



U.S. Department of Housing and Urban Development  
New York State Office  
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New York, New York 10278-0068  
<http://www.hud.gov/local/nyn/>

May 10, 2013

Honorable Robert P. Astorino  
County Executive  
Westchester County  
148 Martine Avenue  
White Plains, NY 10601

Re: *Disapproval of FY 2012 and FY 2013 Annual Action Plans; Assurances Required for Approval*

Dear Mr. Astorino:

By letter dated April 26, 2013, HUD disapproved Westchester County's (the "County's") FY 2013 annual action plan based on HUD's rejection of the County's FY 2013 certification that it will affirmatively further fair housing ("AFFH"). Pursuant to Section 105(c) of the Cranston-Gonzalez National Affordable Housing Act and 24 CFR 91.500, this letter provides the specific reasons for HUD's disapproval of the action plan, as well as actions the County can take to meet the criteria for approval. Because the underlying concerns that led HUD to disapprove the County's FY 2011 and FY 2012 action plans are the same, this letter also pertains to the actions the County can take to secure HUD's approval of those plans. HUD has received the County's letter dated April 24, 2013, along with an Updated Analysis of Impediments to Fair Housing Choice ("Updated AI"). As explained in more detail in the attached review, the County's FY 2011, FY 2012, and FY 2013 AFFH certifications remain rejected based on HUD's review of the County's Updated AI. It is HUD's desire to offer Westchester County a clear and constructive path forward that would allow the County to receive its block grant assistance so it, in turn, can promote community development, produce affordable housing and assist homeless persons and families.

A detailed and lengthy history of the events following HUD's disapproval of the County's FY 2011 and FY 2012 annual action plans was recounted in HUD's March 13, 2013 letter (the "March 13 Letter").<sup>1</sup> In summary, HUD has disapproved the County's FY 2011, FY 2012, and FY 2013 Action Plans and rejected the corresponding AFFH certifications because the

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<sup>1</sup> By letter dated April 27, 2012, HUD disapproved the County's FY2012 action plan as substantially incomplete. That letter set forth that reasons for disapproval and the actions the County could have taken to meet the criteria for approval. The letter gave the County an opportunity to garner approval of its FY2011 and FY2012 plans by providing assurances: (i) to submit a plan to overcome exclusionary zoning practices, in compliance with the direction provided in a letter from HUD's Office of General Counsel dated April 20, 2012 letter and (ii) to abide by the District Court's ruling on the County's duty to promote source-of-income legislation, and (iii) to incorporate plans to overcome exclusionary zoning and promote source of income legislation into its AI. Almost a year later, on April 24, 2013, the County submitted its revised AI in lieu of the requested assurances. As explained in this letter, HUD has determined that the revised AI is insufficient to support the accuracy of the County's FY 2012 AFFH certification and therefore, the FY2012 Action Plan remains disapproved (24 CFR 91.500(d)).

County has failed to conduct a proper exclusionary zoning analysis and to develop a clear strategy to overcome exclusionary zoning practices, including, but not limited to, pursuing legal action. The second basis for disapproval has been the County's failure to include a description of its plan to promote source-of-income legislation consistent with the direction from the Monitor and the District Court in its AI. As previously noted, HUD is encouraged by recent action taken to promote legislation that would ban source-of-income as specified in the August 10, 2009 Stipulation and Order of Settlement and Dismissal (the "2009 Settlement"). At the same time, concerns remain given that the Updated AI does not reflect commitment to promote such legislation as an ongoing duty. Therefore, HUD seeks assurance from the County demonstrating that it is committed to continuing its efforts to promote source-of-income legislation.

