

# ***Affirmatively Furthering Fair Housing: Overcoming Barriers to Implementation of the Westchester County, NY False Claims Case Settlement***

**Master's Thesis by Julie Stein**  
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# **Affirmatively Furthering Fair Housing: Overcoming Barriers to Implementation of the Westchester County, NY False Claims Case Settlement**

by

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## **ABSTRACT**

Westchester County, NY was sued by the Anti-Discrimination Center of Metro New York, Inc. (ADC) under the False Claims Act for allegedly failing to meet its Affirmatively Further Fair Housing obligation for Community Development Block Grant funds received between 2000 and 2006. While Westchester County argued that it had an impressive affordable housing development record, ADC claimed that the County had not done the required Analysis of Impediments to fair housing choice vis-à-vis race and that the County had not taken steps to overcome known impediments to fair housing stemming from racial discrimination and segregation. The lawsuit ended in an August 2009 settlement that requires Westchester County to spend \$51.6 million to build 750 units of affordable housing by 2016 in the 31 municipalities in Westchester with the lowest percentage of minority residents. This case could set a precedent for areas nationwide that have historically resisted residential desegregation.

This thesis examines the challenges faced by stakeholders when implementing a court-ordered fair housing plan. It asks the question: In the face of various barriers to implementation, how does Westchester County get the required affordable Affirmatively Furthering Fair Housing units built in compliance with both the letter and the spirit of the settlement?

To frame the setting of the lawsuit and settlement, this thesis describes the history of the development of Westchester County and examines the federal housing policy context that shaped its suburban landscape. I then provide a detailed case study of the Westchester County False Claims lawsuit, settlement agreement, and implementation plan. Finally, I analyze barriers that the Westchester County Executive's Office will face in trying to implement the settlement agreement, and I provide political, policy and design recommendations for overcoming these barriers.

Thesis Supervisor: Lawrence J. Vale  
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## Chapter 1: Introduction

### *I. Overview*

This thesis examines the challenges faced by stakeholders when implementing a court-ordered fair housing plan. Using the Westchester County False Claims Case as a case study, I identify major barriers that the Westchester County Executive’s Office will likely face in implementing lawsuit settlement requirements to build affordable housing in municipalities with very low minority populations. I also explore the dynamics of a planning environment where not all stakeholders agree with a binding mandate, and I recommend strategies for how to carry out work despite this struggle. Based on stakeholder interviews, literature and lessons from other cases, I make politics, policy and design recommendations for overcoming these barriers to implementation.

I engage with the Westchester False Claims Case<sup>1</sup> from the perspective that the settlement requirements exist and—whether or not they believe that the settlement should exist—many parties have an interest (whether selfish or altruistic, whether they realize it or not) in seeing that the requirements are implemented. Simply put, this thesis asks the question: How does Westchester County get these affordable “Affirmatively Furthering Fair Housing” units built in compliance with both the letter and the spirit of the settlement?

The first step to answering this question is identifying the barriers to implementation. I list and analyze these potential barriers, not to give ideas or tools to those who want to oppose implementation, but so that those actions of opposition can be more easily recognized, exposed and

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<sup>1</sup> A note on the terminology: The Westchester False Claims Case is more commonly known to as the Westchester Fair Housing Settlement, and I refer to the case as both throughout the thesis. As I explain in Chapter 4, the lawsuit was brought against Westchester County under the False Claims Act for alleged fraud in the certification of its obligation to Affirmatively Further Fair Housing under the Community Development Block Grant program.

confronted by those making a good faith effort to implement both the letter and the spirit of the agreement. The second step is pulling ideas, lessons and best practices from the literature and other cases to inform the County's work in overcoming these barriers to implementation.

A short note on what this thesis does not cover: This is not a paper evaluating the premise of the Fair Housing Act or the obligation to Affirmatively Further Fair Housing (AFFH). It will not evaluate whether the Fair Housing Act or the AFFH obligation 'should' exist and/or whether they are effective mechanisms for achieving the goals of anti-discrimination and desegregation. These legal obligations are taken as a given as I explore the implementation question.

## *II. About the author*

I could not have dreamed of a better fit for my master's thesis topic than the Westchester Fair Housing Case. As an urban planner focused on affordable housing policy who grew up in Westchester County, this case has allowed me to explore my academic and professional interests within a context to which I have a deep personal connection.

I grew up in Scarsdale, NY, one of the 31 municipalities eligible under the fair housing settlement for new fair and affordable housing units. I first became interested in urban planning while studying poverty, inequality and social welfare policy as an undergraduate at Brown University. As I studied the history of U.S. housing policy, its influence over residential patterns, and the discrimination and segregation inherent in the early policy and programs, I became aware of the tremendous impact that housing and community development policy has over the other social welfare outcomes I was interested in. It seemed to me that the underlying urban planning and housing issues affecting many low-income communities needed to be addressed so that better social outcomes could truly be achieved through other welfare benefits and support policies. After college, I worked in social policy and health and human services for several years before going to MIT to pursue a Master in City Planning degree in the Housing, Community and Economic Development program.

Through this thesis on fair housing and affordable housing development in Westchester County, NY, I am able to circle back to the issues around discrimination and segregation in housing that brought me to planning in the first place.

Beyond my personal connections to the case, I was attracted to writing about the Westchester fair housing lawsuit, settlement and implementation because of its potential for influence on housing patterns in Westchester County and nationwide. The case is compelling because of the social justice implications of a successful implementation of the settlement requirements, and it is interesting from an academic perspective because of the innovative legal mechanism used in the lawsuit. I hope to contribute research, analysis and recommendations that facilitate a more educated and intelligent discussion about implementation that will move the process forward.

