ANTI-DISCRIMINATION CENTER, INC.

"ONE COMMUNITY, NO EXCLUSION"

Aug. 6, 2013 — Exhibit 2 to the Monitor's report on zoning ("summary charts of municipal zoning data") is now available. These charts, along with the report itself, underline how the Monitor has chosen to understate the extent of exclusionary zoning in four separate contexts:

(1) The long-established New York State legal doctrine of *Berenson* (municipalities are obliged to shoulder their share of the regional need for affordable housing);

(2) The requirement under the federal Fair Housing Act that zoning not perpetuate segregated housing patterns;

(3) The requirement under the federal Fair Housing Act and regulations promulgated thereunder that jurisdictions take appropriate steps to overcome barriers to fair housing choice; and

(4) The dual requirements under the consent decree that Westchester take legal action against municipalities: (a) as necessary to fulfill the purpose of the decree to overcome barriers to fair housing choice; and (b) as necessary to deal with highly-white municipalities that fail to promote the goal of having a minimum of 750 units of affordable housing with maximum desegregation potential built (as in failing to ease their zoning restrictions).

As has been widely noted, the Monitor found that seven of the 31 municipalities addressed by the consent decree have exclusionary zoning. [Croton-on-Hudson, Harrison, Lewisboro, Mamaroneck, Ossining, Pelham Manor, and Pound Ridge.]

What can be discerned from the summary charts, however, is something that the Monitor chose not to highlight and the press has not reported: there are an **additional nine municipalities** that, in the Monitor's language, would not be able to rebut an exclusionary finding under either prong of the *Berenson* test because their zoning ordinances, though possibly having provisions relating to affordable housing opportunities, are **"too narrow in scope to provide genuine opportunities sufficient to meet local and regional need."** [Briarcliff Manor, Bronxville, Buchanan, Cortlandt, Eastchester, Larchmont, Rye, Somers, and Tuckahoe]

Thus, pursuant to the Monitor's own data, at least 16 municipalities were either "exclusionary" or failed to "provide genuine opportunities sufficient to meet local and regional need."

Properly balanced and well-ordered plan for the community?

One element of *Berenson* that the Monitor purports to assess is whether a municipality has a "properly balanced and well-ordered plan for the community" (pages 1-10 of the exhibit).

17 municipalities are put in the category of "not exclusionary" but "warrants improvement." A closer look at this vague middle state reveals that the Monitor uses it to avoid the "exclusionary"

label for all the municipalities that deserve it. It is, in other words the Monitor equivalent of a teacher using a very lenient grading scale to avoid being seen as having too many failing students.

In Mount Pleasant, for example, he reports that multi-family use housing compromises only 1.2 percent of the acreage in the category of "presently available/developed housing." Ability to meet future need in the town for affordable housing? The Monitor says only 5 units. Yet this is supposedly not bad enough for the Monitor to declare that the zoning reflects the absence of a "properly balanced and well-ordered plan for the community. Other municipalities with a similar stark limitation on as-of-right multi-family dwellings are likewise unaccountably not placed in the failure-to-have-a-balanced-and-well-ordered-plan category.

Zoning to permit local and share of regional need for affordable housing to be met?

The second element of *Berenson* that the Monitor purports to assess is whether a municipality has zoning that would allow it to meet both its local need for affordable housing as well as its share of regional need (*see* pages 11-21 of Exhibit 2).

The first problem is that the Monitor massively understates the scope of regional need. The consent decree, of course, recognizes that Westchester is part of a larger housing region. That's why AFFH units built pursuant to the decree can't simply be marketed in Westchester, but need to be marketed in New York City, where there are hundreds of thousands of African-American and Latino families in need of affordable housing.

Instead, he relies on the "Rutgers Report," a study on which Westchester, too, through its Housing Opportunity Commission had used prior to the Astorino administration for a conservative estimate of *countywide* housing need. That Rutgers Report did not account at all for NYC-based affordable housing need that would appropriately be shared by Westchester municipalities (since, as noted above, NYC and Westchester are part of the same housing region).

The Monitor treats the regional housing need attributable to New York City as zero units of affordable housing, and thus dramatically and artificially lowers what each Westchester municipality's appropriate share of that need is.

But even if one were to ignore that fundamental error, there are numerous municipalities (beyond the seven described as having exclusionary zoning) where even countywide need is not being met. **Bronxville, Buchanan, Eastchester, Mount Pleasant, and Scarsdale, for example, have in the aggregate built zero of the 1,396 of the affordable housing units allocated to them by the Housing Opportunity Commission,** according to the Monitor's data.

Irvington and New Castle have each built less than 3 percent of their respective allocations, according to the Monitor's data.

Ardsley, Bedford, North Castle, North Salem, Scarsdale, Somers all have 1 percent or less of their residential acreage zoned for multi-family use.

