

September 26, 2014

BY E-MAIL AND FIRST CLASS MAIL

The Honorable Helen R. Kanovsky  
General Counsel  
United States Department of Housing and Urban Development  
451 7th Street, S.W.  
Washington, D.C. 20410

***United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v.  
Westchester County, No. 06 Civ. 2860 (DLC)***

Dear Ms. Kanovsky:

I write in response to a letter received September 24, 2014 from Glenda L. Fussá, Deputy Regional Counsel for New York and New Jersey, United States Department of Housing and Urban Development (“HUD”). *See* Letter from Glenda L. Fussá to James E. Johnson (the “Letter”), Sept. 24, 2014, attached hereto as Ex. 1.

On May 27, 2014, I agreed to conduct a zoning analysis applying the legal standard set forth in *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) at the request of the Chairman of the Westchester County Board of Legislators (“Chairman”) and the HUD Regional Administrator. That request was part of an attempt by the Chairman and the Regional Administrator to resolve the dispute between the County and HUD concerning the adequacy of the County’s Analysis of Impediments (“AI”). *See* Settlement and Order of Stipulation and Dismissal ¶ 32, Aug. 10, 2009, ECF No. 320. Applying a methodology approved by the Chairman and HUD, and engaging the County, municipalities, and HUD in a thoroughgoing fact-finding process, the Monitor completed the first step of the analysis on September 8, 2014, issuing the *Huntington* Analysis of Westchester County Municipal Zoning (“*Huntington* Report”) to the parties along with a request that any party “offer views as to why it should be amended” by September 24, 2014. *See* Letter from James E. Johnson to Robert P. Astorino, Michael B. Kaplowitz, Holly M. Leicht, and David J. Kennedy, Sept. 8, 2014, attached hereto as Ex. 2. The Letter from Ms. Fussá followed.

The Letter from Ms. Fussá highlights several perceived errors in the *Huntington* Report and requests that portions of it be withdrawn. In the five years of the Monitorship, this is the first time HUD has made the extraordinary request that information or analysis be withdrawn. At this stage of the process, it would not be appropriate to do so.

The Monitor and his team have carefully reviewed the criticisms detailed in the Letter. After due consideration, however, the Monitor considers the criticisms to be inadequately supported. The Letter appears to stem from a misapprehension of the analysis undertaken in the *Huntington* Report. It also contains factual errors and makes a number of inaccurate assumptions.

At times, the Letter appears to misunderstand the purpose of the Report or its import. Ms. Fussá demands that the *Huntington* Report “not receive any deference or [be] given claim preclusive effect in other cases.” Ex. 1, at 10. In so doing, the Letter seeks to create an issue where there is none. The Monitor has repeatedly acknowledged that he cannot bind the parties and has not undertaken to do so. The cover letter to the *Huntington* Report clearly states that the analysis is “not binding on the parties,” and the Report itself declares it is “not the final step in the analysis.” See Ex. 2; *Huntington* Report, at 7. In a matter that is as subject to controversy as this one, there are difficult issues aplenty. There is no need for more to be invented.

Although a more fulsome response to each of the comments in the Letter - should one be necessary - will be left for a later date, two of the Letter’s most fundamental errors are described below:

1. The Analysis Is Consistent. The Letter faults the Monitor for being “inconsistent” in applying the *Huntington* framework to the data, alleging that the *Huntington* Report “reaches different conclusions based upon similar data.” Ex. 1, at 8. The Letter claims that the *Huntington* Report is “contradictory” because it found *prima facie* evidence of disparate impact in Lewisboro, where single-family homes constituted 93.7% of the housing supply, but not Scarsdale, where 94.5% of housing units are single-family dwellings. *Id.* The Letter misreads the Monitor’s analysis. The Letter may take issue with the lack of multifamily housing in Scarsdale, but *Huntington* demands a deeper analysis to parse whether Scarsdale’s *zoning* is the cause. Consistent with the methodology and *Huntington*, the Monitor analyzed whether each municipality’s *zoning code* was restricting the development of housing types more frequently used by minority residents. The Letter asserts that Lewisboro and Scarsdale were “similarly situated” and had “nearly identical facts.” *Id.* This assertion is, plainly and demonstrably, wrong. The municipalities’ zoning codes differed in crucial respects. Where Scarsdale zoned seven of

its districts for multifamily housing development as-of-right, Lewisboro zoned just one district for such housing. In addition, Scarsdale allowed two-family housing as-of-right in five districts compared with Lewisboro's two. On the affordable housing front, Scarsdale has adopted most of the provisions of the model zoning ordinance, while Lewisboro has adopted none.