As to the County's commitment to overcome municipal exclusionary zoning practices, HUD has determined that the Updated AI does not provide sufficient evidence to support the County's FY 2011, FY 2012, and FY 2013 AFFH certifications. Although the Updated AI purportedly engages in some level of fair housing analysis of zoning, it is lacking in substance. The deficiencies noted in HUD's correspondence of March 13, 2013 and March 25, 2013 remain. The County's conclusions are inconsistent with federal precedent in interpreting the Fair Housing Act and applicable state law. Moreover, the "Analysis of Disparate Impact of Zoning Ordinances in Each of the 31 Eligible Municipalities on the Basis of Race" set forth in Appendix 51 of the Updated AI (the "Disparate Impact Analysis") is based on a problematic methodology and asserts conclusions not supported by the data provided. Any future analysis by the County should take into consideration HUD's guidance and the work of the Monitor, James E. Johnson, in his efforts to examine zoning practices within the County.

As detailed in the attached review, the County's Updated AI fails to meet the criteria set forth by the Department to find the County's FY 2011, FY 2012, and FY 2013 AFFH certifications satisfactory. Therefore, the Department has determined that additional assurances from the County are necessary and warranted for HUD to find the County's AFFH certifications to be satisfactory. The following assurances will serve as the foundation for grant conditions that will include timetables and benchmarks that the County must meet to use the funds. If the County provides the following assurances, HUD would be able to approve the annual action plans for FY 2011, FY 2012, and FY 2013:

- The County acknowledges that it has an ongoing duty to affirmatively further fair housing that includes compliance with the 2009 Settlement.
- The County acknowledges that the Settlement includes a duty to promote, through the County Executive, legislation that bans discrimination in housing on the basis of source-of-income. This is an ongoing duty, and the County Executive will continue to take steps to promote the passage of such legislation in accordance with court rulings and recommendations from the Monitor. Such steps will be incorporated into the County's Updated AI, and reported upon in annual performance reports submitted to HUD. The County Executive will refrain from taking steps that hinder passage of such legislation and commits to signing the legislation upon passage.

- The County will revise its analysis of exclusionary zoning practices to incorporate the corrective actions previously specified by HUD.<sup>2</sup>
- The County acknowledges that it must develop a clear strategy to overcome exclusionary zoning practices, including, but not limited to, pursuing legal action. Westchester County will develop a plan that will consist of:
  - Identification of local zoning practices that are having exclusionary impacts, or fail to take into account regional housing needs, in compliance with HUD's Office of General Counsel's letter of April 20, 2012.
  - Development of a process for notifying municipalities of zoning issues that hinder the County's obligations under the Settlement and changes that must be made, and if not made, the consequences of municipalities' failure to make them;
  - Development of a process to involve municipal decision-makers in consultation regarding changes in zoning and land use restrictions;
  - Description of how these requirements will be included in future contracts or other written agreements between the County and municipalities; and
  - Identification of the types of zoning practices that would, if not remedied by the municipality, lead the County to pursue legal action.
- The County will incorporate such zoning analysis and strategy into the Updated AI.
- Should the County, HUD, a Court, or the Monitor identify a municipality with exclusionary zoning practices that violate federal, state or local fair housing law, the County will not provide any HUD financial assistance to such municipality, or for developments or other activities in support of any such municipality, until such municipality comes into compliance.
- If the County, HUD, a Court, or the Monitor determines that there is exclusionary zoning that violates federal, state or local fair housing law, the County will undertake, if necessary, enforcement efforts in consultation with HUD.
- HUD's acceptance of the County's annual action plan(s) does not constitute acknowledgment that the County has fully discharged its obligations under the Settlement, or that the County has otherwise complied with the terms of the Settlement, to date or in the future.

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<sup>2</sup> The County must examine any data regarding (1) the impact of the application of the six Restrictive Practices specified in the attached review on housing development within the eligible municipalities; (2) the impact such practices have on the racial and ethnic composition of eligible municipalities; and (3) whether the restrictions properly take into account regional needs. Accordingly, the County is directed to examine whether local zoning ordinances are having exclusionary impacts and/or segregative effects by reviewing the types, quantity and quality of housing presently in the local jurisdiction, proposals for developments (those formally submitted, in progress, and those abandoned), interviews with affected parties, demographic data for the various zoning districts within each local jurisdiction, and an examination of the entire region, particularly demographic data for other jurisdictions with different zoning practices, the housing available, and of regional housing needs. An examination of proportional statistics, rather than absolute numbers is required. The development of a clear strategy to overcome exclusionary zoning practices, including litigation, is also required.