### *III. Methodology*

My research for this thesis is based on personal interviews, primary and secondary source documents, and literature review. I am an outside observer to the case and the data I have collected should be considered in that context.

Interviews were conducted in person and over the phone. I started with a few contacts I had made through friends, colleagues and cold calling, and I found additional people to interview through snowball sampling (asking my interviewees who else I should talk to about the case). My intention was to interview as broad a range of stakeholders as possible in order to hear a variety of perspectives on the case. I completed a total of 19 interviews between November 2009 and February 2010; each interview was between 30 and 90 minutes. The goals of these interviews were to learn about the history of fair housing and the history of affordable housing in Westchester County; to hear the narrative of the False Claims Act case from a variety of perspectives; to identify anticipated barriers to implementation; and to understand the implications of the case both within Westchester and beyond the county.

I was, for the most part, able to meet with the range of stakeholders I wanted to speak with; people were very generous with their time, and I want to acknowledge that I could not have written this document without their participation. These interviews played a key part in my research, and I appreciate each interviewee's willingness to speak with me about the case. The major stakeholder groups that I was not able to hear from were community- and faith- based not-for-profits doing community organizing with potential future tenants of the fair and affordable housing and the potential future tenants themselves. I also attempted to contact a number of not-for-profits doing work with specific minority populations in Westchester, but I was unable to get in touch with them (they didn't return my phone calls or emails). Similarly, I should acknowledge the sampling bias inherent in the snowball sample methodology.

I was fortunate to have access to numerous primary and secondary source documents, the majority of which were produced during or in response to the False Claims Case. While very little beyond newspaper articles has been written about the case, I was able to access information through court documents, expert reports for the case, documents coming out of the Westchester County Executive's Office, and response documents from the Anti-Discrimination Center, among other sources. I was also fortunate to have my parents on the ground in Westchester, keeping an eye out for local news reports on the case and documents about the case sent to their house from the County. I also conducted a literature review of history, theory and case studies relevant to the Westchester case; those sources can be found on the 'Works Cited' page at the end of each chapter.

I want to thank the American Planning Association Housing and Community Development Division for the student research grant award that funded my research for this thesis.



**Table 1.1: List of interviews**

- **Michael Allen**, Partner at Relman, Dane & Colfax, PLLC [Interviewed November 11, 2009]
- **Jonathan Cortell**, Vice President – Development at L+M Development Partners, Inc. [Interviewed January 8, 2010]
- **Norma Drummond**, Deputy Commissioner of the Westchester County Department of Planning [Interviewed November 20, 2009]
- **Alfred Gatta**, Village Manager of Scarsdale [Interviewed January 21, 2010]
- **Barbara Gerrard**, Town Supervisor of New Castle and member of the Westchester Municipal Officials Association’s subcommittee on the Model Ordinance [Interviewed January 25, 2010]
- **Craig Gurian**, Executive Director of the Anti-Discrimination Center [Interviewed January 8, 2010]
- **Dennis Hanratty**, Executive Director of Mount Vernon United Tenants [Interviewed February 17, 2010]
- **Ken Jenkins**, Chairman of the Westchester County Board of Legislators [Interviewed January 20, 2010]
- **Jim Johnson**, Federal Court Monitor and Partner at Debevoise & Plimpton LLP [Interviewed January 12, 2010]
- **Alan Mallach**, Consultant to the U.S. Department of Housing and Urban Development and the U.S. Department of Justice [Interviewed February 17, 2010]
- **Jim McCarthy**, Chair of the Board of Directors of the National Fair Housing Alliance and President/CEO at Miami Valley Fair Housing Center, Inc. [Interviewed November 13, 2009]
- **Thomas McGrath**, Senior Vice President at the Community Preservation Corporation and Chairman of the Board of the Blue Mountain Housing Development Corporation [Interviewed January 26, 2010]
- **John Nolon**, Professor at the Pace University School of Law [Interviewed February 26, 2010]
- **Rose Noonan**, Executive Director of the Housing Action Council, Inc. [Interviewed January 6, 2010]
- **Sara K. Pratt**, Fair housing consultant [Interviewed January 11, 2010]
- **Lee Roberts**, Town Supervisor of Bedford and President of the Westchester Municipal Officials Association [Interviewed January 21, 2010]
- **John Saccardi**, Principal at Saccardi & Schiff, Inc. [Interviewed November 23, 2009]
- **Ann Seligsohn**, Fair Housing program at Westchester Residential Opportunities, Inc. [Interviewed January 11, 2010]
- **Richard Weinstock**, President of Construction at L+M Development Partners, Inc. [Interviewed November 22, 2009]

Two limitations of my research should be noted. First, I am writing this paper as the implementation planning process is still ongoing, making the subject matter more sensitive and limiting in some cases what information interviewees were able to share with me. While details of the case continue to evolve, I am using May 1, 2010 as the end date for my evaluation. Second, I had limited access to certain information about the lawsuit and settlement process because of the confidentiality of the legal process.