2. Regional Data Was Used Throughout The Report. The Letter accuses the Monitor of defying the approved methodology—which calls for a “regional analysis”—and comparing municipal data to County data “only twice” in the entire report. Ex. 1, at 6. Once more, this criticism betrays a fundamental misunderstanding of the *Huntington* Report. Contrary to the Letter's assertion, the Monitor's disparate impact analysis *for each municipality* was predicated on a comparison between municipal and County data. In other words, the Monitor's team followed the analysis 31 times, not just twice. The Monitor relied exclusively on County data to find that minority residents more frequently use multifamily, affordable, and rental housing, and then compared this data to “each municipality's zoning ordinance . . . to identify whether restrictions are placed on the development of such housing types.” *Huntington* Report, at 22.

The flaws in the Letter raise concerns that the Letter does not reflect the considered judgment of the senior legal team of HUD. Furthermore, it is doubtful that the Department of Justice (“DOJ”) had a meaningful opportunity to review the Letter. These apparent process errors matter. The Monitor, at some stage, will file a report with the Court. The Court typically relies upon the DOJ to provide the Court with the benefit of its independent judgment about the legal interests of the United States. There are sound reasons for that: it increases the likelihood that the Federal Government's position is thoroughly reasoned and vetted; and it ensures that, for the benefit of the public, the position is clear. Such clarity is vital, particularly in circumstances like this one where the stakes are high both for Westchester communities needing federal assistance and families seeking an expansion of housing opportunities in the County.

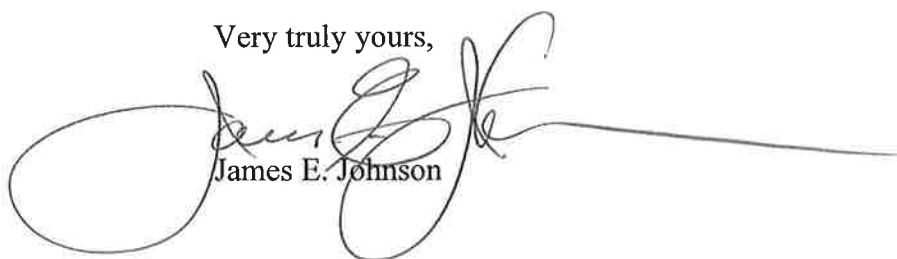
My request is simple: that the Federal Government adopt a considered, unified voice before submitting further comments for my consideration given that they may form the basis of a future court filing.

The *Huntington* Report identified six communities as to which there was *prima facie* evidence of exclusionary zoning. Three of them have already met with the Monitor to explain their zoning and address related issues. We have already begun gathering facts necessary to undertake the next step in the *Huntington* analysis, which is to decide whether there are legitimate governmental justifications for the effect on minority

residents. Given the Letter, I cannot ask these communities to continue their efforts until there is a clear signal from the Federal Government.

I note that the Chairman has asked for additional time for municipalities to submit comments. *See* Letter from Michael B. Kaplowitz to James E. Johnson, Sept. 24, 2014, attached hereto as Ex. 3. Even before I received the Letter, that request seemed sensible. I would hope to receive a response vetted by appropriate officials at HUD and the DOJ by October 15, 2014. I will set a timetable for municipal responses after receiving the Federal Government's response.

Very truly yours,



James E. Johnson

cc: The Honorable Denise L. Cote, U.S. District Judge (S.D.N.Y.)  
The Honorable Robert P. Astorino, County Executive  
Kevin J. Plunkett, Deputy County Executive  
Robert F. Meehan, County Attorney  
Mary J. Mahon, Special Assistant to the County Executive  
The Honorable Michael B. Kaplowitz, Chairman, County Board of Legislators  
Holly M. Leicht, Regional Administrator, HUD  
Glenda L. Fussá, Esq., Deputy Regional Counsel, HUD  
The Honorable Preet Bharara, United States Attorney (S.D.N.Y.)  
David J. Kennedy, Assistant United States Attorney (S.D.N.Y.)  
Benjamin J. Torrance, Assistant United States Attorney (S.D.N.Y.)  
Lara K. Eshkenazi, Assistant United States Attorney (S.D.N.Y.)

## **EXHIBIT 1**



**U.S. Department of Housing and Urban  
Development**

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Jacob K. Javits Federal Building  
26 Federal Plaza  
New York, New York 10278-0068

**Via E-Mail**

September 24, 2014

James E. Johnson, Esq.  
Debevoise & Plimpton, LLP  
919 Third Avenue  
New York, New York 10022

Re: *United States ex rel. Anti-Discrimination Center v. Westchester County*  
06 civ. 2860 (DLC) – Monitor’s Analysis of Westchester County Municipal  
Zoning

Dear Mr. Johnson:

We are in receipt of your draft report of September 8, 2014, Monitor’s *Huntington* Analysis of Westchester County Municipal Zoning (the “Monitor’s Analysis”). We appreciate your having undertaken the effort to conduct an analysis of local restrictive zoning practices, at the request of the Chairman of the Westchester County Board of Legislators, to investigate whether, under the legal standard articulated in *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 844 F.2d 926 (2d Cir.), *aff’d per curiam*, 488 U.S. 15 (1988) (“*Huntington*”), municipal zoning codes in Westchester County (the “County”) have a disparate impact on black and Hispanic persons and potentially violate Title VIII of the Civil Rights Act of 1964, 42 U.S.C. § 3604 *et al.* (the “Fair Housing Act”). The 120-page report and voluminous exhibits display the seriousness with which you have approached this task.

