

Appendix 23

Report to Westchester County

Land Use Law Center

June 29, 2012

Affirmatively Furthering Fair and Affordable Housing Under New York and Federal Law and Policies

Purpose:

This report reviews the exclusionary zoning law in New York under the *Berenson* line of cases. It discusses the status of county, state, and federal smart growth, energy, and planning policies and laws as a guide to determining whether local plans and regulations promote a “properly balanced and well-ordered plan for the community” under *Berenson*. In addition, the policies, cases, and statutes are reviewed to determine the legitimate governmental objectives of zoning and to evaluate the basis on which local zoning practices can be considered exclusionary. Finally, the report reviews communication strategies and zoning initiatives that can be used to affirmatively further fair housing and suggests that these strategies and initiatives constitute an effective approach to accomplishment of the goals of the Westchester County Fair Housing Settlement.

Summary:

New York case law establishes that the absence of provisions in local zoning that permit multi-family zoning are exclusionary where regional needs for affordable housing are unmet. The three principal Court of Appeals decisions on the topic of exclusionary zoning establish a number of judicial principles for reviewing whether a particular community’s zoning is unconstitutional. The state’s highest court’s opinions hold that:

- zoning should provide for a properly balanced and well-ordered plan for the community;
- regional needs must be considered;
- zoning cannot be enacted with an exclusionary purpose;
- zoning restrictions must bear a substantial relation to the public health, welfare, and safety;
- the decision as to how properties are to be classified rests with the local legislature;
- if the purposes that zoning accomplishes are fairly debatable, the judgment of the local legislature must control;
- zoning ordinances enjoy a presumption of constitutionality, which may be rebutted if demonstrated beyond a reasonable doubt;
- the burden of proving that zoning is not reasonable is on the challenger;

- courts look at the zoning pattern for the entire community, not at any particular zoning district or neighborhood;
- localities have no responsibility to facilitate the development of housing specifically affordable to lower-income households;
- but their zoning must accommodate an array of opportunities for housing facilities.

The decisions of the Court of Appeals establish that there is a broad range of permissible objectives that zoning can accomplish to create a balanced and well-ordered community, with affordable housing being among them.

While the Court of Appeals has asked the state legislature to act to provide guidance to localities regarding their specific housing responsibilities, no such statute has been adopted. Instead, there are several state and federal statutes, programs, and policies that define what a well-ordered and balanced community is. They discourage zoning that furthers sprawl and encourage zoning that concentrate development in mixed-use and mixed-income centers and corridors, where vehicle miles travelled and energy and resource consumption can be minimized. A local zoning ordinance provides for a well-ordered and balanced community if it contains a wide range of uses, including multifamily housing, accommodates development that would reasonably be expected to locate in the specific geographic area, and conforms to these state and federal policies.

This report recommends an aggressive, pro-active county program that includes the promulgation and promotion of a model comprehensive plan component for affordable housing and several innovative zoning techniques to supplement and support the model inclusionary zoning ordinance. The recommendations include regular meetings of chief elected officials, training and deployment of leadership teams in each community, the delivery of technical assistance, a public education campaign, and regular meetings of an Executive Roundtable including the monitor of the Settlement Agreement, HUD, non-profit and for-profit developers, local officials, and housing experts to review progress toward Affirmatively Furthering Fair Housing and to recommend additional strategies to achieve maximum success.

If encouraged to adopt strategies such as these, Westchester's towns and villages can become leaders in the national effort to create success stories and best practices to guide HUD's rule-making and help other localities that receive federal funding succeed in affirmatively furthering fair housing. These strategies build on the thirty-year record of accomplishment in Westchester's communities regarding affordable housing. They have the potential for building a permanent constituency for promoting the benefits of diversity. Westchester's communities have been successful in promoting affordable housing and learning to explain how it meets critical needs, such as workforce and senior housing. No less critical are the need for diversity and its benefits to current residents and the opportunity for diverse households to live where they choose.

Seeing the completion of the Settlement Agreement as an opportunity to embrace diversity as a fundamental policy and benefit supports the strategic approach outlined above. This strategy under New York law could be the most effective method of

unifying local officials, advocates, HUD, the Monitor, and private developers and gaining acceptance of fair and affordable housing goals for the long-term.