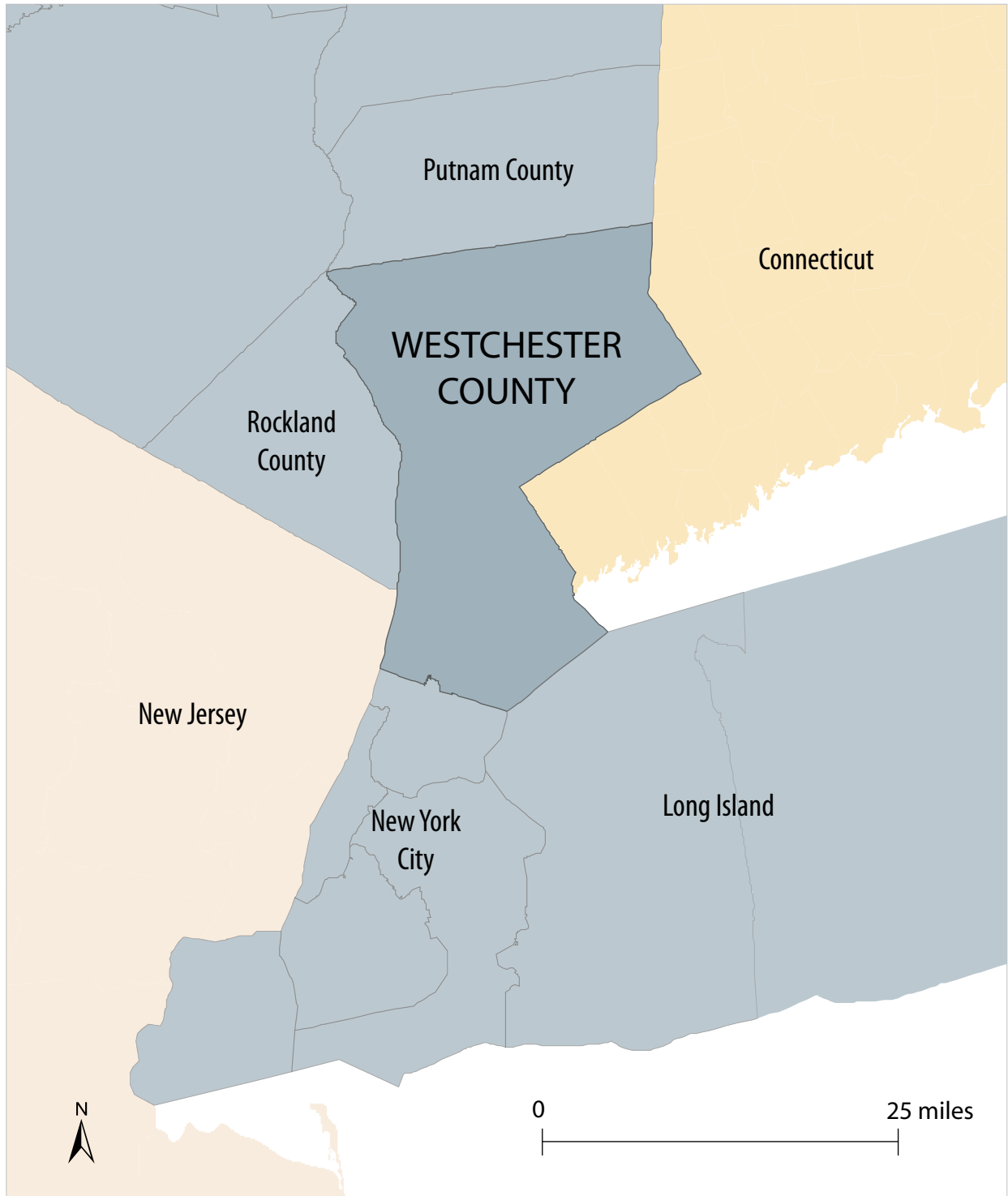
#### IV. *Chapter summaries*

- **Chapter 1: Introduction** provides an overview of the thesis and how I became interested in the topic; a description of the methodology used in my research; and a summary of each chapter.
- **Chapter 2: A brief history of development in Westchester County** gives the context within which the lawsuit was brought. It describes the county's geography and municipal structure; its demographics and housing stock; the history of planning and development in the county since its earliest colonial settlement; and its place within the larger narrative of the American suburban landscape.
- **Chapter 3: The history and role of federal housing policy** lays out the national policy context that has shaped the development of suburban housing and development in Westchester and nationwide. The chapter looks at the federal-level policies around the promotion of home ownership, housing assistance for low- and moderate-income populations, and housing discrimination and segregation. It describes the evolution of U.S. housing policy over time, explains the federal housing policies that exist in 2010, and looks at the state of housing discrimination and segregation in 2010. The chapter then details the Fair Housing Act and the Affirmatively Furthering Fair Housing obligation

embedded in the Community Development Block Grant program, which is a key piece of the Westchester False Claims Act case.

- **Chapter 4: False Claims Act Lawsuit and Settlement** is the in-depth case study. In this chapter, I look at history of affordable housing and fair housing in Westchester County, tell the story of the lawsuit and settlement, and explain the implications of the case. Specifically, the chapter looks at the history of Westchester County's housing policies and programs and evaluates the resulting development; it describes the False Claims Act legal mechanism used in the lawsuit, gives the chronology of the case, and describes the settlement and the start of the implementation process; finally, the chapter discusses the nationwide impact of the Westchester case.
- **Chapter 5: Barriers to implementation of the fair housing settlement** analyzes challenges that the County and other stakeholders will likely face in implementing the requirements of the settlement order. The chapter identifies and details the following seven barriers to implementation: 1) Lack of affordable housing; 2) Resistance to appearance of density; 3) NIMBYism; 4) Political expedience; 5) Commitment to the status quo; 6) Limits of court-ordered requirements; and 7) Unintended consequences.
- **Chapter 6: Recommendations for overcoming barriers to implementation** presents recommendations for addressing the seven implementation challenges identified in Chapter 5. Recommendations are drawn from the literature and from examples of best practices used within Westchester and outside of the county.