Buchanan, Larchmont, Mount Pleasant, Pelham, and Rye Brook all have less than 2 percent of their residential acreage zoned for multi-family use.

The Monitor chose not to label any of the municipalities mentioned in this section as having failed to meet regional affordable housing need as defined under *Berenson.*

Note: there is an interesting discordance in the language used by the Monitor in describing what must be done under this prong of *Berenson* (consider *and* provide for one's share of regional affordable housing need), and what would get one into the Monitor's "exclusionary" category for this purpose (*neither* considering *nor* providing). In fact, of course, a municipality who *considered* the issue but *failed to provide* the appropriate zoning would be in violation of *Berenson.*

Final *Berenson* "score"

This section of the summary charts is found at PDF pages 22-38 of Exhibit 2.

Some of the municipalities that were "passed" by the Monitor for purposes of his *Berenson* analysis got that pass because of easy grading on the prongs discussed above.

But, as mentioned at the top, nine municipalities were found by the Monitor to have zoning that couldn't rebut a presumption of being exclusionary because they didn't provide a genuine opportunity for development sufficient to meet the local and regional need for affordable housing. Nevertheless, none of these nine got a result that acknowledged the municipality being in violation of *Berenson.*

Thus, for example, Briarcliff Manor has a variety of restrictions narrowing the scope of affordable housing provisions (including age restrictions, resident preferences, and limited availability of zoning friendly to affordable housing). Eastchester, too, has very little zoning for affordable housing, and that includes affordable housing that can only be built for seniors. But despite having zoning insufficient to meet local and regional affordable housing need, these were among the municipalities the Monitor did not place in his narrowly circumscribed group he was prepared to call exclusionary under *Berenson.*

One thing that appears to have been factored into the Monitor's municipality-friendly *Berenson* analysis is the fact that some municipalities have enacted the so-called "Model Ordinance," or provisions equivalent to it. That model has an unfortunate history. What was supposed to happen under the consent decree was the issuance of a model to which municipalities would have to adapt themselves so as to begin to AFFH. Instead, the Monitor chose, without warrant, to come up with a weakened version in the hope that some municipalities would accept *something.*

In fact, if the so-called model were universally adopted tomorrow, not a single unit of additional multi-family housing would be able to be built as-of-right because the model only addresses circumstances where multi-family housing is *already* permitted. In other words, the model allows the *most* restrictive municipalities off the hook.

The Monitor, for example, gives the thumbs-up on "rebuttal rank" to Bedford and New Castle, both of which have adopted model ordinance or model-ordinance-like provisions. But the facts on the ground say something else: Multi-family housing in Bedford as percentage of residential acreage: 0.5 percent. New Castle: 3.6 percent.

Disparate impact on racial and ethnic minorities?

It is first of all important to recognize that the Monitor states that the "data provided by the County and available online via the U.S. Census Bureau suffer from gaps and a lack of precision which hinder a thoroughgoing review of each municipality's zoning ordinances. **Accordingly, the following discussion of race and ethnicity provides only an initial step in identifying whether the municipal zoning ordinances are such that they may impede integration by placing a barrier on the ability to build affordable housing"** (Monitor Report, page 40; emphasis added).

IN OTHER WORDS, IT WOULD BE INACCURATE TO CLAIM "NO DISPARATE IMPACT" BASED ON THE MONITOR'S FINDINGS.

[See discussion of a data error by the Monitor that caused him to seriously understate the extent to which Mount Pleasant is characterized by residential segregation at page 7 of this document.]

To the extent that the Monitor does engage in a disparate impact analysis, that analysis is fundamentally flawed. He looks only at the limited question of whether *within a single municipality* there is a large variation between the African-American or Latino population of zoning districts allowing multi-family housing and those districts that don't. In the landmark *Huntington* case, there was such a variation, and the court was not obliged to look beyond this.

But neither Huntington nor its progeny, nor disparate impact cases elsewhere in the country suggest that in-municipality variation is the ONLY way disparate impact can exist, and thus the Monitor's analysis is fundamentally flawed..

If in-municipality variation were all that could be assessed, the result would be untenable. "Lily-White, New York" is fictional, but it could stand in for many jurisdictions in New York and in other metropolitan areas throughout the United States. The demographic patterns in Lily-White were established over several decades following World War II by intentional discrimination practiced by various level of government along with all of the private sectors involved in real estate (developers, landlords, banks, homeowners, real estate brokers, etc.). The patterns in other words, did not just fall from the sky.

Lily-White — which has little land zoned for multi-family use, and is thus uncongenial to the development of affordable housing — was particularly successful in keeping both the single district in which multi-family housing is allowed *and* the single-family housing districts essentially all white. If one were only looking at variation within the locality, one wouldn't find it. But one would hardly conclude that exclusionary zoning doesn't exist.