Exclusionary Zoning Under New York Law:

Case Law

Only towns, villages, and cities have zoning power in New York. There is no constitutional or statutory definition of exclusionary zoning in New York to determine the obligations that these communities have to zone for housing that can be made affordable by housing developers. The only guide that localities have comes from case law generally known as the *Berenson* line of cases: those discussed in and those that descended from the seminal case of *Berenson v. New Castle*, decided by the New York Court of Appeals in 1975.¹

The core of the *Berenson* decision is its declaration that:

[T]he primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's land.... [I]n enacting a zoning ordinance, consideration must be given to regional [housing] needs and requirements.... There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met.²

The *Berenson* line of cases establish very general standards to determine whether a locality's zoning is exclusionary, while urging the state legislature, in turn, to provide for regional and state-wide planning regarding these matters. Indicating its discomfort with deciding such matters, the *Berenson* court stated:

Zoning ... is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning.³

The Court of Appeals *Berenson* decision established a test for lower courts to apply when determining the reasonableness of local zoning ordinances. The test includes two factors: (1) "whether the town has provided a properly balanced and well-ordered plan for the community . . . that is, are the present and future housing needs of all the town's residents met" and (2) whether regional needs have been considered.⁴ In

¹ *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975).

² *Id.* at 109-110.

³ *Id.* at 111.

⁴ *Id.* at 110.

Berenson, the Court of Appeals noted, “if a district is set aside for multiple-dwelling development, there is no requirement that other portions of a town contain such developments.”⁵

After adopting these guidelines, the State's highest court remanded the case for trial to the Supreme Court in Westchester County, which decided the case in 1977.⁶ That court found that New Castle's ordinance violated both prongs of the test. The zoning ordinance was declared invalid to the extent that it failed to allow for multifamily development at densities of at least eight units per acre. New Castle was directed to issue a building permit for the project and was given six months to amend its ordinances to provide for the construction of 3,500 units of multifamily housing over a ten-year period.

The Town appealed the trial court's decision. The Appellate Division upheld the declaration of the invalidity of the ordinance as well as the requirement that the plaintiff's land be rezoned,⁷ but it reversed both the trial court's unit goal and the requirement that the Town award a specific density for the plaintiff's development. The Appellate Division ordered New Castle to remedy the constitutional problems with its ordinance within six months. The immediate result was the rezoning of the plaintiff's parcel to multi-family housing and the development of upper-income condominiums on that land.

The Court of Appeals revisited the *Berenson* principles in *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, five years after its *Berenson* decision. In *Kurzius*, the court added a third factor to *Berenson*'s two-part test and restated several principles regarding the validity of zoning.⁸ The court held that if the ordinance was enacted with an exclusionary purpose it would fail constitutional examination. The *Kurzius* court reviewed and sustained the validity of a five acre minimum lot zoning in the Village of Upper Brookville. In doing so, it restated several principles used by the judiciary in reviewing zoning in New York:

- “zoning is a valid exercise of the police power if its restrictions are not arbitrary and they bear a substantial relation to the health, welfare and safety of the community”;⁹
- zoning ordinances, as legislative acts enjoy a “presumption of constitutionality,” which may be rebutted if demonstrated beyond a reasonable doubt;¹⁰
- the decision “as to how various properties shall be classified or reclassified rests with the local legislative body” and “its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary;”¹¹

⁵ Citing *Matter of Fox Meadows Estates*, 233 App.Div. 250, 252 N.Y.S. 178, affd. without opn. 261 N.Y. 506, 185 N.E. 714 (1931)

⁶ Unpublished opinion, Westchester County Sup.Ct. (Dec. 30, 1977) (discussed in *Berenson v. Town of New Castle*, 415 N.Y.S.2d 669, 670 (App. Div. 1979)).

⁷ *Berenson v. Town of New Castle*, 415 N.Y.S.2d 669 (App. Div. 1979).

⁸ *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, 51 N.Y.2d 338 (1980), *cert. denied*, 450 U.S. 1042 (1981).

⁹ *Id.* at 343.

¹⁰ *Id.* at 344.

¹¹ *Id.*

- “the burden of establishing such arbitrariness is imposed upon him who asserts it.”¹² and
- if the purposes that zoning accomplishes are “fairly debatable, the legislative judgment must be allowed to control.”¹³

Another eight years passed before the Court of Appeals returned to the *Berenson* doctrine in *Asian Americans for Equality v. Koch*.¹⁴ In that case, the *Asian Americans for Equality* plaintiffs charged that the adoption of a special area-wide zoning district would displace residents who require low-income housing by eliminating some existing housing and not providing adequate incentives to developers for more.¹⁵ The court rejected this “piecemeal” analysis of a community’s zoning ordinance, holding that it is how the entire community is zoned that matters under *Berenson*.¹⁶ After repeating prior court principles regarding the “strong presumption of constitutionality”¹⁷ that zoning enjoys and that the party attacking zoning bears the burden of overcoming that presumption “beyond a reasonable doubt,”¹⁸ the court held that “*Berenson* did not mandate affirmative relief.”¹⁹ Quoting *Berenson*, the *Asian American* court indicated that “our concern was not ‘whether the zones, in themselves, are balanced communities, but whether the town itself, as provided by its zoning ordinances, will be a balanced and integrated community.’”²⁰ Further the court noted “in our prior decisions we have not compelled the [community] to facilitate the development of housing specifically affordable to lower-income households; a zoning plan is valid if the municipality provides an array of opportunities for housing facilities.”²¹