**Figure 2.1: Map of Westchester County within the Tri-State Region**



## **Chapter 2: A brief history of development in Westchester County**

*“The chronological narrative of Westchester’s history provides a dynamic example of the unfolding diverse history of the American suburb extending from the pre-Civil War ‘romantic suburb’ to the ‘corporate suburb’ of the last quarter century” – Roger Panetta (Panetta 2006: 7).*

*“Westchester had long played a major role in this quintessentially American story” – Kenneth Jackson (Jackson 2006: vii).*

To put the Westchester Fair Housing Case in context, this chapter discusses the demographics, geography, political structure, and history of the county. The larger story about development in the county helps explain the residential patterns we see today—including the current challenges of building affordable housing throughout the county. These baseline conditions frame the setting for the Fair Housing Case, and they describe how Westchester is positioned to address the underlying issues of the lawsuit and the requirements of the settlement.

### *I. Geography and municipal structure*

Westchester is a suburban county of New York City, located directly to the north of the city. The county is bounded by the Bronx to the south, Connecticut and the Long Island Sound to the east, Putnam County to the north, and the Hudson River to the West. The north-south rivers and valleys running through the county’s 448 square miles have impacted development patterns, further reinforced by the three north-south commuter rail lines connecting the county to New York City. As is the case for all counties in New York State, Westchester County itself is a “municipal corporation with geographical jurisdiction, home rule powers and the fiscal capacity to provide a wide range of services to its residents;” the county entity in New York State has evolved, to some extent “into a form of ‘regional’ government that performs specified functions and which encompasses, but does not

necessarily supersede, the jurisdiction of the cities, towns and villages within its borders” (State of New York 2009: 39).

Westchester has 45 municipalities, which the county’s planning department classifies into five geographic sub-regions: the Central Region (along the I-287 corridor), the Long Island Region (in the southeast, bordering the sound); the Hudson River Region (in the west); the North County Region (in the northeast, within the New York City watershed); and the Bronx River Valley Region (in center of southern Westchester). The municipalities within each sub-region share similar social, economic and physical characteristics, and each sub-region faces unique sets of development opportunities and challenges because of these characteristics.

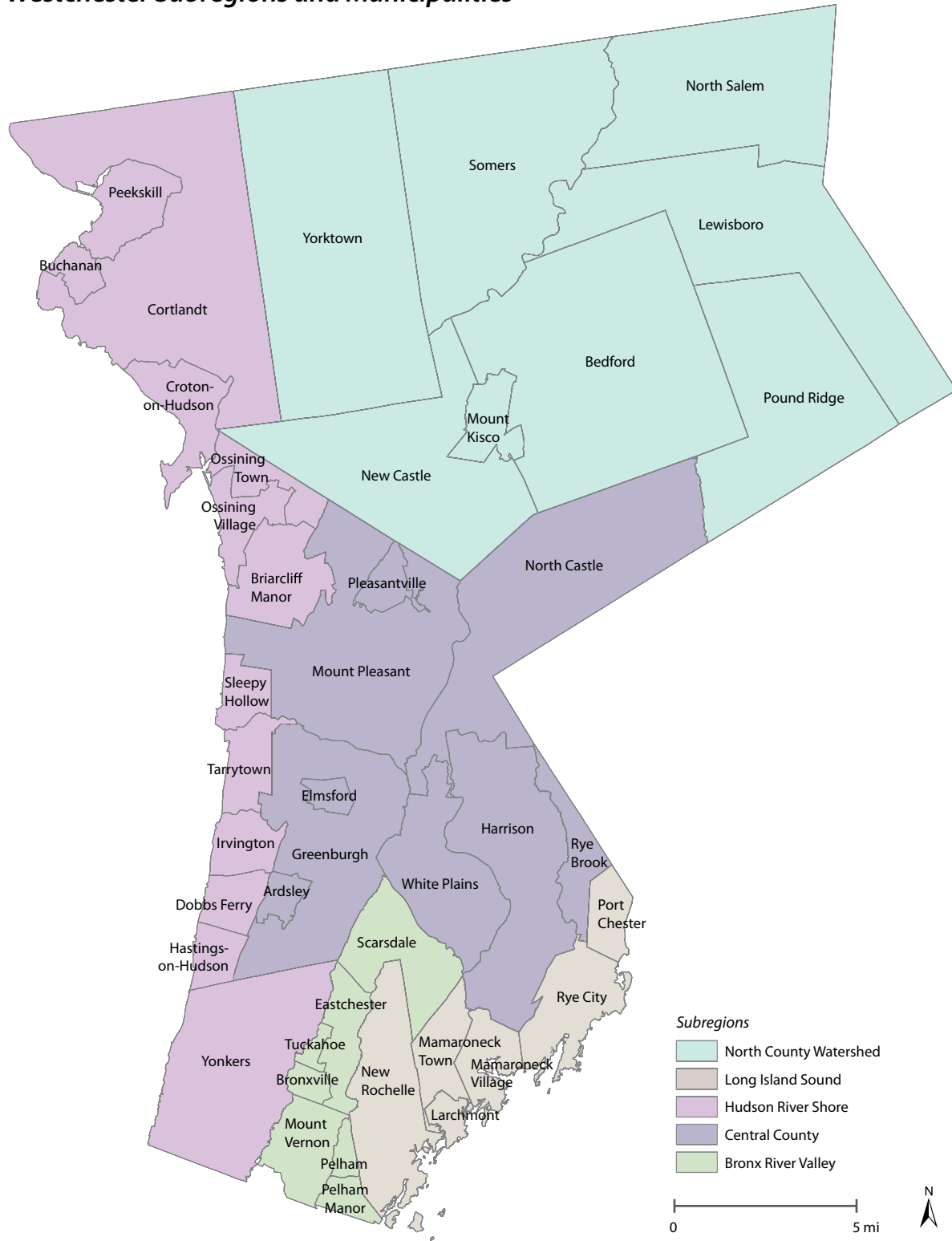
Westchester municipalities are classified by size and political structure into cities, towns and villages.<sup>2</sup> There are 6 cities in Westchester: Mount Vernon, New Rochelle, Peekskill, Rye, White Plains and Yonkers. There are 19 towns, which cover all the land in the county not included in the cities. The 20 villages in the county are sub-areas of the towns; the villages can be within a larger town, coterminous with a town boundary, or contained within two towns. In some towns, there are areas that don’t belong to a village. These areas that are not part of the incorporated villages can be part of an unofficial hamlet designation and/or part of a place designated by the census for statistical purposes; these unofficial designations are often used as the common name for a community within a town. It is these technical municipal boundaries (city, town and village)—rather than the unofficial, more vernacular community boundaries—that were used to define the areas eligible for affordable housing under the Fair Housing settlement; this is important to note, as the more popular understandings of community boundaries often do not match up with the official municipal lines, which can lead to confusion about each community’s requirements under the settlement agreement.

