable Housing Needs Assessment*, Rutgers University Center for Urban Policy Research (2004) (available at http://www.westchestergov.com/pdfs/HOUSING_RutgersReport033004.pdf) (last accessed April 19, 2012) (the "*Needs Assessment*"). Based on the Needs Assessment, the County developed an allocation plan that assigned a portion of the needed units to each of its municipalities. Westchester County Housing Opportunity Commission, *Affordable Housing Allocation Plan* (2005) (available at http://www.westchestergov.com/pdfs/HOUSING_HOCAllocation05.pdf) (the "*Allocation Plan*") (last accessed April 19, 2012).

The *Needs Assessment* and the *Allocation Plan* may represent adequate tools that the County can use to evaluate the local jurisdictions' consideration of the regional housing needs in their zoning ordinances.

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THE COUNTY'S ZONING SUBMISSION

In its *Zoning Submission*, the County collected and reviewed codified zoning ordinances adopted by 43 cities, towns and villages ("local jurisdictions") in Westchester County. The *Zoning Submission* includes a narrative for each of the 43 jurisdictions, each of which includes seven subsections, one for each of the six Restrictive Practices highlighted by the Monitor, and a seventh one for "Other Considerations".

With regards to each of the Restrictive Practices within each of the 43 narratives, the *Zoning Submission* includes a short description (referred to as an "Analysis") of a zoning ordinance that includes the Restrictive Practice within each jurisdiction, and, in most instances, a "test" that the ordinance meets, as set forth below.

Restrictions that limit or prohibit multifamily housing

According to the *Zoning Submission*, all of the jurisdictions restrict multifamily development to certain districts. Several jurisdictions only allow multifamily development as-of-right in one district.² The County does not examine whether these restrictions are having exclusionary impacts. To the extent that these restrictions result in the concentration of minority populations in certain areas, those restrictions may be exclusionary and may violate the Fair Housing Act. *See Huntington*, 844 F.2d at 937-938. The *Zoning Submission* also failed to consider whether these restrictions take into account regional needs, as required by *Berenson*.

Instead of analyzing whether these restrictions were having exclusionary impacts, the portions of its *Submission* regarding this type of restriction apply the following test, in all but one of the local jurisdictions:

It is to be expected that every municipal zoning ordinance will permit certain uses in some districts and not in other districts as the regulation of land uses is the basic function of zoning. The key observation to be made is whether a zoning ordinance permits a wide range of uses that would reasonably be expected to locate in the specific geographic area. This ordinance meets that test.

See Zoning Submission, Paragraph A.1. in each individual narrative, *e.g.*, Village of Ardsley, p. 14. The County, however, does not provide any legal authority regarding the applicability of this test to determine whether the zoning ordinances at issue are exclusionary or not.

² For example, Cortlandt allows for multifamily zoning as-of-right in only one of its 22 districts. In Irvington this zoning is allowed in one of 15 districts and in Lewisboro it is allowed in one of 13.

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Moreover, the County didn't even apply its test to the Town of Cortlandt. The County does not provide an explanation for this divergence in its analysis.

With regards to the jurisdictions that limit multifamily development as-of-right,³ or that place other limitations on multifamily developments, the County favorably notes that they may allow multifamily development nevertheless, subject to the approval or issuance of a special use or special exception permit. *See, e.g., Zoning Submission*, p. 8.⁴ However, the approval of variances or the existence of a permitting scheme does not establish a nondiscriminatory effect. Inconsistent granting of variances or special exception permits can, in fact, be deemed exclusionary. "Ordinances and zoning decisions which in practice are utilized to exclude the poor and racial minorities, as applied, do not bear a rational relationship to a legitimate state purpose." *Hope, Inc. v. County of DuPage*, 717 F.2d 1061, 1076 (7th Cir. 1983). The *Zoning Submission*, however, does not include an analysis of the effects of these variances or permitting processes. Moreover, reliance on a process that requires developers to apply for variances or permits adds uncertainty to the development process, and increases costs. Rational developers may be reluctant to undertake the planning necessary for a development when approval is discretionary.