To support its view that communities are not required to affirmatively further affordable housing, the court cited *Suffolk Housing Services v. Town of Brookhaven*.²² There the plaintiff alleged that Brookhaven's zoning ordinance was unconstitutional under *Berenson* because it did not allow for enough low-income housing. While the Second Department expressed an abhorrence of “unconstitutional zoning barriers that frustrate the deep human yearning of low income and minority groups for decent housing they can afford in decent surroundings,”²³ it held that Suffolk Housing Services failed to “overcome the presumption of the constitutionality of the Brookhaven zoning ordinance”²⁴

Additional cases cited by or following the 1975 Court of Appeals *Berenson* decision establish instructive principles:

¹² *Id.*

¹³ *Id.* (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

¹⁴ *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121 (1988).

¹⁵ *Id.* at 126.

¹⁶ *Id.* at 130.

¹⁷ *Id.* at 131.

¹⁸ *Id.*

¹⁹ *Id.* at 132.

²⁰ *Id.* at 133 (quoting *Berenson*, 415 N.Y.S.2d. at 109).

²¹ *Id.* at 136.

²² *Suffolk Hous. Servs. v. Town of Brookhaven*, 511 N.E.2d 67 (N.Y. 1987).

²³ *Id.* at 71.

²⁴ *Id.* at 69.

- *Matter of Fox Meadow Estates v. Culley*, 233 App.Div. 250, 252 N.Y.S. 178, affd. without opn. 261 N.Y. 506, 185 N.E. 714 (1931) (zoning ordinance that limited multifamily and businesses to areas adjacent to where such development had already occurred was held valid since a locality may adopt plans suitable to its own peculiar location and needs, acting reasonably);
- *Blitz v. Town of New Castle*, 94 A.D.2d 92, 463 N.Y.S.2d 832 (2d Dep't 1983) (holding that the number of housing units allowed or possible under a multifamily zoning ordinance, and not the number that will actually or probably be built, is determinative of whether such ordinance adequately considers regional needs and requirements);
- *Continental Bldg. Co., Inc. v. Town of North Salem*, 211 A.D.2d 88, 625 N.Y.S.2d 700 (3d Dep't 1995) (holding unconstitutional an ordinance which ignored regional needs for multifamily and affordable housing by reducing the number of multifamily housing units from 379 to 129 and limiting the percent of total area of the community zoned for multifamily housing to 1/3 of one percent);
- *Land Master Montgomery, LLC v. Town of Montgomery*, 821 N.Y.S.2d 432 (Sup 2006) (holding that changes to a town's zoning laws that eliminated the only specifically dedicated multi-family zoning districts in the town were enacted without proper regard to local and regional housing needs and had an impermissible exclusionary effect).

Although the Court of Appeals in *Berenson* referred to regional needs, it did not define with any precision the region involved. It refers to "Westchester County, and the larger New York City metropolitan area," which at the time of the decision could have referred to the jurisdiction of the Tri-State Regional Planning Commission, which included parts of New Jersey and Connecticut, the jurisdiction of the Regional Plan Association, which is larger, or the portion of the larger New York Metropolitan area that constitutes the economic market for housing, which would be logical, but remains to be defined. Today, Westchester is affiliated with the mid-Hudson region, a seven county area to its north and west. The region's Economic Development Council has been charged by the state with developing both economic development and sustainability plans to guide the expenditure of hundreds of million dollars in state funding, including housing subsidies and public infrastructure grants. None of its current plans establish regional housing needs or a methodology for estimating them.

State Legislative Action

Despite the appeal by the *Berenson* court for legislative action, there is no state-wide legislation in New York that requires local governments to provide affordable housing. Contrast this to New Jersey, where, since 1985, the state legislature has enacted and amended state legislation establishing housing regions, allocating fair shares to municipalities within those regions for the construction of new affordable housing, and awarding builders zoning remedies where municipalities fail to amend their zoning to comply with their fair share.²⁵

²⁵ N.J. STAT. ANN. §§ 52:27D-301 et seq. (2007).

In Connecticut, the state legislature adopted the Affordable Housing Land Use Appeals Act in 1990.²⁶ It expressly reverses the presumption of validity that sustains most municipal land use decisions when a developer challenges the denial of an application to construct affordable housing. Under the Act, a municipality that denies such an application carries the burden of proving that its action is justified by showing not only that the denial was necessary to protect substantial public interests in health and safety, but that these interests clearly outweigh the need for affordable housing.