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<sup>2</sup>According to the State of New York *Local Government Handbook*: “The primary difference between a city and a village is that the organization and powers of cities is set out in their own charters, while most villages are organized and governed pursuant to provisions of the Village Law. Also, unlike a city, a village is part of a town, and its residents pay town taxes and receive town services.” Also note “there is no statutory minimum size, either in population or geographical area, which must be met for an area to become a city. Furthermore, there is no concept of progression from village to city status” (State of New York 2009: 51).

**Figure 2.2**

**Westchester Subregions and Municipalities**



(Data source: Westchester County Geographic Information Systems)

New York State's Municipal Home Rule Law governs the relationships among the counties, cities, towns, villages and the state. This 1964 article of the New York State Constitution grants power to general purpose local governments (counties, cities, towns and villages) over "their own property, affairs, and government" and protects these local governments from interference from the state in these matters (State of New York 2009: 30). New York's home rule powers are "among the most far-reaching in the nation" (State of New York 2009: 29), giving local government the power to "adopt ordinances, resolutions, rules and regulations; acquire real and personal property; acquire, establish and maintain recreational facilities; fix, levy and collect charges and fees; and in the case of a city, town or village, to adopt zoning regulations and conduct comprehensive planning" (33). Note that the power to "adopt zoning regulations and conduct comprehensive planning" is granted to cities, towns and villages but not counties (State of New York 2009: 33). Home rule acts as both a legal framework and a philosophy of governance; it lays out the legal process through which local governments can act and it motivates a fierce protection of this right to self-determination on the part of the local governments. The implementation of the Westchester fair housing settlement will run up against the home rule issue, as the county creates a plan involving property, zoning and planning activities that are controlled by the cities, towns and villages.

## *II. Population and housing*

Westchester's 2010 population is projected at 945,174 (*Population* 2010). As of 2000, 63% of Westchester working residents were employed in the county, while the other 37% commuted to work, primarily in New York City (*Labor Force* 2008).

Westchester's 2009 Area Median Income<sup>3</sup> for a 4-person household is \$105,300. While Westchester is one of the wealthiest counties in the country, ranking third in per capita income in 2000 (Keller 2006: 327), a huge income gap exists: of Westchester's 340,377 households, 15.5% have

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<sup>3</sup> Defined by the U.S. Department of Housing and Urban Development



an annual income of less than \$25,000 at the same time 16.8% have an annual income of more than \$200,000 (*Westchester County, New York - Selected Economic Characteristics: 2008*). Poverty is concentrated: 70% of persons below the poverty line live in the cities, compared to 47% of the total population (*Income and Prices 2010*).

The county's racial and ethnic demographics as a whole are generally consistent with New York State as a whole, but the distribution of the minority population is concentrated in the southern part of the county and in the cities. In 2008, the county's population was 60% White non-Hispanic, 19.5% Latino, 14.6% Black, and 5.9% Asian (*Westchester County, New York*). For comparison, in 2008, New York State was 60% White non-Hispanic, 16.7% Latino, 17.3% Black, and 7.0% Asian (*Westchester County, New York*); in 2008, the United States as a whole was 65.6% White non-Hispanic, 15.4% Latino, 12.8% Black, and 4.5% Asian (*USA*).

**Table 2.1: Percentage of population by race and ethnicity, 2008**

	<b>Westchester</b>	<b>New York State</b>	<b>United States</b>
<b>White non-Hispanic</b>	60%	60%	65.6%
<b>Latino</b>	19.5%	16.7%	15.4%
<b>Black</b>	14.6%	17.3%	12.8%
<b>Asian</b>	5.9%	7%	4.5%
	100%	100%	100%

(sources: *Westchester County, New York and USA*)

While the county has the same percentage minority population as the state as a whole and a higher minority population than the country as a whole, the distribution of the minority population across the county is not even. Using data from 2000, the minority population was disproportionately located in the cities (66% of the total minority population, compared to 46% of the entire population and 35% of the White non-Hispanic population) and in the south part of the county (59% of the total minority population, compared to 47% of the entire population and 40% of the White non-Hispanic population) (*Population 2010*). Furthermore, in 2000, "80 percent of the county's African American population [lived] in 5 places: Mount Vernon, Yonkers, New Rochelle, Greenberg, and White Plains"

(Keller 2006: 339). Latino’s “geographical pattern of settlement is similar to that of African Americans, with Yonkers, Mount Vernon, New Rochelle, Port Chester, Peekskill, and Ossining serving as major centers; [but] some of the most dramatic growth has been seen in less likely places, such as Elmsford, Mamaroneck, Bedford, and Mount Kisco.” (Keller 2006: 339-340).