As stated in the Methodology (Monitor’s Analysis, Exhibit 11), the Monitor’s Analysis is intended, if adopted by the County as its own, to replace portions of the Analysis of Impediments to Fair Housing Choice (the “AI”) prepared and submitted by the County to HUD that pertained to exclusionary zoning. We provide the following comments pursuant to your invitation to do so by September 24, 2014.

**I. The *Huntington* standard**

The Fair Housing 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.

In *Huntington*, the court considered the Fair Housing Act claims of a plaintiff class consisting of blacks, Hispanics and lower-income persons in need of housing opportunities in the

Town of Huntington, New York and the surrounding areas, all of whom would qualify for residency in proposed projects subsidized under the federal Section 8 program and who sought to reside in racially and economically integrated housing. *Id.* at 928, n. 2. At the time of the lawsuit, Huntington had 200,000 residents, 95% of which were white and only 3.35% (or approximately 6,700) were black. *Id.* at 929. Seventy-percent of the black population resided in 6 census tracts. The black population in 30 of the 48 census tracts in the Town in 1980 was less than 1%. *Id.* Another plaintiff in the case was a private developer interested in fostering residential integration, who proposed to build a subsidized, multifamily project outside of the areas where the black and Hispanic populations were concentrated. The Town refused to approve the zoning changes needed for the project to proceed. *Id.*

The decision held that, in order to establish a *prima facie* violation of Section 3604 of the Fair Housing Act, a plaintiff in an exclusionary zoning case need only show that the challenged action has a discriminatory effect on members of a protected class. It further explained that discriminatory effect could be established in either of two ways: (1) by showing that the defendant's actions had a disparate impact on members of the protected class; or (2) by showing that the defendant's actions perpetuated segregation. *Id.* at 934-37.

A. Prohibited bases of discrimination and use of appropriate comparison group

When conducting a discriminatory effect or disparate impact analysis, “[w]hether using statistics or some other analytical method, [analysts] must also utilize the appropriate comparison groups. They must first identify members of a protected group that are affected by the neutral policy and then identify similarly situated persons who are unaffected by the policy.” *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 576-77 (2d Cir. 2003).

The Monitor’s Analysis compares a municipality’s “minority” population to its “total” or “overall” population. *See* p. 18. It purports to define “minority” “in the same way that the Settlement [does]” and cites paragraph 7. *Id.* at 22, fn. 9. However, the word “minority” is not used in the Settlement at all. The protected classes identified in the Settlement are single race African-American, or what the census data terms black, and Hispanic. Similarly, the Methodology (as defined below) describes the populations to be examined as “African Americans” and “Hispanics” (¶ 2), and endeavors to “conduct a race- and national-origin Hispanic based demographic analysis” (Task 3).

The Monitor’s Analysis use of “minority” represents a combination of the black and Hispanic populations. *See* p. 22, fn. 9.

In *Huntington*, the black and Hispanic populations were examined together because it was alleged that both of these classes were similarly impacted. In order to base a disparate impact claim on data that combines race and ethnicity, it must be shown that the two groups share commonalities and face similar discrimination. *See Keyes v. Sch. Dist.*, 413 U.S. 189, 197-198 (1973); *Coalition of Bedford-Stuyvesant Block Assoc. v. Cuomo*, 651 F. Supp. 1202, 1209 fn. 3 (E.D.N.Y. 1987) (court considered data that combined Hispanic and black residents but noted that the “better practice” is to consider the groups separately.)

The Monitor's Analysis is intended to assist the County in determining whether the black population, Hispanic population, or both are being disparately impacted by municipal zoning. No assumption has been made that either class has been impacted or that both classes have been similarly impacted. It is possible that certain zoning practices may have a discriminatory effect on one protected class but not the other. The data presented in the Housing Consultants' Report (as defined below) shows that the two groups are represented in very different percentages among the various municipalities of the County. *See* Table 1, p. 3. Some municipalities that have very small percentages of black residents have considerably larger percentages of Hispanic residents. *Id.* For example, Rye Brook is only 1.5% black but is 11.1% Hispanic. *Id.* This data suggests that black and Hispanic residents may face different obstacles in obtaining housing. A proper analysis would consider black and Hispanic data separately.