The real question is whether the existing zoning perpetuates segregation. Put another way, one simply has to ask, **"If affordable housing being stymied by existing zoning restrictions were allowed to be built, would that perpetuate segregation less than the status quo?"**

To answer that question, you wouldn't simply look within the locality. **You would look at the universe of income-eligible households in the region and *compare the demographic composition of that universe with the demographic composition of the locality.*** If the percentage of African-American or Latino families eligible for the housing were materially higher than the percentage of African-Americans or Latinos in the locality, that would be *another* way (of a variety of ways) of proving disparate impact.

The Monitor doesn't ask the question and doesn't look at the data.

Affirmatively furthering fair housing?

Westchester got in trouble in the first place because both it and its municipalities were supposed to be affirmatively furthering fair housing — but weren't. AFFH requires actions to remove barriers to fair housing choice. As must be apparent to the Monitor, something need not rise to the level of a *Berenson* violation to represent an impediment to fair housing choice. But this line of inquiry is not pursued.

Where, oh where is paragraph (7)(j) of the consent decree?

This is the critical *action* requirement of the consent decree (as opposed to separate and independent *analysis* requirements).

Would the easing of the zoning restrictions in a municipality that hinder the construction of affordable housing promote the building of AFFH units under the decree? *The answer is obviously yes in far more than seven jurisdictions.*

Has Westchester acquired a direct or indirect interest in any property and then challenged any restrictive municipality under either *Berenson;* the *County of Monroe* doctrine (the existence of which is acknowledged by the Monitor in footnote 6 on page 17 of his report and again on page of the report); or the Fair Housing Act? *Not only is the answer "no," Westchester has stated clearly its across-the-board, regardless-of-circumstance policy of not doing so.*

This is a clear violation of the first prong of Westchester's paragraph (7)(j) obligations, for which it should be held in contempt. Four years after this obligation arose, neither the Monitor,

nor HUD, nor the U.S. Attorney for the Southern District has moved to hold Westchester to account for its failure to act.

Would litigation by the County against zoning barriers to affordable housing in ultra-White municipalities — such as under the *County of Monroe* doctrine which, along with other causes of action, makes clear that local prerogative is not the final word in a zoning dispute — serve the purpose of the decree to AFFH? *Neither the Monitor, HUD, nor the U.S. Attorney could deny it.*

Has Westchester done so? *Not only is the answer "no," Westchester has stated clearly its across-the-board, regardless-of-circumstance policy of not doing so.*

This is a clear violation of the second prong of Westchester's paragraph (7)(j) obligations, for which it should be held in contempt. Four years after this obligation arose, neither the Monitor, nor HUD, nor the U.S. Attorney for the Southern District has moved to hold Westchester to account for its failure to act.

Changing the mandatory to the permissive

Characteristically, the Monitor takes an obligation to take *all* appropriate steps, including litigation, and, without warrant, translates it into a milder obligation — four years after the entry of the decree — to pick from among a variety of potential steps (knowing full well that litigation won't be among them). At this rate, we won't get to a demand for the use of the appropriate "stick" before the scheduled end of the consent decree in 2016.

DATA ERRORS

One basic data error that the Monitor makes is in describing the population of Mount Pleasant as being 5.7 percent Black (Report, page 46). The first problem is that the Monitor looked at the Town of Mount Pleasant as a whole, and didn't just look at the unincorporated portion of Mount Pleasant as distinct from other components. It's not surprising that one would report an inaccurately high percentage of Blacks if one is including municipalities within the town that have high minority populations (like Sleepy Hollow, over 50 percent Latino).

Another error is to fail to look at the "Black, non-Hispanic" population. If you include Blacks who are Hispanic, you get a double count (one person counted both as "Black" and "Hispanic"). Another issue, acknowledged by the Monitor, is the failure to remove "group quarters population" (like people in prisons or other facilities) from the population.

It turns out that the Black, non-Hispanic population of the unincorporated portion of Mount Pleasant (not including people in group quarters) is *not* 5.7 percent *or anything close.*

It's actually only fractionally above 1 percent.

The Monitor would have been suspicious of the 5.7 percent number if he had examined the May 30, 2011 affidavit submitted on ADC's behalf by Professor Andrew Beveridge of Queens College. It identified Mount Pleasant as one of 25 Westchester municipalities with non-Hispanic Black populations under 3 percent.

Indeed, in a September 14, 2011 reply affidavit of Professor Beveridge's, he included as Exhibit A Westchester County's table of "Black and Hispanic Populations With Group Quarters Excluded, 2000-2010." It showed Mount Pleasant with a Black population of 1.0 percent in 2010.

It is the Monitor's policy not to consult with or seek advice from ADC — the civil rights plaintiff in the lawsuit that gave rise to the consent decree — despite ADC's repeated offers to be of assistance.