**Table 2.2: Location of place of residence by race/ethnicity status, 2000**

	<b>Residing in cities</b>	<b>Residing in southern Westchester</b>
<b>White non-Hispanic population</b>	35%	40%
<b>Minority population</b>	66%	59%
<b>Entire population</b>	46%	47%

(source: Population 2010)

As of 2008, the county’s housing stock had 338,682 occupied units (6% vacancy rate): 63.7% of total units are owner-occupied, 45.6% of total units are single-family detached homes (*Westchester County, New York - Selected Housing Characteristics: 2006-2008*), and 77.5% of units were built before 1970 (Center for Urban Policy Research 2004). The median sales price of a single-family home was \$560,000 in the fourth quarter of 2009 (New York State Association of Realtors 2009). Chapter 4 provides a detailed analysis of the housing stock, including development, policy, affordability, and the 2009 fair housing case.

### III. *County planning initiatives*

Westchester’s first land use policy document, *Urban Form*, was adopted in 1975. The County’s current planning framework, *Patterns*, came out in 1996. *Westchester 2025: A Partnership for Westchester’s Future*, an “interactive, web-based planning resource that will integrate the plan’s elements with sections on visualization, community overviews, regional partnerships and demographics that can help decision-making and communication,” came out in 2008 but has yet to be adopted (*News from Westchester County*). After the fair housing settlement, the *Westchester 2025* website was taken offline so that the County could amend the plan’s Long Range Land Use Policies to

“embody the goals” of the fair housing settlement agreement and the model zoning ordinance being developed (*Stipulation and Order 2009*). As of April 2010, *Westchester2025* is only partially back online, with limited functionality. Chapter 4 will describe in detail the County’s planning initiatives around housing from the last 50 years.

#### IV. *History of the development of Westchester County*

Westchester has historically been on the forefront of suburban development, serving as a model for suburbanization in the United States and beyond as “the first large suburban area in the world to develop...” (Jackson 2006: vii-viii); Westchester is in a category of just a few other metropolitan areas—such as Boston and Philadelphia—in terms of the historic significance of its suburban development. The importance of the 2009 fair housing case is no different; with jurisdictions nationwide paying attention to the outcome of the lawsuit, other places are looking for signals as to what impact the implementation of the settlement will have on their own localities. If the fair housing stipulation order is enforced, it means potential enforcement of fair housing requirements nationwide; conversely, if its requirements are ignored without recourse, then other places will not feel the need to act to avoid similar suits. It is important to know Westchester’s development history and record on housing to understand how and why it is both a prototypical American suburb and an anomaly—and why the outcome of the False Claims Act lawsuit will serve as an important precedent for fair and affordable housing development nationwide.

Westchester County’s colonial history dates back to Dutch and English settlements in the early 17<sup>th</sup> century. Westchester was one of the original twelve counties designated as the English New York colony in 1683. These British settlers “owed their success to the hundreds of slaves who worked the county’s soil, helping to make it the breadbasket of the American Revolution” (Keller 2006: 328-329). The county contains several key Revolutionary War sites, including important battlefields and army

headquarters. After the revolution, large amounts of land previously owned by British loyalists were confiscated and sold to farmers. By 1832, there were 4,000 active farms in Westchester.

Since its inception, Westchester has had a separate but linked history to New York City. Farmers shipped agricultural products and meats to the New York City market, economically linking the two places and prompting enhanced transportation between the two; this “agricultural connection was a proto-suburban tie to the city” (Panetta 2006: 8). However, the opening of the Erie Canal and the introduction of the railroad throughout the county in the middle of the 19<sup>th</sup> century weakened Westchester’s monopoly on supplying farm goods to the city; this triggered a decrease in the value, number and size of farms in the county and a shift in production to more specialized goods (Panetta 2006: 8).

In the second half of the nineteenth century, Westchester County attracted a new brand of farmer—“the gentleman farmer”—a wealthy industrial man looking for refuge in the country and nostalgic ties to the past through farming. Agriculture served as a hobby, rather than a business endeavor, for the gentleman farmer. Says historian Roger Panetta, “Westchester’s antebellum agricultural landscape was ripe for subdivision,” because of decreasing farm values and increasing interest from New Yorkers in rural estates; “The availability of cleared land and the prospect of country estates and gentlemen’s farms were the prerequisites for the suburbanization of Westchester” (Panetta 2006: 10).

With the appeal and possibility of country living established, the development of Westchester’s extensive railroad network in the middle of the nineteenth century made it practical—at least for certain segments of the population. Westchester was one of the first places in the country to embrace rail, with connections established between New York City and White Plains in 1844, New York City and Peekskill in 1849, and New York City and Connecticut in 1843; local residents “came to understand that the railroad would connect them with the city and would be a permanent element in the emerging suburban landscape” (Panetta 2006: 17). Some of the earliest rail customers were

county farmers, who used the train to transport perishable goods to the New York City market more quickly. However, the major user of the railroad would be the “new species of traveler designated as commuters” (Panetta 2006: 17) born from the railroad tracks that served as the “pathways for suburban development” (22). The railroads and the real estate industry worked together to promote residential Westchester property and commuting lifestyle.

The impact of the railroad on real estate and development patterns was immediate:

“As early as 1855, English observer W. E. Baxter could note that suburban villas were ‘springing up like mushrooms on spots which five years ago were part of the dense and tangled forest, and the value of property everywhere, but especially along the various lines of railroad, has increased in a ratio almost incredible’” (Jackson 2006:vii).