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Settlement, or that the County has otherwise complied with the terms of the Settlement, to date or in the future.

In accordance with 24 CFR 91.500(d), the County must provide its revisions or resubmissions to its FY 2013 plan to the Department by June 10, 2013. The Department is also giving the County an additional opportunity for approval of its FY 2011 and FY 2012 plans. Upon prompt provision of these assurances, signed by the County Executive no later than the June 10th deadline, HUD expects to be able to approve the FY 2011, FY 2012, and FY 2013 annual action plans and allow the block grants for these years to go forward. HUD remains available to provide technical assistance to the County so that it can meet these important requirements. If you have any questions please have the appropriate person contact me at (212) 542-7428.

Sincerely,



Vincent Hom  
Director  
Community Planning and Development

Attachment

cc: Kevin J. Plunkett, Deputy County Executive  
Robert F. Meehan, Westchester County Attorney  
David J. Kennedy, Assistant US Attorney for the Southern District of New York  
Benjamin Torrance, Assistant US Attorney for the Southern District of New York  
Lara Eshkenazi, Assistant US Attorney for the Southern District of New York

## **Attachment: Review of Westchester County's Updated AI**

### **Source-of-Income Legislation**

The County's updated AI, at Chapter 12 pp. 198-200, discusses the history of source-of-income legislation, including the history of litigation, and notes that the County Executive submitted source-of-income legislation to the Board of Legislators on April 24, 2013 with a commitment to sign the legislation, if passed by the Board. We would reiterate, however, that the Second Circuit Court of Appeals has found that the County's obligation to promote the legislation is a continuing one. *See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester County*, 2013 U.S. App. LEXIS 6965 (2d Cir. 2013). As such, the AI must include a description of the County Executive's plan to continue to promote the legislation.

### **The Exclusionary Zoning Analysis and Strategy**

As explained in the March 13 Letter, HUD has undertaken the review of each submission the County has made to the Monitor regarding its exclusionary zoning analysis and strategy to overcome exclusionary zoning.<sup>3</sup> Additionally, we have now reviewed the Updated AI, including the Disparate Impact Analysis. The County's Updated AI remains inadequate.

The March 13 Letter, at page 9, reiterates the corrective actions first articulated in HUD's April 20, 2012 letter (the "Corrective Actions").<sup>4</sup> The County was required to undertake the following Corrective Actions:

- (1) Examine the impact of the application of the six Restrictive Practices<sup>5</sup> on housing development within the eligible municipalities;
- (2) Examine the impact such practices have on the racial and ethnic composition [of the eligible municipalities];
- (3) Examine whether the restrictions properly take into account regional needs; and
- (4) Develop a clear strategy to overcome exclusionary zoning practices, including litigation.

In examining whether local zoning ordinances are having exclusionary impacts and/or segregative effects, the County was directed to review the following factors:

- (1) The types, quantity, and quality of housing presently in the local jurisdiction;
- (2) Proposals for developments (those formally submitted, in progress, and those abandoned);
- (3) Interviews with affected parties;

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<sup>3</sup> HUD undertook a review of the County's responses to the Monitor's May 14, 2012 letter, the District Court's July 26, 2012 Order (the "July 26 Order"), and the Monitor's follow-up requests. The review included all documents sent by the County to the Monitor and HUD on July 6, 2012, July 31, 2012, August 7, 2012, August 8, 2012, August 15, 2012, August 27, 2012, September 6, 2012, September 21, 2012, October 5, 2012, November 21, 2012, and November 22, 2012, and a zoning analysis methodology proposed by the Monitor and accepted by the County on August 7, 2012.

<sup>4</sup> See letter from Glenda L. Fussa to Kevin J. Plunkett, dated April 20, 2012.