An "effect-oriented" analysis must also be conducted of an ordinance in Briarcliff Manor that requires multi-family developments to have "'on the same lot an enclosed, suitable surface play area for small children having an area of not less than 200 square feet for each dwelling unit therein.'" *Zoning Submission*, at p. 19. Simple math tells us that, for a modest development of 30 units, a developer would be required to provide 6,000 square feet of enclosed play space. The County's analysis does not consider whether this ordinance, which would have a significant impact on development costs, is having an impact in the development of multifamily housing, or exclusionary effects.

In addition, while the *Zoning Submission* acknowledges (at p. 8) that zoning ordinances may set specific requirements regarding parking spaces that limit the development of housing, the County did not consider whether limitations regarding parking spaces may limit multi-family or affordable housing development, and if they did, whether such an ordinance would have exclusionary effects.⁵

³ The practices that need to be examined that are referenced in this letter are not exhaustive, only illustrative.

⁴ With regards to Cortlandt, which only allows multi-family housing in one out of 22 distinct zoning districts, and further limits those developments to three- and four-units, with a maximum of one- or two-bedrooms, the County concludes in its "Other Considerations" section that this is not unduly restrictive because the Town allows cluster development, at variance of those requirements, apparently on a discretionary basis. *Zoning Submission* at pp. 24-25.

⁵ In the past the County has noted that certain unnamed municipalities place onerous requirements on developers to include, for example, one parking space per bedroom. *See, e.g., Westchester County's Analysis of Impediments to Fair Housing Choice July 2011 Submission*, at pp. 152, 191-192.

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Limitations on the size of a development

While the County acknowledges that each jurisdiction places restrictions on the size of development, *e.g.*, the required land area per unit, the County did not examine whether these restrictions had exclusionary impacts, or resulted in the concentration of minority populations in certain areas. The *Zoning Submission* also failed to consider whether these restrictions take into account regional needs.

Instead, in the portions of its *Submission* regarding these types of restrictions, the County describes its test for such ordinances as follows:

It is to be expected that every municipal zoning ordinance will establish a minimum permitted density of development. The key observation to be made is whether a zoning ordinance provides for a range of density appropriate to the geographic area and supportable by existing or new infrastructure. This ordinance meets that test.

See Zoning Submission, Paragraph A.2. in each individual narrative, *e.g.*, Village of Ardsley, at p. 14. The County, however, does not provide any legal authority regarding the applicability of this test to determine whether the zoning ordinances at issue are exclusionary or not.

Also, this portion of the Zoning Submission focuses primarily on minimum land area requirements on a per dwelling basis. This focus on density disregards other bulk regulations, the implementation of which may prove exclusionary. For example, as the County rightly noted in its Analysis of Impediments to Fair Housing Choice July 2011 Submission ("*AI Submission*"), at pp. 149-151, restrictions on setback, coverage, height and floor area ratios may limit affordable housing development. The County must examine whether the local ordinances include these types of limitations on the size of a development, and, if they do, whether they have an exclusionary impact.

Limitations directed at Section 8 or other affordable housing

In those portions of its *Submission* regarding these types of restrictions, the County states that "The Village/Town Zoning Ordinance does not establish any limitation or restriction of any type on the use of Section 8 housing choice vouchers or other form of housing subsidy." *See Zoning Submission*, Paragraph A.3. in each individual narrative, *e.g.*, Village of Ardsley, at p. 14. The methodology used to determine whether a local jurisdiction limited Section 8 or housing

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subsidies was an electronic word search for the words "Section 8", "HUD", "source income" and "choice voucher" in 42 municipal codes⁶. *Id.* at p. 13.

The County, however, does not state whether it examined "[l]imitations directed at ... other affordable housing" in the local jurisdictions to determine whether any such restrictions are having exclusionary impacts, or have resulted in the concentration of minority populations in certain areas. The *Zoning Submission* also failed to consider whether any such restrictions take into account regional needs.