Determining What Are Questionable Local Zoning Practices:

In the absence of instructive state legislation in New York, exclusionary zoning is what the courts say it is. New York's exclusionary zoning cases provide only general guidelines, falling far short of providing precise standards for determining what zoning practices are legally questionable. The principles derived from the *Berenson* line of cases are as follows:

- Local zoning must include multifamily housing where local and regional needs are unmet;
- Localities cannot adopt zoning with an intent to exclude those in search of multifamily housing in the region;
- If one, or some local zoning districts, permit multifamily housing, there is no requirement that it must be permitted in other zones;
- There are no judicial standards that require particular types of areas to be zoned for multifamily housing;
- Claims that a community does not have enough land zoned for multifamily housing must overcome the presumption of validity that the courts afford local zoning;
- Overcoming that presumption requires proof beyond a reasonable doubt;
- To determine if regional needs were considered, it is the number of units that are allowed under local zoning, not the number that will actually or probably be built as multifamily housing; and
- Beyond zoning for multifamily housing where there is a need for it, communities are not required to provide affirmative relief to ensure that it is provided.

The obvious limitation affecting the courts in this field is the lack of a statutory definition of the affordable housing responsibility of each community. What are the standards for local performance? What is the housing region? Who is it that is in need of housing within that region? What is each community's proportionate share of that need? What other public interests are served by zoning that must be balanced with the provision of affordable housing?

How does a challenger, under these judicial standards, demonstrate beyond a reasonable doubt that a community's zoning is arbitrary? Without definitions and studies sanctioned by the state, how does a court, the county, or HUD determine when a locality is exclusionary zoned? Without such definitions how can it be determined what are questionable zoning practices? The one thing that is clear is that the absence of

²⁶ CONN. GEN. STAT. §§ 8-30g (2002).

multifamily housing from a community's zoning ordinance, where there is a proven regional need for affordable housing, is exclusionary.

What Is a Properly Balanced and Well-Ordered Community?

The Court of Appeals *Berenson* decision established a test for lower courts to apply when determining the reasonableness of local zoning ordinances.²⁷ The test includes two factors: (1) "whether the town has provided a properly balanced and well-ordered plan for the community . . . that is, are the present and future housing needs of all the town's residents met" and (2) whether regional needs have been considered.²⁸ Under *Berenson*, regional housing needs must be considered as one factor, among others, in creating a properly balanced and well-ordered plan.

Under New York State law, zoning must be in conformance with a comprehensive plan. The New York State Court of Appeals noted in *Udell v. Haas* that "the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use."²⁹ Indeed, the statutes require that all land use regulations must be made "in accordance with a comprehensive plan."³⁰

Under New York planning enabling statutes, the following considerations are appropriate in formulating a local comprehensive plan:³¹

- Existing and proposed location and intensity of land use.
- Natural resources and sensitive environmental areas.
- Agricultural uses, historic, coastal, and cultural resources.
- Population, demographics and socio-economic trends, and future projections.
- The location and types of transportation facilities.
- Existing and proposed location of public and private utilities and infrastructure.
- Existing housing and future housing needs, including affordable housing.
- Present and future location of historic sites, educational, cultural, health, and emergency services.
- Existing and proposed recreational facilities and parkland.
- Present and future locations of commercial and industrial facilities.
- Specific policies and strategies for improving the local economy in coordination with other plan topics.
- Any and all other items which are consistent with the orderly growth and development of the municipality.
- All or part of the plan of another public agency.

State Policies Regarding Land Use

²⁷ *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975).

²⁸ *Id.* at 110.

²⁹ *Udell v. Haas*, 21 N.Y.2d 463, 469 (1968).

³⁰ *See* Town Law, § 263.

³¹ *See* Town Law, § 272-a.

The planning statutes mentioned above encourage towns and villages to consider the plans of state agencies and the state legislature in determining what constitutes a well-ordered and balanced plan for the community. The Smart Growth Public Infrastructure Act states that “It is the purpose of this article to augment the state's environmental policy by declaring a fiscally prudent state policy of maximizing the social, economic and environmental benefits from public infrastructure development through minimizing unnecessary costs of sprawl development including environmental degradation, disinvestment in urban and suburban communities and loss of open space induced by sprawl facilitated by the funding or development of new or expanded transportation, sewer and waste water treatment, water, education, housing and other publicly supported infrastructure inconsistent with smart growth public infrastructure criteria.”³²