The population growth statistics tell the same story: in the decade immediately after the introduction of the railroad, the county’s population nearly doubled from 58,263 in 1850 to 99,497 in 1860 (Panetta 2006: 19).

Most of the new suburban development was restricted to the wealthy industrialists, as the cost of railroad tickets was set by railroad and real estate interests to help determine who was able to live in Westchester as one of the commuter class. “Initial costs [of railroad tickets] were modest, but in time the railroads raised the rates... One historian has concluded that the high price of the ticket established Westchester as a ‘leafy enclave for the well to do’” (Panetta 2006: 18). While the most famous developments in Westchester were built as weekend and summer retreats for the wealthiest families, “Westchester’s significance derived mostly from the upper-middle-class development of entire communities, Scarsdale, Mount Vernon, New Rochelle, Bronxville, and Rye prominent among them” (Jackson 2006: vii-viii). The development of private golf and yacht clubs was a “critical element in [this] transition from country retreat to year-round community” (Panetta 2006: 24).

While the commuter class developments were restricted to the upper-middle class—facilitated by “a raft of village incorporations in the last quarter of the nineteenth century” that created “communities that could establish...development patterns to exclude the poor” (Keller 2006: 330)—other working-class towns grew to accommodate those working in manufacturing and

construction. Railroad workers populated the towns of New Rochelle, White Plains, Mount Vernon and Ossining, which themselves were becoming “thriving commercial centers” (Keller 2006: 331). Skilled and unskilled laborers (often newly arrived immigrants) working on the county’s new dam and aqueduct projects moved to the nearby towns and villages of Valhalla, Hawthorne, Elmsford, Croton and Buchanan. Furthermore, as Westchester’s economy shifted away from farming, the “manufacturing and mining sectors were heavily staffed with the new foreign workers... who settled in the towns, cities, and villages where there were jobs: Yonkers, Ossining, Port Chester, White Plains, Peekskill, Greenberg, Tarrytown, and New Rochelle” (Keller 2006: 331). Stoney Hill in Harrison was the county’s “first significant free black community,” dating back to 1779 when the “Westchester Quakers had manumitted their slaves” (Keller 2006: 336). Other African American communities existed in “Bedford, New Rochelle, Ossining, Rye, and Yonkers, many of which were said to house stations on the Underground Railroad” (Keller 2006: 336).

The streetcar played a key role in Westchester’s development at the turn of the 20<sup>th</sup> century, opening up the suburbs to new classes of people and creating new zones for development. Similar to the streetcar suburbs Sam Bass Warner studied in Boston, the progress in transportation technology allowed “a continuous enlargement of its supply of residential land” (Warner 1982: 64), allowing people to live farther away from the center but spend the same amount of time commuting. By 1891, electric streetcars “fanned out in every direction from Mount Vernon, the trolley hub;” and by the end of the century, “Streetcar lines linked Yonkers with Mount Vernon and New Rochelle and extended as far north as Tarrytown” (Panetta 2006: 39). To the south, the streetcars created linkages with New York City transportation as well. The streetcar fare cost just one-fifth of what the commuter rail cost, significantly broadening the population that could afford to travel and commute through the suburbs; with the addition of the streetcar, “working-class New Yorkers could begin to imagine escaping to the country and the suburbs” (Panetta 2006: 38). This mode opened up vast new parts of the county to development, as the previously isolated areas between local commuter railroad stations became

accessible. “Contemporaries and historians agree that rapid suburbanization at the turn of the century was the most important contribution of the streetcar” (Panetta 2006: 39). Indeed, as it had done between 1850 and 1870, and then again between 1870 and 1890, the population of Westchester County doubled between 1890 and 1910 to a total of 283,000 residents (Jackson 2006: viii).

By the end of the 19<sup>th</sup> century, “Westchester had witnessed the dawn of the modern subdivision” (Panetta 2006: 29), with its suburban landscape a “distinctive mix of estates and planned developments...[that] reflected an emerging continuum of class...[and] drew both the upper and middle classes to ‘America’s suburb’” (32). A key feature and attraction of the suburbs was the health and education benefits it would offer to children: “child-friendly communities and quality schools were the benchmarks in establishing the cachet of a suburban neighborhood” (Panetta 2006: 34). Beyond this, historian Mary Corbin Sies describes an emerging consensus about the rest of the suburban way of life in Westchester that provided the ideology for this new twentieth-century suburb. First, the suburb was the model of a working community—full of good homes and civic order—that shared “national ideals, including personal independence, freedom of choice, family pride, self-sufficiency, and private enterprise” (Sies in Panetta 2006: 32). Second, the suburb allowed Westchester residents to maintain “authority over development and the character of the community;” this autonomy and self-determination would be used to ward off “the dangers of creeping urbanization” (Sies in Panetta 2006: 32). Third, the suburb could cater to “‘the American desire for residential homogeneity.’ Attracting families of similar class, religion, ethnicity, and race promised social cohesion and the kind of consensus needed to build sustainable suburban communities” (Sies in Panetta 2006: 32). This consensus around the ideal suburban community was a powerful force in local politics and development policy; the flipside of this narrative is, of course, the exclusionary practices required to achieve this level of control and homogeneity.

Scarsdale was a leader in using exclusionary techniques to limit the number and types of development allowed within the village; to accomplish this, Scarsdale enacted a zoning code in 1922, tightened the permitting process for developers, implemented restrictive deeds, increased building standards and construction costs, and introduced an informal architectural review process. Other municipalities in Westchester followed Scarsdale's lead in an attempt to "secure homogeneity by screening out city migrants whose class and ethnic profiles were not 'right'" (Panetta 2006: 49). Robert Fogelson describes the fear of minorities persisting nationwide, fed by widespread racism, that "led most real estate men to believe that the presence of even one or two [non-white] families in an otherwise stable residential neighborhood would drive out the whites—and seal its fate" (Fogelson 2005: 127).