Additionally, in examining whether "minorities" have been disparately impacted, the Monitor's Analysis compares a "minority" population to "total" population. However, as the *Tsombanidis* court explained, the appropriate comparison group is "similarly situated persons who are unaffected" by zoning in the various municipalities. 352 F.3d at 576-77. Given the data, it appears that the appropriate comparison group for the analysis of exclusionary municipal zoning practices in Westchester County is non-Hispanic whites. The Monitor's Analysis currently does not compare black and Hispanic population data to white population data.

B. Departure from the *Huntington* standard: Analysis of "clusters" instead of patterns of segregation

In applying the *Huntington* standard, the Monitor's Analysis substitutes the word "clustering" for the word "segregation." The Monitor's Analysis proposes that it will be appropriate to use the term "segregation" only if a *prima facie* case of disparate impact is established and the municipality cannot present a "legitimate governmental interest and no less discriminatory alternative." Fn. 8, pp. 21-22. However, this is not the standard articulated in *Huntington*. That decision makes no distinction between the result of a pattern of concentration before and after a jurisdiction has had an opportunity to defend its practices. Before the *Huntington* court turns to the question of possible justifications it finds that Huntington's actions "significantly perpetuated segregation." 844 F.2d at 938.

By focusing on "clusters" of minorities within the bounds of individual municipalities, the Monitor's Analysis does not examine whether municipalities that have very small populations of black or Hispanic residents, or both, may be segregated because they exclude these populations. While it is true that "clusters" of persons of a protected class in one area should raise Fair Housing Act concerns, so too should a pattern of near total exclusion. Both patterns are evidence of discrimination. For these reasons, the Methodology provided for a regional approach, which is the subject of a discussion below.



C. Departure from the *Huntington* standard: Application of the undefined “*Huntington* threshold”

The Monitor’s Analysis applies the “*Huntington* threshold” when discussing perpetuation of segregation and disparate impact. *See* Monitor’s Analysis, pp. 18-20. Although no numerical “threshold” is established by the *Huntington* decision, the “threshold” is evoked throughout the Monitor’s Analysis to both “trigger *Huntington* concerns” (*see, e.g.*, Larchmont analysis, p. 64) and to find that there is no concern. (*See, e.g., id.*, Mamaroneck analysis, p. 70: “These levels approach, but do not surpass, *Huntington* thresholds.”) The Monitor’s Analysis must define the “*Huntington* threshold.”

II. Departures from the agreed-upon Methodology

A. No regional analysis

There are various analytical approaches that can be employed to conduct a disparate impact analysis, and deciding which method will produce statistically relevant and reliable results is a case-specific inquiry. *See Tsombanidis*, 352 F.3d at 576 (2d Cir. 2003).

The Monitor engaged the team of John Shapiro and Brian Kintish, experts from the Pratt Graduate Center for Planning and the Environment (collectively, the “Housing Consultants”), to develop a methodology that could be used to conduct this disparate impact analysis of municipal zoning in the County (the “Methodology”). Monitor’s Analysis, p. 3 and Exhibit 11. A key component of the Methodology is that it directs a regional analysis which compares individual municipalities to “Westchester County as a whole.” *See* Methodology ¶ 2 and Task 3 (requiring the Housing Consultants to “compare the municipality to the region as a whole”). This approach is consistent with HUD’s Fair Housing Planning Guide, which provides guidance to recipients of federal funding on conducting a proper AI. *See* Fair Housing Planning Guide at 5-6 – 5-8 (discussing relevant inquiries recipients should make regarding issues within their “geographic area,” here the County as a whole). The appropriateness of designating the County as the “region” for purposes of a zoning analysis is supported by case law. *See, e.g., MHANY Mgmt. v. County of Nassau*, 843 F. Supp. 2d 287 (E.D.N.Y. 2012)(finding a restriction on the development of multifamily housing perpetuated segregation in a municipality where minorities constituted 2.6% of the population as compared to the County where municipalities constituted 19.7% of the population).<sup>1</sup>

However, the methodology applied in the Monitor’s Analysis deviates from the agreed-upon regional Methodology as set forth below.

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<sup>1</sup> In discussing the development of the Methodology, and for the purposes of this analysis only, HUD agreed that the region would be defined as the County. Depending on the purpose, what defines the “region” may be subject to change.

The Monitor's Analysis examines two issues – (1) whether zoning “perpetuates racial and ethnic clustering;”<sup>2</sup> and (2) whether zoning has a disparate racial and ethnic impact on “minorities”. P. 21. In describing the analysis, it is noted that the Monitor's Analysis “does not make findings with respect to whether any municipality drafted its zoning code with the *intent* to discriminate against minorities.” P. 4 (emphasis in original). While intent is not required to find a Fair Housing Act violation, if potential intent was observed during this analysis, HUD would expect that the Monitor's Analysis would make that known.