The *Zoning Submission* does reveal some questionable practices that bear further analysis, as they have the potential for exclusionary impacts. For example, the Town of Bedford has an ordinance that provides that no more than five people may reside in a single-family lot that has an accessory apartment. *Zoning Submission* at p. 17. Generally, accessory apartments represent a mechanism that can be used to increase the supply of affordable housing, because an accessory unit generally costs less to build than stand alone housing. It also facilitates homeownership for lower income families, because the accessory apartment can be rented and generate income for the homeowner to pay for a mortgage on the entire property. It is possible that Bedford's proscription is limiting the installation of accessory apartments because it negatively impacts the owner's ability to rent the unit. Therefore, Bedford's restriction on the number of dwellers in a single-family lot with an accessory apartment represents a limitation on "affordable housing" which the County must analyze to assess any exclusionary impact.

Another potential restriction on affordable housing that may have an exclusionary impact and should be analyzed can be found in the Town of Greenburgh. Greenburgh has only one zoning district that allows public housing as its principal use. *Id.* at pp. 35-36. The County correctly points out that "[u]nder typical zoning ordinance interpretation, once a principal use is defined by an ordinance, then unless it is listed as a principal use in a specific district, it is assumed to not be permitted." *Id.* at 35. Although the County states that it has direct knowledge that the town has not so interpreted its ordinance, this nonetheless poses a limitation that bears further analysis. The County also failed to identify the data that it represented to have knowledge of.

Another potential restriction on affordable housing that may have an exclusionary impact and should be analyzed can be found in the Village of Ardsley. Ardsley has an Affordable Housing Overlay district. *Id.* at 14-15. An exclusionary analysis needs to be conducted to determine whether the existence of this district is resulting in the concentration of minority populations in certain areas. The District also provides for priorities in "workforce housing" to be given to Village employees and residents. This practice should be examined to determine whether it has an exclusionary impact. The County should also consider the impact that this restriction has with regards to regional needs.

⁶ The County did not review the code of one "non-eligible municipality," the Village of Sleepy Hollow, because it "is not in an easily searchable format." *Zoning Submission* at p. 12.

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Similarly, the Town of Somers has only one district subject to the mandatory inclusion of affordable housing units. This practice should be examined to determine whether it has an exclusionary impact, or whether it may have the effect of concentrating minority population in certain areas. The County should also consider the impact that this restriction has with regard to regional needs.

Restrictions that directly or indirectly limit the number of bedrooms in a unit

In the portions of its *Submission* regarding these types of restrictions, the County conclusorily presents information regarding various limitations on the number of bedrooms, without any consideration as to whether these restrictions are having exclusionary impacts, or have resulted in the concentration of minority populations in certain areas. *See Zoning Submission*, Paragraph A.4. in each individual narrative, *e.g.*, Village of Ardsley, at p. 15. The *Zoning Submission* also failed to consider whether these restrictions take into account regional needs. The exclusionary analyses should also consider whether these restrictions are adversely affecting families with children, a protected class under the Fair Housing Act.

An example of a limitation on the number of bedrooms that needs to be examined is that in the Town of Cortlandt. The *Zoning Submission* notes that, in its one district zoned for multifamily development as-of-right, Cortlandt limits such developments to three- and four-units, which are further limited to one- and two-bedrooms. While the *Zoning Submission* points to the newly constructed Roundtop development as an example of the town's willingness to build developments with more than four units, Roundtop is nonetheless limited to two-bedroom units. Further examination of the impacts of this type of limitation is warranted.

Moreover, in the past, the County has noted that certain unidentified municipalities indirectly limit the number of bedrooms by placing onerous requirements on developers to include, for example, one parking space per bedroom. *See, e.g.*, *AI Submission* at p. 192. The *Zoning Submission* does not include any information regarding this previously disclosed restriction. This type of requirement may have an exclusionary effect that warrants analysis.