This law guides the expenditure of all state infrastructure funds, infrastructure that is needed to support local development. It is essential that local plans and zoning conform to its principles, if localities are to compete successfully for state infrastructure dollars. The law further specifies its criteria for funding, which include advancing projects that use existing infrastructure and that are located in municipal centers and currently developed areas. Among the objectives listed in the law to justify these locational criteria are to protect natural resources, to foster compact, mixed use development, and to foster the diversity and affordability of housing in proximity to places of employment, recreation, and commercial development.³³

Additional priorities for state agencies that fund land use, economic development, and housing projects are found in the recently-adopted Regional Economic Development Council strategies. Westchester is located in the Mid-Hudson Region, whose regional council’s strategy calls for compact, mixed-use development patterns that create an opportunity for growth that is sustainable, cost-effective, energy- and natural resource-conserving, climate-friendly, affordable, and attractive to young workers, concentrating growth around existing infrastructure.

Executive Order 30-24 (GHG Emissions) and Executive Order No. 2 (Energy Policy) state New York’s commitment to the reduction of greenhouse gases and energy conservation which are furthered by initiatives that attract population growth to existing urban areas and additional compact, mixed use development locations, thereby reducing vehicle miles travelled and energy consumption in buildings.

³² Env. Con. Law § 6-0105

³³ Id, § 6-0107[2].

Under the recently-launched Cleaner Greener Communities Program,³⁴ the State of New York is promoting sustainable development and has pledged \$100 million to fund plans and projects that reduce greenhouse gas emissions, 85% of which are carbon dioxide that comes largely from the generation of electricity to heat and cool buildings and tail pipes of personal motor vehicles.³⁵ These funds have been secured by the state under the Regional Greenhouse Gas Initiative (RGGI) which establishes a cap on emissions and then auctions allowances to emit GHG to large utilities that pay for them. Currently, a sustainability plan for the Mid-Hudson Region is being developed under the Cleaner Greener Program. That plan will become part of the Mid-Hudson Economic Development Council's plan and will determine the kinds of projects that will be funded under the budgets of all state agencies that are involved with land use, housing, and economic development as well expenditure of the \$100 million in RGGI funds allocated to the Cleaner, Greener Communities Program.

This describes a new regional planning strategy in New York that will guide comprehensive planning and zoning and assist communities in determining what is a well-ordered and balanced community. The emphases in these initiatives disfavor sprawl and favor compact, mixed use, walkable neighborhoods served by transit and other infrastructure that allow communities to preserve current open space, which is now regarded as a climate mitigation strategy since it is the vegetated landscape that sequesters 18% of all carbon dioxide emitted in the United States.

Federal Sustainable Community Initiatives

These planning principles in New York State are echoed by the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Transportation (DOT) at the federal level. In their report called *Federal Barriers to Local Housing and Transportation Coordination*, dated August 15th, 2011, the agencies' policies regarding affordability and access to high opportunity locations, which is central to affirmatively furthering fair housing, were described as follows:

"Developing safe, reliable, and economical transportation choices helps to decrease household transportation costs, reduce our nation's dependence on foreign oil, improve air quality, reduce greenhouse gas emissions, and promote public health. A 2004 study commissioned by FTA called *Hidden in Plain Sight* estimates that the demand for housing near transit will increase to 14.6 million households by the year 2030, more than double the six million households that currently reside within a half mile of transit. As demand for walkable, transit-accessible neighborhoods grows, federal housing and transportation funding will

³⁴ <http://www.nyserda.ny.gov/Funding-Opportunities/Consolidated-Funding-Application/~media/Files/FO/Closed%20opportunities/2011/RFP%202391/cgc-guidance-document.ashx>

³⁵ Together these sources constitute 52% of domestic emissions of carbon dioxide.

increasingly need to be coordinated in order to ensure the benefits of these investments particularly are available to low-income households....

“The Sustainable Communities Initiative is designed to support regional, state, and local strategies that better coordinate transportation, housing, and development policies and investments to ensure not only more investment in affordable housing, but also more equitable distribution of affordable housing, including assisted housing, public housing, and unsubsidized affordable housing – near public transportation stops, job centers, and other essential destinations. Restrictive land use ordinances, policies, and practices can negatively affect individuals’ ability to live in high opportunity areas, based upon their race, national origin, familial status or disability and other protected characteristics under the Fair Housing Act.

“To address these impediments to fair housing choice, coordinated governmental planning at both the regional and local level is essential to achieve both long-term sustainability and enhanced fair housing choice by linking public transportation with enhanced access to affordable housing, excellent public elementary schools, job training, and other essential services. Due to the substantial costs involved in developing high-density housing near public transportation and in other sustainable contexts, major investments of public funds will be needed to ensure that a portion of these housing units are affordable to low- and moderate-income families. To protect this substantial public investment and ensure that low- and moderate-income families have continued access to sustainable communities, federal incentives for communities that provide covenants and other affordable housing protections for affordability over the longest-possible timeframe should be available. Providing a number of quality transportation options, ensuring the affordability of housing in these areas, and increasing access to jobs and educational opportunities will increase regions’ long-term economic resilience.”