To analyze whether a municipality's zoning code “perpetuates racial and ethnic clustering,” the Monitor's Analysis compares the minority household population percentage in multifamily zones to the municipality's total minority household population. If these two percentages are “in line” then no “clustering” is found. *See, e.g.*, Ardsley analysis, Monitor's Analysis at p. 33. If there is a “disparity” between the two percentages, “clustering” is found and the municipality is said to “violate *Huntington*.” *See, e.g.*, Larchmont analysis, Monitor's Analysis at p. 64. To determine whether a municipality's zoning code has a “disparate impact,” the most common data points referenced were the percentage of occupied housing units which are multifamily, the percentage of occupied units which are renter-occupied, and whether the municipality has passed the “model ordinance.” *See, e.g.*, Harrison analysis, Monitor's Analysis at pp. 57-59.

A municipality-centered analytical approach was used in *Huntington* to elicit statistically relevant results under a very different fact pattern. In Westchester, a larger geographic and demographic area must be used for comparative purposes.

At the time the Second Circuit considered the claims in *Huntington*, the title town was home to 200,000 people, 6,700 who were identified as Black. 844 F.2d at 929 (2d Cir. 1988). Because Huntington's population is several times larger than that of the municipalities being examined here, a municipality-centered analysis can produce statistically meaningful results. Not so in Westchester, a County of significantly smaller municipalities, some of which, like Buchanan, are nearly 1/100<sup>th</sup> the size of Huntington in terms of population. *See* Monitor's Analysis, Ex. 1, Report on the Black and Hispanic Populations in the Westchester County Municipalities Subject to the Settlement (the “Housing Consultants' Report”), Table 1, p. 3.

For those municipalities with small total populations and even smaller numbers of black and Hispanic residents, like many in the County, relying upon this municipality-centered methodology will produce statistically unreliable results. Take, for example, the Village of Ardsley, which has a total household population of 4,444, including 105 African American households and 286 Hispanic households. *Id.* at Table 9, p. 17. The Monitor's Analysis determines that Ardsley's minority population is not “clustered” because minorities constituted 6.3% of the household population of the multifamily district in 2010, which is “in line” with Ardsley's minority household percentage of 8.8%. Monitor's Analysis, p. 33. This determination fails to take into account that the County's minority household percentage is 36.1%, or more than

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<sup>2</sup> Our comments regarding the examination of clusters are set forth above.

four times Ardsley's minority household percentage. Additionally, the Monitor's Analysis gives considerable weight to the number "6.3%" without putting that number into context.<sup>3</sup> Here, the multifamily zone being discussed is home to a total of 16 households. There are no African American households and one, single Hispanic household. Housing Consultants' Report, Ardsley Table 9, p. 12. Ardsley "passes" under this municipality-centered analysis based on the presence of one Hispanic household among 4,444.<sup>4</sup>

Appropriate comparison to County data would give context to certain comments contained within the Monitor's Analysis which appear, at first blush, indicative of integration. For example, this analysis notes "[a]s a result of the opportunities created by Bedford's zoning code...20% of the occupied housing units in Bedford were in multifamily or two-unit housing[.]" Monitor's Analysis, p. 38. However, juxtaposed against the percentage of occupied units Countywide which are multifamily or two-unit – 48.3% – this statistic is far less compelling.

The Housing Consultants' Report collects a great deal of relevant information supportive of the regional approach that was not considered in the Monitor's Analysis. The color-coded maps of Westchester County found at pages 5 and 6 satisfy the Methodology's mandate to identify "zoning patterns where African Americans and Hispanics live within the County." Methodology ¶ 2; *see also* Monitor's Analysis at p. 16. These maps clearly depict a pattern of concentration of African Americans and Hispanics in certain municipalities, including Mount Vernon, New Rochelle, White Plains and Peekskill. However, because of the municipality-centered approach used in the Monitor's Analysis, these maps were not considered.

Although the Methodology and the Monitor's Analysis acknowledge the requirement to conduct a regional analysis, comparison of municipal data to County data is made only twice within the 120 page report. The first regional comparison is made at page 92:

"[a]s evidence of the barriers Pelham Manor's zoning code imposes on the County's minorities, minority residents constituted 9.0% of Pelham Manor's total household population in 2010 compared with 36.1% of the County's total household population."