Restrictions on lot size or other density requirements that encourage single-family housing or restrict multifamily housing

According to the County, all of the jurisdictions have restrictions regarding density.⁷ The *Zoning Submission*, however, does not examine whether these restrictions are having

⁷ The narratives for this type of Restrictive Practice take issue with the characterization of the multiple layers of requirements in each of the various jurisdictions as "restrictions." *See Zoning Submission*, Paragraph A.5. in each individual narrative, *e.g.*, Village of Ardsley, at p. 15. Instead, the narratives state, it is the description of those requirements that cause the reader to "perceive" that there are

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exclusionary impacts. The *Zoning Submission* also failed to consider whether these restrictions take into account regional needs. Particularly concerning was the density requirement in the town of North Castle, which has an extensive array of minimum lot requirements for various districts.

The County describes its test for such ordinances as follows:

It is to be expected that every municipal zoning ordinance will establish a minimum lot size and a maximum permitted density for each type of development. The key observation to be made is whether a zoning ordinance provides for a range of housing types and a range of density that is appropriate to the geographic area and supportable by existing or new infrastructure. This ordinance meets these tests.

See *Zoning Submission*, Paragraph A.5. in each individual narrative, *e.g.*, Village of Ardsley, at p. 15. The County, however, does not provide any legal authority regarding the applicability of these tests to determine whether the zoning ordinances at issue are exclusionary or not.

Limitations on townhouse development

In the portions of its *Submission* regarding these types of restrictions, the County conclusorily presents information about such limitations, without any consideration as to whether these restrictions are having exclusionary impacts, or have resulted in the concentration of minority populations in certain areas. See *Zoning Submission*, Paragraph A.6. in each individual narrative, *e.g.*, Village of Ardsley, at p. 15. The *Zoning Submission* also failed to consider whether these restrictions take into account regional needs. The exclusionary analysis should also consider whether this restriction is adversely affecting families with children, a protected class under the Fair Housing Act. Particularly concerning were the restrictions imposed by the Village of Larchmont, which limit this type of development to two-bedroom units, among other limitations.

CORRECTIVE ACTIONS

In the *Zoning Submission*, at p. 13, the County concludes that its "analysis has not identified specific local zoning practices that have exclusionary impacts." As reflected above, however, this conclusion is not supported by the *Submission*, because the methodology utilized by the County to determine whether a zoning practice is exclusionary is not based on applicable

restrictions. Since the multiple requirements do, by definition, restrict development, we can't agree with the County's conclusory statements that the various ordinances do not restrict development.

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law. And with the exception of a handful of anecdotes,⁸ the *Zoning Submission* does not reflect an examination of any data regarding the impact that the application of these Restrictive Practices is having on housing development within the local jurisdictions, the impact that they are having in the composition of their populations, and whether the local restrictions are properly taking into account regional needs.

The data to be examined includes 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. An examination of this data is required in order to determine whether local zoning ordinances are having exclusionary impacts and/or segregative effects. An examination of proportional statistics, rather than absolute numbers is required.

If it is determined that there is an adverse impact on a protected class, the County should examine whether the particular ordinance being examined (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. See *Huntington* at 939.

The County must also examine whether the ordinance is adversely affecting the local jurisdictions' obligation to meet regional needs.

Once specific exclusionary zoning practices are identified, in accordance with the *Monitor's Report* and the Magistrate's Decision, the County is required to, at a minimum:

- 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

⁸ The anecdotes include references to a development in Cortlandt, an example of a project constructed in a manner inconsistent with the local zoning ordinance, the County's "direct knowledge" of Greenburgh's interpretation of its zoning ordinance governing public housing, and "reports [by unidentified Somers'] planning professionals."

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- Identify the types of zoning practices that would, if not remedied by the municipality, lead the County to pursue legal action".

CONCLUSION

Absent an adequate methodology, and an examination of the impacts that the application of the Restrictive Practices are having based on actual data, the County's conclusion is not adequately supported. The development of a strategy to correct exclusionary practices is also required. HUD remains available to provide technical assistance to the County so that it can meet these important requirements.

Sincerely,



Glenda L. Fussá
Deputy Regional Counsel for
New York/New Jersey

c: Robert F. Meehan, Westchester County Attorney
James E. Johnson, Esq.
Benjamin Torrance, Assistant U.S. Attorney for the Southern District of New York