<sup>5</sup> Monitor's Report and Recommendation Regarding Dispute Resolution (Amended), dated November 17, 2011 (the "Monitor's Report").

- (4) Demographic data for the various zoning districts within each local jurisdiction;
- (5) Demographic data for the entire region, particularly demographic data for other jurisdictions with different zoning practices; and
- (6) Regional housing needs.

The County's Updated AI fails to adequately address the Corrective Actions that HUD has consistently laid out as a path toward compliance. Specifically, the Updated AI does not satisfactorily consider the impact of the six Restrictive Practices on housing development and racial and ethnic composition or regional needs. Nor has the County addressed several of the factors HUD identified as crucial to a proper analysis, including types, quantity and quality of housing presently within a jurisdiction; whether any proposals for development have been curtailed due to local zoning issues; demographic data for the entire region; or regional housing needs.

**The County has not examined the impact of the application of the six Restrictive Practices on housing development within the eligible municipalities (Corrective Action # 1)**

The Updated AI does not review the types, quantity, and quality of housing presently in the eligible municipalities. With the exception of a few anecdotal notations,<sup>6</sup> the Updated AI does not present a review of housing types and, therefore, fails to address Corrective Action # 1.

**The County has not examined the impact of the application of the six Restrictive Practices on the racial and ethnic composition of the eligible municipalities (Corrective Action # 2)**

The County's Disparate Impact Analysis attempts to address Corrective Action # 2. However, it is based upon a problematic methodology. The County uses a methodology that it admits is statistically unreliable in municipalities in which the Black and Hispanic population or the size of its multifamily district is very small. Despite acknowledging this flaw, the County did not engage in any analysis as to why those numbers are so low. Further, the County alternated between using 2000 and 2010 data, and between using data that includes and excludes group quarters. The County merely seeks to do an analysis regarding the sufficiency of the amount of affordable housing within each community. The County's methodology does not consider whether each zoning ordinance permits such municipality to affirmatively further fair housing. Without consideration of whether the multifamily zones are concentrated in a specific area within each municipality and whether this concentration causes a pattern of segregation, analysis of the numbers of Black and Hispanic people and the amount of multifamily as-of-right zoning cannot shed any light on whether the minority population is integrated within the municipality. Of additional concern, the County asserts conclusions which cannot be supported by the data provided. The Disparate Impact Analysis is therefore inadequate.

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<sup>6</sup> See, e.g. Disparate Impact Analysis, Town of Somers. The "Municipality Specific Geographic Considerations" section identifies a 2,260 unit condominium development and a 120 unit townhome development. The notation does not identify the zoning districts in which these two developments exist, nor does it describe the quality of the units.

As an initial matter, references to specific municipalities below should not be read to indicate that HUD has made a determination that such municipality employs exclusionary zoning practices. The municipalities and data cited are merely illustrative of HUD's concerns regarding the County's chosen methodology and resultant conclusions.

### Methodology

The County acknowledges that the methodology it employed to conduct the Disparate Impact Analysis is problematic. The very first narrative presented raises as an "important consideration" that the number of Black and Hispanic residents is so small that the County's chosen methodology is "subject to a high rate of error."<sup>7</sup> It further cautions that the data presented "cannot be said to provide any statistically significant information."<sup>8</sup> Similar disclaimers are repeated throughout the Disparate Impact Analysis. For example, in its analysis of the Town of Ossining, the County finds that the Town's small population "[r]ender[s] any statistical analysis subject to a high rate of error."<sup>9</sup> Yet in the analyses where the sample size is too small to draw conclusions, the County does not engage in any analysis regarding why the Black and Hispanic population or the size of their multifamily districts is so small. Given the County's disclaimers, HUD cannot accept its methodology, or the conclusions the County draws from it, as sound.