Based at least in part on this evidence, the Monitor's Analysis concludes that "Pelham Manor's zoning code does not provide meaningful opportunities for the development of affordable, multifamily, or rental housing and disparately impacts the County's minority residents who use those housing types." *Id.* at 91. A nearly identical analysis is conducted for Pound Ridge. *Id.* at 98. This is precisely the type of comparison contemplated by a regional analysis and would be

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<sup>3</sup> The Monitor's Analysis may also benefit from consideration of "absolute numbers." It avoids the use of absolute numbers rather than proportional statistics, stating that the methodology is "at odds with *Huntington*." P. 20. However, although *Huntington* states that proportional statistics produced the relevant results in that case, it does not preclude a methodology which considers absolute numbers in conjunction with proportional statistics if the method produces statistically reliable results. *Huntington*, 844 F.2d at 938.

<sup>4</sup> This is not to say that HUD considers Ardsley, or any Westchester County municipality, to be exclusionary. It is only to say that the evidence presented is not statistically relevant to conclude otherwise.

beneficial if applied to the other municipalities analyzed, several of which contain fewer than the 9.0% minority population found to be evidence of disparate impact in Pelham Manor.<sup>5</sup>

B. Consideration should be given to restrictive practices other than those applicable to multifamily housing

The Methodology stated that this analysis would consider, at a minimum, the following zoning requirements:

- Restrictions that limit or prohibit multifamily housing development;
- Limitations on the size of a development; i.e., number of units;
- 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.

Task 3. The Monitor's Analysis discusses some, but not all, of these zoning requirements. Each of the municipality narratives describes the number of zoning districts that allow multifamily development as-of-right within the municipality. *See, e.g.,* Monitor's Analysis, Ardsley analysis at p. 33. Each narrative describes alternatives to multifamily housing that could potentially provide affordable housing, including two-family districts and mixed-use districts. *See, e.g., Id.* at p. 34. Finally, each narrative discusses limitations on townhouse development. *See, e.g., Id.*

However, missing from the Monitor's Analysis is discussion of (1) limitations on development size; (2) restrictions that directly or indirectly limit the number of bedrooms in a unit; and (3) restrictions on lot size or other density requirements that encourage single-family housing or restrict multifamily housing. These limitations, although facially neutral, can have a disparate impact on protected classes.

In analyzing the zoning code of Pound Ridge, for example, the Monitor's Analysis does not discuss limitations on the size of multifamily development. The town code limits the number of units permitted to 50 and allows no more than 4 units per building. TOWN OF POUND RIDGE CODE §§ 113-57.E and H. Similarly, the Monitor's Analysis overlooks that certain restrictions on lot size within Pound Ridge's zoning code may discourage multifamily development, such as the requirement that such developments in the R-1A and R-2A zones have a site area of not less than 20 acres and development in the R-3A zone have a site area of not less than 30 acres. *Id.* § 113-57.C.1. Finally, the Monitor's Analysis does not discuss limitations that indirectly limit the number of bedrooms in any municipality. For example, multifamily developments in Bedford must provide for one parking space per unit plus one parking space for every bedroom within the

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<sup>5</sup> For example, Bronxville had a 4.6% minority household population as of the 2010 census. Monitor's Analysis, p. 42. Mount Pleasant's minority household population was 7.4% of its total. *Id.* at p. 73.

unit. BEDFORD TOWN CODE § 125-102(A). Therefore, a three-bedroom unit would require four parking spaces. The effect of this requirement on development should be discussed.

III. The Monitor's Analysis treats relevant data inconsistently

As more fully discussed below, the Monitor's Analysis is inconsistent in its treatment of the data presented by in the Housing Consultants' Report because it (1) reaches contradictory conclusions based upon similar data; and (2) ignores seemingly relevant data.

A. The Monitor's Analysis reaches different conclusions based upon similar data

The Monitor's Analysis presents similar data among various municipalities but reaches different conclusions. At times, this contradiction results in finding one municipality has violated *Huntington* standards while another similarly-situated municipality has not.

An example of this issue is seen in the analyses of Scarsdale and Lewisboro. The Lewisboro analysis states that "as a result of [zoning restrictions on multifamily development], 4.2% of Lewisboro's occupied housing units were in multifamily housing, and 93.7% of Lewisboro's occupied housing units were single-family homes." Monitor's Analysis at p. 68, *quoting* Housing Consultants' Report on Lewisboro, Table 6. Lewisboro's zoning code is found to "disparately impact the countywide minority household population in violation of the *Huntington* standard." *Id.* at 69. "Of Scarsdale's total occupied housing units, 4.6% were in multifamily housing[]" and 94.5% are single-family homes. *Id.* at 108; *see also* Housing Consultants' Report on Scarsdale, Table 6. However, on these nearly identical facts, the Monitor's Analysis concludes that Scarsdale's zoning code does not have a disparate impact. *See* p. 108. No reasoning is provided for the contradictory results.