HUD Secretary Shaun Donovan has stated that he is making sure that “federal dollars stop encouraging sprawl and start lowering the barriers to the kind of sustainable development our country needs and our communities want.” Localities in Westchester wishing to qualify for much-needed federal HUD and DoT funding, will be motivated to consider these principles in determining what is a well-ordered and balanced community.

County Plans: Patterns for Westchester and 2050 Vision

Westchester County’s adopted plans provide further guidance, consistent with these federal and state planning policies, for localities drafting comprehensive plans and determining what is a well-ordered and balanced community. This guidance is

consistent with and furthers the policies and plans of the state and federal governments listed above. These plans were adopted by the Westchester County Planning Board and are known as Patterns for Westchester (1996) and Westchester 2025 (2010), which endorses and updates Patterns. According to the 1996 plan, its goal “is to strengthen centers, improve the function of corridors and protect the county’s open space character. All the strategies discussed in the following chapters [of Patterns] are aimed at this goal.” The plan further notes, “[d]evelopment policies which strengthen centers are essential to the continuing vitality of the county. These policies require strategies which not only encourage new development in centers, where sufficient capacity exists, but also address urban decay brought on by industrial and commercial obsolescence and deteriorated housing.”

Westchester 2025 contains this language, “The development of affordable housing in a way that affirmatively furthers fair housing is a matter of significant public interest because the broad and equitable distribution of affordable housing promotes sustainable and integrated residential patterns, increases fair and equal access to economic, educational and other opportunities and advances the health and welfare of the residents of Westchester County.” Westchester 2025 “recommends these policies to municipalities as guidance for their own decision-making[:] channel development to centers, enhance transportation corridors, assure interconnected open space, preserve natural resources, support development and preservation of permanently affordable housing,....”

Strategies That Provide for Well Ordered and Balanced Communities and Affirmatively Further Fair Housing

Towns and villages in Westchester have received clear and consistent guidance from the federal, state, and county governments regarding the types of plans and land use regulations they should adopt to address current governmental objectives and to qualify for governmental funding. These principles constitute legitimate governmental objectives in determining what a well-ordered and balanced community is and establish a framework for determining what zoning actions are questionable because they fail to conform to these principles. Using the Settlement as an opportunity to affirmatively further fair housing that is consistent with these policies, the County can recommend a number of zoning strategies for local consideration and aggressively promote them through effective communications strategies as it has with the Model Inclusionary Zoning Ordinance.

Zoning Strategies:

The model inclusionary zoning ordinance drafted by the County and approved by the Monitor affirmatively furthers fair housing by requiring that ten percent of all residential developments of a certain size be set aside and affirmatively marketed for

fair and affordable housing. The ordinance also recommends that additional affordable housing be created in these developments by offering bonuses to developers in exchange for them. Since such developments will only occur where zoning permits, and since zoning must conform to the comprehensive plan, this strategy furthers a well-ordered and balanced plan for the community. It supplements the affordability of housing that can be built in zones where multifamily housing is permitted by local zoning, which also furthers the locality's comprehensive plan.

In addition to mandatory and bonus zoning for residential development, New York law encourages localities to adopt additional flexible and innovative zoning techniques as long as the end in view is "the most appropriate use of the land."³⁶ This standard was endorsed by the Court of Appeals in sustaining Tarrytown's use of floating zoning just after the end of World War II in the *Rodgers v. Tarrytown* case.³⁷ Judicial opinions hold that the statutes that delegate towns, villages, and cities the power to regulate land use are to be broadly interpreted.

Among the flexible forms of zoning that localities can be encouraged to adopt are:

- *Clustered Subdivisions*: State law allows local legislative bodies to encourage or require developers to cluster lots or the homes permitted under the existing zoning law on a small portion of the site to encourage open space preservation on the part of the parcel. Local cluster laws can allow duplexes, townhouses, or garden apartments on lots located in single-family zones. These types of housing can be built more affordably than large-lot single family homes because the per unit cost of water, sewer, roads, sidewalks, etc. are reduced.
- *Special Use Permits*: Various types of affordable housing can be allowed by special permits where increased densities or different types of development are desired. The local legislative body amends the zoning to allow one or more types of affordable homes to be built and specifies, in that amendment, the performance standards that such housing must meet. The planning board can be given the authority to issue such special permits, or that authority can be retained by the legislative body. Uses allowed by special use permit are legislatively declared to be legal in the affected zoning districts and it is arbitrary to deny a special use permit if the applicant can show that its proposal conforms with the standards contained in the special use permit legislation.³⁸
 - A special permit could be created to allow individual parcel owners to work with a developer and propose a scattered site, affordable housing program for their parcels.
 - A special permit could be created for smaller affordable housing projects that need and can support requests for parking relief, set back

³⁶ N.Y. VILLAGE LAW § 7-704 (McKinney 2004).