It is also problematic that the individual narratives vacillate between 2000 and 2010 census data without clear reference to which data is being presented. The County generally presents the total population and minority population based on 2010 census data and includes group quarters. For example, the analysis for the Town of Bedford states that it has 17,357 residents. The County also states that Bedford has a Black and Hispanic population of 3,042 residents without clearly noting that this includes 793 residents of group quarters, many of whom are prisoners at the Bedford Hills Correctional Facility. Touting the number of institutionalized minorities within the Town is disingenuous at best. Furthermore, the language of the Settlement emphasizes that group quarters residents should not be included in the analysis.<sup>10</sup> Inclusion of residents in group quarters serves to skew the analysis, as is evident in the case of Bedford. Furthermore, the County relies upon different data—from the 2000 census—in constructing its minimum lot size charts, included in each "Analysis" section. It is difficult to conduct a proper analysis when using inconsistent data and the County's conclusions are thus undermined.

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<sup>7</sup> See Disparate Impact Analysis, Village of Ardsley, "Important Considerations."

<sup>8</sup> See *id.*

<sup>9</sup> See Disparate Impact Analysis, Town of Ossining, "Important Considerations." Curiously, the County does not raise any concern in its analysis of the Village of Bronxville, whose population is comparable to the Town of Ossining. See Disparate Impact Analysis, Village of Bronxville, "Important Considerations."

<sup>10</sup> See Stipulation ¶ 7 (instructing that group quarters residents should not be included in the population for purposes of classifying municipalities for the development of Affordable AFFH units).

The County draws conclusions which are not supported by the data

Despite the County's above-referenced disclaimers regarding the statistical significance of its methodology, the County repeatedly draws conclusions based on it. Even assuming the County's methodology was not flawed and ignoring the County's own disclaimers, the Disparate Impact Analysis draws conclusions which are not supported by the data. The County concludes that the zoning ordinances of all 31 eligible municipalities "do[] not have a disparate impact on minorities."<sup>11</sup> The same conclusion is drawn regarding the impact of the six Restrictive Practices in each eligible municipality.<sup>12</sup>

Regarding restrictions on lot size or other density requirements that encourage single-family or restrict multi-family housing (Restrictive Practice 5), the County reiterates the same concerning conclusion it has articulated in the past:

The restrictions on lot size or density requirements in the zoning districts where multi-family housing is not permitted as-of-right, however, would have no effect of "encouraging" single-family housing or "restricting" multi-family housing within these districts. To build multi-family housing within these districts, a special permit, waiver or variance would be required, and in obtaining that permission, lot size and other density requirements could be waived as well.<sup>13</sup>

It is well-settled that allowing multifamily housing by permit, "which commit[s] multi-family and affordable housing to the total discretion of Town officials," cannot overcome the exclusionary nature of a zoning code that does not provide for multifamily construction as-of-right.<sup>14</sup> Leaving development to the discretion of Town officials will necessarily lengthen the process of development, increasing costs and dissuading affordable development. The County finds no problem, however, with the zoning ordinance of the Town of Ossining, which does not allow for multifamily development as-of-right in any of its 16 mapped zoning districts. The County notes that the Town of Ossining allows for multifamily development by permit in three districts and that multifamily developments have been built. Nevertheless, the County is obliged to look deeper into a zoning code which on its face does not allow for any multifamily development as-of-right. It fails to do so, weakening support for its conclusion that the Ossining zoning ordinance does not have a disparate impact on minorities.

For each municipality, the County presents a chart which it claims supports its conclusion that "the data does not show that minimum lot sizes have a disparate impact on minorities...."<sup>15</sup> These charts list minimum lot sizes and describe the percentages of single-race Black and

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<sup>11</sup> See, e.g., Disparate Impact Analysis, Village of Ardsley, "Analysis."

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., Disparate Impact Analysis, Village of Ardsley, "Presence of the Six Restrictive Practices (5)."

<sup>14</sup> *Land Master Montg. I, LLC v. Town of Montgomery*, 821 N.Y.S.2d 432, 439 (N.Y. Sup. Ct. Orange County 2006).

<sup>15</sup> See, e.g., Disparate Impact Analysis, Village of Ardsley, "Analysis."