An additional example is seen in the two instances in which the Monitor's Analysis conducts a regional analysis. As discussed above, the Monitor's Analysis makes two references to a regional analysis, at pages 92 and 98, by comparing the minority household populations in Pelham Manor and Pound Ridge to the County's total minority household population. The analysis shows that there is a considerable disparity between the minority household populations of these two municipalities and the County's total minority household population and states that the disparity is "evidence of the barriers" their zoning codes impose upon the County's minorities. However, the Monitor's Analysis draws two opposite conclusions. Pelham Manor, whose minority residents constitute 9.0% of its total household population, is found to have a zoning code that "provides *prima facie* evidence of disparate impact in violation of *Huntington*." Monitor's Analysis, p. 90. Yet, although Pound Ridge has a lower minority household population than Pelham Manor - 5.8% - the Monitor's Analysis concludes that it's zoning code does not violate *Huntington*. *Id.* p. 97.

B. The Monitor's Analysis does not utilize all relevant data contained in the Housing Consultants' Report

As previously stated, the Housing Consultants' Report collects a great deal of relevant information that was not considered in the Monitor's Analysis. For example, the Housing Consultants' Report contains tables comparing median income by housing tenure for all municipalities and for the County. Tables 36 and 37, pp. 59-60. This information could have been analyzed in conjunction with information regarding the average purchase price of homes in the County, gathered previously for the Monitor's *Berenson* Report and incorporated by reference into the Monitor's Analysis at footnote 1. However, these tables are not referred to in the analysis.

Additionally, the Monitor's Analysis does not include certain concerns raised by the Housing Consultants' in their Report. Specifically, the Housing Consultants' Report notes that "[i]n 2010 Scarsdale had the lowest minority population percentage and the second lowest minority household population of all Westchester municipalities" and less than 9% of its occupied housing units were rentals. Scarsdale analysis, pp. 1 and 2. Neither of these facts was incorporated into the Monitor's Analysis. The Housing Consultants' Report also noted that Bronxville's minority household population percentage of 4.6% was the lowest percentage of any municipality in Westchester. Bronxville analysis, p. 1. This information was noted by the Monitor's Analysis only in a footnote and did not bear on the results, which found that Bronxville's code does not perpetuate clustering or have a disparate impact on minorities. Page 42 fn. 16.

IV. Portions of the Monitor's Analysis are beyond the scope of the AI

Because the Monitor's Analysis was intended as a document that the County could adopt and incorporate into its AI so that the County would come into compliance with paragraph 32 of the Settlement and HUD program requirement, it should not contain findings or determinations that are not relevant to those needs.

A. Determinations that absolve municipalities of liability are beyond the scope of the AI

As the title denotes, an Analysis of Impediments identifies barriers to fair housing choice and would not contain determinations that purport to absolve municipalities of liability under the Fair Housing Act. Accordingly, all statements that purport to absolve individual municipalities from having practices that can potentially exclude blacks and Hispanics should be deleted from the Monitor's Analysis. These determinations are beyond the scope of the AI and have a chilling effect on potential claimants under the Fair Housing Act. We can also expect that the Monitor's Analysis will be produced by these municipalities as having precedential value and providing authoritative evidence to fend off claims of discrimination in other cases. This will be particularly true if the Monitor's Analysis were to be filed with the Court.

We urge the Monitor to withdraw these portions of the Monitor's Analysis and to clearly indicate that the Monitor's Analysis should not receive any deference or given claim preclusive effect in other cases.

B. Demographic shift data is not relevant and beyond the scope of the AI

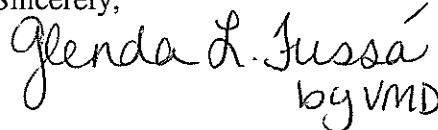
Data regarding demographic changes between the 2000 and 2010 census can be removed. As stated in the Monitor's Analysis, HUD was provided an opportunity to review the Housing Consultants' preliminary reports. P. 17. In providing feedback on these preliminary reports, HUD asked the Monitor to explain how this data would be used. The Monitor indicated that his analysis would not rely on this data, and that he would not include it in the final report. Since the data was in fact not used, we request that the data be removed.

C. References to relative "desirability" should not be included in the AI

Finally, references to the relative "desirability" of a municipality or area should be removed from the Monitor's Analysis. The Monitor's Analysis does not indicate the criteria used to determine desirability.

We thank you for the opportunity to provide this feedback and look forward to continuing to work with you to refine this Analysis.