³⁷ *Rodgers v. Village of Tarrytown*, 302 N.Y. 115 (1951).

³⁸ N.Y. TOWN LAW § 274-b (McKinney 2004); N.Y. GEN. CITY LAW § 27-b (McKinney 2004); N.Y. VILLAGE LAW § 7-725-b (McKinney 2004).

requirements, height limits, or any other zoning requirement that inhibits the development of an appropriately-scaled affordable housing development.

- It could also be used to permit larger affordable housing projects with possibly greater impact on surrounding areas and include the performance standards that projects would have to meet to win approval. This latter permit could include permission to construct mixed-use projects appropriate, for example, in existing commercial districts.

- *Floating Zones:* Affordable housing developments can be permitted by amending the zoning code to provide for a special affordable housing use zone which is then applied to designated parcels upon application of their owners or by action of the local legislature, when opportunities to develop affordable housing appear. This second step in the floating zoning process results in the amendment of the zoning map to redistrict the subject parcels and permit the new use.³⁹
 - This technique could be used, for example, to allow duplexes to be built in any single family district when the developer commits to making one of the units an affordable rental unit.
 - It could also be used to allow a larger scale garden apartment complex to be built in a single-family zone if the developer owns enough land to buffer the complex from the neighboring homes and agrees to landscaping and other amenities.

- *Generic Environmental Impact Statements:* When any of these techniques is used to encourage affordable housing, a generic environmental impact statement can be prepared when the law is initially adopted that reviews and mitigates any adverse environmental impacts involved.⁴⁰ When this happens, it is possible that developers of individual projects would not be required to prepare lengthy and costly environmental impact studies. This alone can provide a powerful incentive for developers to concentrate their projects in designated development areas, because it can expedite the development review process significantly.

Communication Strategies That Embrace Diversity's Values:

Towns and villages have limited staff and volunteer capacity. They often need help reviewing and revising their comprehensive plans and zoning ordinances in order to achieve their vision of a well-ordered and balanced community. Elected leaders change, zoning and planning board membership turns over, subsidies and financing opportunities come and go, the economy changes, particularly in recessionary times (greatly altering housing needs), and federal and state agencies develop new ideas about what localities have to do to qualify for funding.

³⁹ In *Rodgers v Village of Tarrytown* [N.Y. 1951] 96 N.E.2d 731, municipalities in New York learned that they have the authority to create novel zoning devices such as the floating zone to achieve the most appropriate use of land.

⁴⁰ See N.Y. COMP. CODES R. & REGS. Tit. 6, § 617.10 (2004).

To affirmatively further fair housing, the County can continue to initiate a number of strategies to ensure that, as housing construction occurs, an adequate and fair share of it becomes available to those whose interests are advanced by the Fair Housing Act. More importantly, each time a project is proposed and debated or an ordinance is discussed and adopted, effective communications can create a permanent constituency that understands and supports the values of diversity.

Chief Elected Officials Roundtable

The County's link to local governments is the chief elected officials. The importance of communicating effectively with them about the terms of the Settlement, progress under the Implementation Plan, and methods of aggressively promoting fair and affordable housing cannot be overstated. The County can continue the successful experience of convening local chief elected officials once a quarter, or more often, to answer questions, review progress and strategies, urge additional initiatives and policies, and select local residents to create a leadership team in each locality.

Leadership Teams

Each of the communities involved in the Settlement should have or strengthen a leadership team to affirmatively further fair housing. In all of them, there are already leaders who have been trained through the Land Use Leadership Alliance Training Program (LULA).. The LULA program trains respected local leaders to engage citizens and create an alliance of enfranchised leaders. The LULA can be a method of distributing needed materials for local education on barrier removal, the benefits of diversity, and other techniques to affirmatively further fair housing (AFFH).

The LULA program, in collaboration with the Community Housing Resource Center, can also be engaged and tasked to use existing trained leaders as a catalyst to build and educate additional leaders in a community as advocates for diversity, affordable housing projects, zoning, and other techniques that AFFH. Essentially, the LULA program would work with a trained local leadership team to build a cadre of supporters for land use policies and practices response to fair housing and for developments, one community at a time. A goal of establishing and sustaining a Fair & Affordable Housing Leadership Team in each community is recommended.