Hispanic populations in zoning districts with those minimum lot size requirements. The County does not specify which data they are relying upon in constructing these charts. However, drawing from the data presented by the County to the Monitor on October 5, 2012, we can conclude that the County used 2000 census data, excluding group quarters. For many of the charts, the percentages of Black and Hispanic populations in the County-chosen zones do not decrease as the minimum lot size increases allowing the County to conclude consistently that minimum lot size does not have a disparate impact. However, the County consistently ignores the lowest minimum lot size requirements in constructing its charts. Consequently, the County is forming conclusions based on partial data. It is possible the County would have come to different conclusions had it included more of the data at its disposal.

The chart for the Town of Bedford illustrates this problem. In focusing only on those districts with 10,000 square foot minimum lot size requirements or greater, the County draws its conclusions without considering the zoning districts that are home to 44% of its minority population. These are the exact zoning districts in which the Black and Hispanic populations would be highest if, in fact, the minimum lot size requirements are having a disparate impact. The omission of the districts with the least restrictive minimum lot size requirements skews the data to support the conclusion that higher minimum lot sizes do not have a disparate impact. The County presents the following chart:

<b>Minimum Lot Size</b>	<b>Single-Race Black Population</b>	<b>Hispanic Population</b>
10,000	1.4%	6.4%
20,000	0.9%	3.3%
40,000	1.2%	4.1%
87,120	0.9%	2.4%
172,240	1.8%	4.7%

This chart does not include all of the minimum lot size requirements included in the Town of Bedford's zoning code. Inclusion of even one of the additional zones would create a much different picture. Consider, for example, if the County had included data for its Village Apartment district, which sets a minimum lot size requirement of 3,500 square feet. The resulting chart would look like this:

<b>Minimum Lot Size</b>	<b>Single-Race Black Population</b>	<b>Hispanic Population</b>
3,500	5.2%	13.6%
10,000	1.4%	6.4%
20,000	0.9%	3.3%
40,000	1.2%	4.1%
87,120	0.9%	2.4%
172,240	1.8%	4.7%

Had the County included even one additional data point for the Town of Bedford, it is difficult to imagine that the County could have argued that minimum lot size requirements have no disparate impact on minorities. The County must base its conclusions on all of the available data.

Even ignoring the County's omission of available data, it is still difficult to understand how the County concluded that the charts presented for each of the 31 separate municipal analyses demonstrate that large lot zoning does not have a disparate impact on minorities. The County's charts, based on its own cherry-picked data, repeatedly contradict this conclusion on their face. For example, the chart presented for the Town of North Castle shows that the minority population is almost two times greater in the zones with the lowest minimum lot size listed. This would suggest that higher minimum lot sizes may have a disparate impact - the converse of the County's conclusion. Similarly, in the Town of Pelham, while the single-race Black population is 5.75% in the zones with a minimum lot size of 5,000 square feet, the population plummets to 1.3% at 10,000 square feet - a decrease of over 75% in the rate of single-race Black population from one zone to another. Still the County concludes the data demonstrates no impact.

Finally, the County does not consider the size of zoning districts in conducting its analysis. Treating all zoning districts as equal, regardless of the amount of land area the zones occupy, skews the data in support of the County's conclusions. For example, the County notes that the Hispanic population of the Village of Tarrytown is "highly prevalent" in the 30,000 square foot zoning districts, which are the second largest minimum lot size districts in Tarrytown. However, the 30,000 square foot zoning districts only occupy 34.2 acres and are home to only 108 of Tarrytown's 11,271 residents. Conclusions based upon such a small percentage of residents in a small percentage of the Village undermine the finding that minimum lot size has a complete lack of impact on minorities.

The County has failed to meaningfully address the impact of the six Restrictive Practices on the racial and ethnic composition of the eligible municipalities, Corrective Action # 2, because its methodology raises clear statistical concerns and its conclusions are not supported by the data it presents. These issues render the County's Disparate Impact Analysis inadequate.