Sincerely,



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

cc: Hon. Robert P. Astorino, County Executive  
Kevin J. Plunkett, Deputy County Executive  
Robert F. Meehan, Westchester County Attorney  
Mary J. Mahon, Special Assistant to the County Executive  
Hon. Michael B. Kaplowitz, Chairman, Westchester County Board of Legislators  
Holly M. Leicht, Regional Administrator, HUD  
David J. Kennedy, Assistant U.S. Attorney (S.D.N.Y.)  
Benjamin H. Torrance, Assistant U.S. Attorney (S.D.N.Y.)  
Lara K. Eshkenazi, Assistant U.S. Attorney (S.D.N.Y.)

## **EXHIBIT 2**



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September 8, 2014

BY E-MAIL AND FIRST CLASS MAIL

The Honorable Robert P. Astorino  
County Executive  
Westchester County  
148 Martine Avenue  
White Plains, New York 10601

The Honorable Michael B. Kaplowitz  
Chairman, Westchester County Board of Legislators  
148 Martine Avenue, 8th Floor  
White Plains, New York 10601

Holly M. Leicht  
Regional Administrator  
United States Department of Housing and Urban Development  
26 Federal Plaza, Suite 3541  
New York, New York 10278

David J. Kennedy  
Assistant United States Attorney  
86 Chambers Street, 3rd Floor  
New York, New York 10007

***United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v.  
Westchester County, New York, No. 06 Civ. 2860 (DLC)***

Dear Hon. Astorino, Hon. Kaplowitz, Ms. Leicht, and Mr. Kennedy:

Attached is a memorandum setting forth the analysis of 31 eligible communities in light of *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988). The report identifies six municipalities as to which there is evidence of a *prima facie* violation under *Huntington*. The *Huntington* framework provides an opportunity for either the County or the municipality to come forward with evidence of a legitimate

government purpose for the regulations. The deadline for such a proffer is September 24, 2014.

Although requested by the Chair of the Board of Legislators and the HUD Regional Administrator, this report is not binding on the parties and either party may offer views as to why it should be amended. It is requested that such views be submitted by September 24.

Very truly yours,



James E. Johnson

cc: Kevin J. Plunkett, Deputy County Executive  
Robert F. Meehan, Esq., County Attorney  
Mary J. Mahon, Special Assistant to the County Executive  
Glenda Fussa, Esq., Deputy Regional Counsel, HUD  
Benjamin H. Torrance, Assistant U.S. Attorney (S.D.N.Y.)  
Lara K. Eshkenazi, Assistant U.S. Attorney (S.D.N.Y.)

Attachment

## **EXHIBIT 3**



# WESTCHESTER COUNTY BOARD OF LEGISLATORS

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FAX: (914) 995-3884  
Email: kaplowitz@westchesterlegislators.com

**MICHAEL B. KAPLOWITZ, J.D., CFP**

*Chairman of the Board*  
*Legislator, 4<sup>th</sup> District*  
26 Lalli Drive  
Katonah, New York 10536

Dear Mr. Johnson,

September 17, 2014

Monday, September 15th, marked the passage of the deadline by which Westchester County was required to submit an Analysis of Impediments (AI) in order to prevent the reallocation of the Community Development Block Grant Funds for fiscal year 2012.

Despite my urging him to do so, County Executive Astorino declined to adopt your Berenson and preliminary Huntington Analyses into the AI for submission to HUD.

I am, of course, sorry to see the \$5.2 million lost to Westchester communities. However, I remain committed to the greater goal of satisfying the terms of the 2009 settlement through working with the six municipalities identified in your analyses to either a) demonstrate that their zoning practices are not exclusionary or b) to help those communities voluntarily effectuate zoning changes that would remedy any potentially exclusionary practices.

It is toward that end that I write to request that you extend the period for municipal feedback on your preliminary findings under the Huntington Analysis to November 1, 2014.

In my initial discussions with municipal leaders whose communities are cited under Huntington, especially those who were not cited under Berenson, I have been told that more time to analyze the Huntington results and the data will result in a more compelling and comprehensive explanation of existing zoning than what they might produce in just 2 weeks. I am confident that my Legislative colleagues working in partnership with municipal leaders and in conjunction with your staff and mine will be able to facilitate real progress.

I believe that engaging in meaningful dialogue with these communities during an expanded window of time before your Huntington *prime facie* determinations become "final" will pay dividends both in the work that is produced and in establishing good will with the municipalities moving forward in this process.

With the deadline to prevent reallocation of the fiscal year 2012 CDBG funds passed, I believe giving these communities more time to make their best arguments against their inclusion on the list is a good investment of your time.

As always, I remain committed to supporting our communities and your office in the shared objective of disproving or correcting any zoning potentially exclusionary practices, as this is the clearest path toward fulfilling the requirements of the 2009 settlement.

Very Truly Yours,

A handwritten signature in cursive script that reads "Michael B. Kaplowitz". The signature is written in dark ink and is positioned above the printed name.

Michael Kaplowitz  
Chair, BOL