Delivery of Technical Assistance

Additional technical assistance, which can take the form of guides and on-site assistance, can be given to Settlement Communities to help the affected

communities achieve the goals of the Order and have a balanced plan for their community drawing upon the Federal, State and County policies described above. The Roundtables, LULA, and the Leadership Teams will engage the localities in formulating a Fair & Affordable Housing Plan to be supported by technical assistance. A recommended goal is a locally determined Fair & Affordable Housing Plan for each affected community.

Plan elements may include:

- Comprehensive plan amendment: development of a fair and affordable housing component in the community's comprehensive plan.
- Land use policy: development of policies that allow for the creation of fair and affordable housing. This may include more effective management of local development, inclusion of affirmative marketing principles, analysis of local inclusionary zoning laws in the context of the model ordinance, and programs needed for specific fair and affirmative housing projects.
- Public processes: establish an expedited local review process for fair and affordable housing developments.
- Site Identification: site identification and evaluation for fair and affordable housing projects, including identifying sites that effectively integrate individuals and families into the community and provide access to services such as transportation.
- Project and Program Finance: preparation of financial modeling scenarios and identification of, and making application to potential funding sources to assure that housing can be developed affordably.
- Board Education Workshops: preparation and delivery of educational workshops for a specific community's legislative board, planning board, zoning board, school board, and other municipal staff to discuss the terms of the Settlement, the Implementation Plan, the Model Ordinance, affirmative marketing, and other on-going initiatives being promoted by the County.

Public Education Campaign

A sustained Public Education Campaign on Fair and Affordable Housing can complement and support the initiatives described above. The Leadership Teams can play important roles in its delivery along with many other delivery systems such as the League of Women Voters, houses of worship, service clubs, community organizations, PTAs and the Junior Leagues. Topics should include the value of diversity to communities and those who benefit from the housing, dispelling the myths (property values, impact on schools, large scale developments, etc.) fair and affordable housing initiatives, fair housing in the

context of Smart Growth initiatives, etc. Planning, location, addressing the issues that participants raise, and facilitation are key to the effectiveness of these meetings. In addition to meetings, opportunities to discuss these topics on radio and cable should be pursued as well as taping so that they can be regularly aired.

Executive Roundtable:

Westchester County has an opportunity to create a model program for affirmatively furthering fair housing. It needs assistance in learning about success stories elsewhere, available best practices, developing new practices, and aggregating energies and resources to meet the challenge of AFFH. To accomplish this, it should establish an Executive Roundtable that can meet regularly and invite HUD, the Monitor, key developers, and select local leaders, to effectively evaluate success and refine strategies.

Conclusion:

This report illustrates the difficulty that a court, county, or federal agency has in determining what precisely constitutes exclusionary zoning and what municipal zoning practices would, if not remedied, cause the County to pursue some type of enforcement action against the offending towns and villages. At a minimum, litigation against “offending municipalities” would be cumbersome, burdensome, and of dubious long-term success. Judicial guidelines are at best general and burdens of proof onerous. In fact, most Westchester communities have adopted a range of practices that allow the private sector to produce affordable types of housing. There are no up-to-date studies of regional housing needs and no agreed upon methods of allocating that need to communities that is based on the realities of the recessionary economy, fundamental changes in state and federal land use and funding policies, and major adjustments in housing markets due to demographic change. Any such allocation plan, to be effective, must be convincing to the local officials and local land use board members who have to take action to meet regional needs and absorb the housing allocated. How such a plan could be created in the current economy, policy and judicial environment is, at least, enigmatic.

If encouraged to adopt strategies such as those listed above, Westchester’s towns and villages can become leaders in the national effort to create success stories and best practices to guide HUD’s rule-making and help other localities that receive federal funding succeed in affirmatively furthering fair housing in a radically changed economy and environment.

Perhaps more importantly, these strategies build on the thirty-year record of accomplishment in Westchester’s communities regarding affordable housing. They have the potential for building a permanent constituency for promoting the benefits of

diversity. Westchester's communities have been successful in promoting affordable housing and learning to explain how it meets critical needs, such as workforce and senior housing. No less critical are a community's need for diversity and its values and the opportunity for people to live where they choose. Seeing the completion of the Settlement Agreement as an opportunity to embrace diversity as a fundamental policy and benefit supports the strategic approach outlined above and could, under the current economic and legal situation in New York, be an effective method of unifying local officials, advocates, HUD, the Monitor, and private developers and gaining acceptance of fair and affordable housing goals for the long term.

This report was prepared by the staff of the Land Use Law Center with the assistance of the Housing Action Council. June 29, 2012.