**The County has not examined whether the six Restrictive Practices properly take into account regional needs (Corrective Action # 3)**

Nothing within the Disparate Impact Analysis or the Updated AI as a whole discusses whether the zoning schemes of the eligible municipalities properly take into account regional needs. As both HUD and the Monitor have noted in multiple letters,<sup>16</sup> the legal standard for the analysis of exclusionary zoning under New York law - commonly referred to as the *Berenson*<sup>17</sup> test - requires a close examination of regional needs. To date, the County's sole presentation regarding regional needs was a list provided to the Monitor on July 31, 2012, later updated by letter dated November 20, 2012. This list showed that none of the eligible municipalities had met its share of the housing need, as determined in the 2005 Affordable Housing Allocation Plan.

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<sup>16</sup> See April 20, 2012 from Glenda L. Fussa to Kevin J. Plunkett, p. 3; March 13, 2013 from Glenda L. Fussa to Kevin J. Plunkett, p. 4; May 14, 2012 from James E. Johnson to the Honorable Robert P. Astorino, p. 4.

<sup>17</sup> See *Berenson v. New Castle*, 38 N.Y. 2d 102, 110 (1975).

The County has attempted to argue that it is not bound by the findings of the 2005 Affordable Housing Allocation Plan that it commissioned.<sup>18</sup> To be clear, HUD does not contend that the County is required to build any units based on the allocation plan. However its contention that the 2005 Affordable Housing Allocation Plan was not adopted by the County does not absolve it of its obligation to address regional needs. Until such time as the County develops a satisfactory needs assessment by which it can apply the *Berenson* doctrine, the 2005 Affordable Housing Allocation Plan remains an adequate tool that the County can use to evaluate the local jurisdictions' consideration of the regional housing needs. Having not done so, the County fails to address Corrective Action #3.

**The County has not developed a clear strategy to overcome exclusionary zoning practices, including litigation (Corrective Action # 4)**

As with prior Submissions, the County again has not developed a clear strategy to overcome exclusionary zoning practices, as directed by the Monitor's Report (pages 15-16), HUD's April 20 Letter (page 12) and the Monitor's October 1 Letter (page 2). Nothing in the Updated AI addresses a strategy to overcome exclusionary zoning practices, including litigation. With no new information to review, HUD continues to find the strategy presented in the County's November 2012 Submissions unacceptable.<sup>19</sup> The County has thus failed to address Corrective Action # 4.

In summary, the County's conclusions are still inconsistent with applicable federal precedent interpreting the Fair Housing Act and the *Berenson* doctrine. Since HUD's disapproval of the County's FY 2011 Action Plan in July 2011, HUD has provided detailed direction to the County on how to apply established legal precedent in examining whether a zoning ordinance has a discriminatory or segregative impact.<sup>20</sup> The County has also benefited from the Monitor's efforts to provide direction regarding a proper exclusionary zoning analysis.<sup>21</sup> Nevertheless, despite this extensive guidance, the Updated AI is not a proper analysis of exclusionary zoning practices and does not provide a clear strategy to overcome exclusionary zoning practices, including litigation. In this regard, the County has not applied established legal precedent in examining whether a zoning ordinance has a discriminatory or segregative impact. Furthermore, notwithstanding the availability of data to conduct a proper analysis, the County ignored reasonably available evidence of regional housing needs. The County's continued inability to comply with the Corrective Actions prevents HUD from approving the County's FY 2011, FY 2012 and FY 2013 annual action plans.

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<sup>18</sup> See April 4, 2013 letter from Honorable Robert P. Astorino to Secretary of HUD Shaun Donovan, p. 5.

<sup>19</sup> See HUD's March 13 Letter, pp. 8-9.

<sup>20</sup> See letters dated April 20, 2012 and March 13, 2013 from Glenda L. Fussa to Kevin J. Plunkett.

<sup>21</sup> See Monitor's Report and Recommendation Regarding Dispute Resolution (Amended), dated November 17, 2011 (the "Monitor's Report") and letter dated May 14, 2012 from James E. Johnson to the Honorable Robert P. Astorino.