

Robert P. Astorino
County Executive

Kevin J. Plunkett
Deputy County Executive

July 6, 2012

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

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

Dear Jim:

In response to your letter of May 14, 2012, commenting on the County's Zoning Submission, the County respectfully submits that the County's Zoning Submission followed the direction given in your Report and Recommendation of November 17, 2011, that the County assess the impact of enumerated zoning practices, defined in your May 14th letter as "Questioned Practices."

The County's Zoning Submission looked at each of the six Questioned Practices in the context of the 853 unique zoning districts established by the 43 municipalities with land use regulatory authority in Westchester County. Through the 5,118 specific inquiries, we provided a narrative response to each Questioned Practice for each municipality. The Zoning Submission also provided a compendium of all zoning provisions for each municipality.

You have asked pursuant to paragraphs 13(b) of the Stipulation and Order of Settlement and Dismissal ("Stipulation"), that the County provide a "revised zoning analysis, consistent with the legal principles set forth above...." (Letter p. 7). However, we believe that the analysis which has been undertaken is in fact consistent with general planning principles and applicable law and must respectfully disagree with your view that the "test" which was a part of that analysis "has no basis in law." (Letter p. 6). The analysis is in fact completely consistent with *Berenson v. New Castle* and subsequent case law.

In this regard, we have requested the views of Professor John Nolon of the Pace University School of Law Land Use Center. In a report dated June 29, 2012, and attached hereto, Professor Nolon writes (footnotes omitted):

Office of the County Executive

Michaelian Office Building
White Plains, New York 10601

Telephone: (914) 995-2909 Fax: (914) 813-4028 E-mail: kplunkett@westchestergov.com

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.

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.

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.

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... this is, are the present and future housing needs of all the town’s residents met” and (2) whether regional needs have been considered. In *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.”

*** * ***

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. 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”;**
- **zoning ordinances, as legislative acts enjoy a “presumption of constitutionality,” which may be rebutted if demonstrated beyond a reasonable doubt;**
- **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;”**

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

Another eight years passed before the Court of Appeals returned to the *Berenson* doctrine in *Asian Americans for Equality v. Koch*. 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. 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*. After repeating prior court principles regarding the “strong presumption of constitutionality” that zoning enjoys and that the party attacking zoning bears the burden of overcoming that presumption “beyond a reasonable doubt,” the court held that “*Berenson* did not mandate affirmative relief.” 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.’” 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.”

* * *

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.

As noted above, the *Berenson* Court stated that “in enacting a zoning ordinance, consideration must be given to regional needs and requirement.” 38 N.Y.2d at 110. The County’s Zoning Submission has considered that the municipal zoning ordinances have been adopted pursuant to the comprehensive plan of the municipality. In performing its analysis, the County has found no basis to find that any municipality has not given consideration to regional needs and requirements. Through its review of all local zoning districts, as described in the Zoning Submission, the County has found that all of the zoning ordinances provide for the development of multi-family housing.

In addition, the County’s Zoning Submission found that each municipality’s zoning ordinance met the test of providing for a range of housing types and a range of density that is appropriate to the geographic area and supportable by existing or new infrastructure. Thus, each zoning ordinance met the test set forth in Professor Nolon’s study as follows: **“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 (smart growth) state and federal policies.”**

The County finds that all these factors establish that its municipalities meet the standards set by *Berenson* and the line of cases that followed, and that their zoning is not exclusionary as determined by the Zoning Submission.

STRATEGIES WITH RESPECT TO ZONING

As the County has not found any unconstitutional exclusionary zoning provision in the municipal ordinances which have been analyzed, it is respectfully submitted that it cannot formulate a strategy to “overcome” such provisions which have not been found to exist. Nevertheless, in accordance with your requests in paragraph 5(b) on page 8 of your letter, the County has and will continue to communicate with municipalities with respect to

zoning issues and recommended changes, involve municipal decision-makers in discussions regarding such recommendations and communicate County policies, including among other things the discretionary funding policy and model zoning provisions, regarding future contracts or other written agreements between the County and municipalities.

For example, this includes developing and promoting model ordinance provisions to guide the eligible municipalities with respect to the development of housing units that affirmatively further fair housing.

For its part, the County developed Model Ordinance Provisions which received your approval. Nine municipalities have adopted it, and many more have the provisions under active consideration. As part of its advocacy, the County circulated the Model Ordinance Provisions; its planning and housing staff as well as representatives of the County Executive's senior staff have appeared at numerous forums and seminars where they have promoted, explained and responded to questions about the provisions. The County's Planning Commissioner has engaged in frequent conversations with a number of municipal elected officials and their counsel to discuss the Model Ordinance Provisions.

The Planning Department has drafted for its website "Frequently Asked Questions" with answers, relating to the Model Ordinance Provisions.

In addition, the County is giving consideration to funding a program at Pace Law School's Land Use Center directed to training municipalities on inclusionary zoning, and the flexible forms of zoning municipalities can be encourage to adopt.

The County will convene a quarterly meeting to review progress and strategies and build support for fair and affordable housing among each municipality's leadership.

In addition, the County, with your approval as Monitor, is moving forward to utilize transit based advertising to reinforce the message that Westchester County provides welcoming communities to those seeking fair and affordable housing.

Further, the County is engaged in discussions with your team as to how best to communicate to Westchester residents the benefits that diversity brings to a community.

We will respond to several other questions you raised in your May 14th letter.

In paragraph 5 (a) of your letter, on pages 7 and 8, you asked about the County's Affordable Housing Allocation Plan. It was developed by the Housing Opportunity Commission in 2005, but was never adopted by the County's Board of Legislators, was advisory in nature, and further, was not a component of the Settlement Agreement.

As to the impact of the six Questioned Practices on cost or geographical placement of affordable housing, the County finds that the significant restrictions and limitations are the cost of real estate in the eligible communities as well as environmental factors such as

steep slopes, wetlands, watershed regulation, soil compatible with septic, and endangered species. The geographic placement of affordable AFFH housing units will be in compliance with the locational criteria of the Settlement Agreement, that is, in an eligible municipality, based on racial and ethnic demographic information from the 2000 Census, with priority given to sites and census tracts that are located in close proximity to public transportation.

We are unable to respond to paragraph 5 (a) iv, since racial and ethnic composition is only available through census numbers, which are broken down into census tracts, block groups, and blocks. These designations do not match or conform to zoning districts.

With respect to your requests in paragraphs 5 (c) through 5 (h) for the names of individuals who participated the preparation of the Zoning Submission, along with records and documents relating thereto, and other data, we respectfully look to your June 29th letter as suggesting that the process and topics for interviews and related discovery can be discussed following your receipt of this letter.

As we have offered in the past, we are available to meet with you and your team to do a more formal presentation of our zoning studies as well as planning tools such as Westchester 2025, which hopefully would provide an alternative, or at least preliminary, venue for resolving the questions you have relating to the Zoning Submission.

Very truly yours,



Kevin J. Plunkett
Deputy County Executive

Attachments (2)

Cc: Hon. Robert P. Astorino, County Executive
Robert Meehan, Esq., County Attorney
Mary J. Mahon, Esq., Special Assistant to the County Executive
Glenda L. Fussa, Esq., Deputy Regional Counsel, New York Office, HUD
Benjamin H. Torrance, Esq., Assistant U. S. Attorney (S.D.N.Y.)
Erich Grosz, Esq., Debevoise & Plimpton, LLP