By 1930, all incorporated municipalities in Westchester had enacted zoning ordinances and established boards of appeal, and most had set up planning boards. Publicly, these were promoted as public health initiatives, but the real cause of the ordinances was economic: to protect single-family home values from the impact of non-conforming uses (Panetta 2006: 51). Scarsdale successfully limited the building of apartments; other towns were more hospitable to apartments but required "developers to incorporate building designs, landscaped grounds and domestic amenities consistent with the character of the neighborhood" (Panetta 2006: 51).

As delineated by a social science study conducted at the time, by the 1920s, Westchester's suburbs could be separated into three groups: one, the wealthy residential suburbs (such as Scarsdale, Rye and Bronxville), whose development exhibited careful planning and whose residents were families headed by professional, commuting men; two, the middle-class and working communities (such as Hastings, North Tarrytown, Tuckahoe and Mamaroneck), which exhibited poor planning and weak zoning, and whose residents were mostly non-commuting, second generation immigrants and African Americans; and three, the satellite cities (such as Yonkers, New Rochelle, Mount Vernon, White



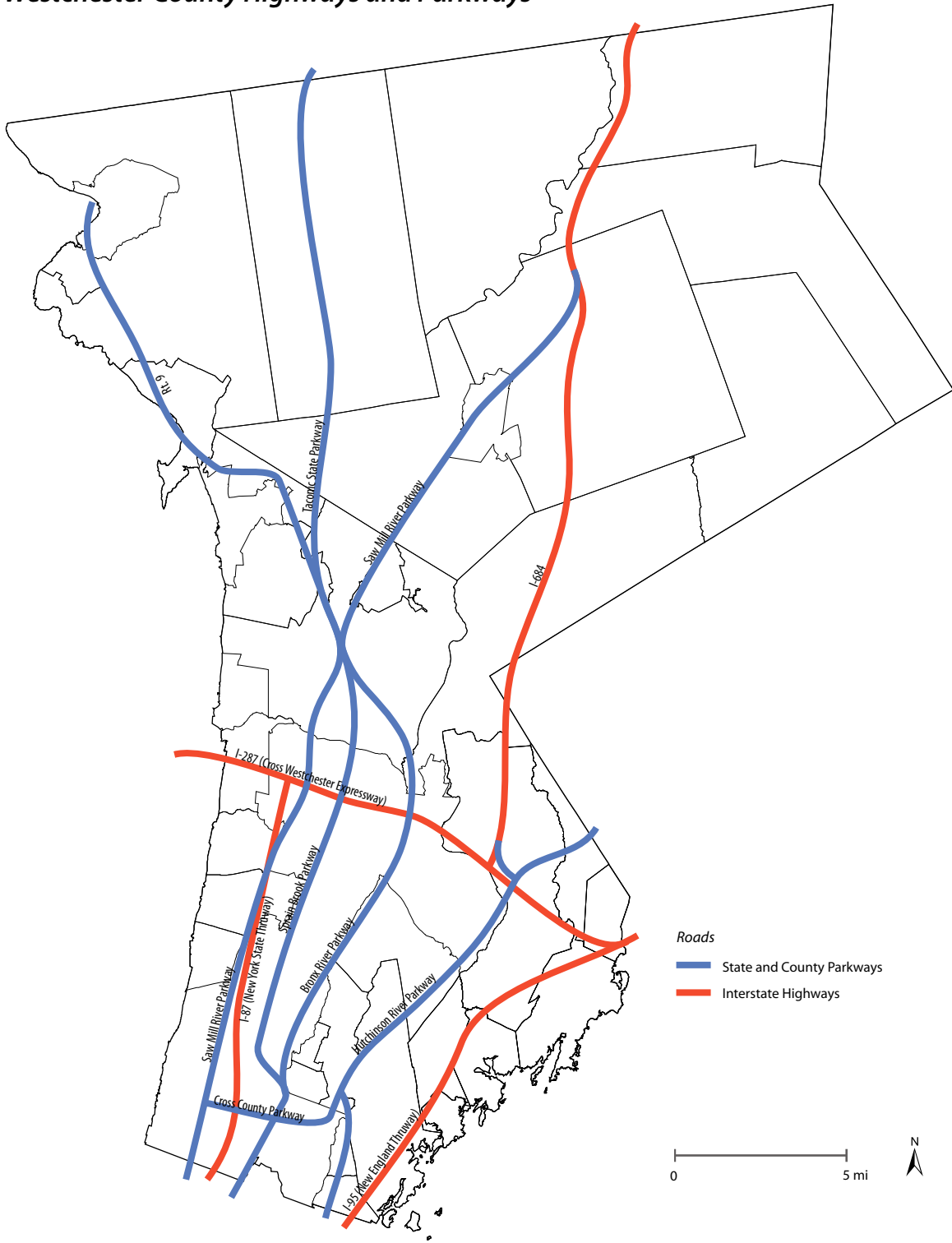
Plains and Port Chester), which were much larger and more urban, with mature business districts (Panetta 2006: 56-57).

The introduction of the consumer automobile made a major impact on the development and suburbanization of Westchester County. "When the private motorcar replaced the railroad as the transport mode of choice for most suburban travelers, Westchester County was still at the forefront of American development" (Jackson 2006: *viii*). Westchester's Bronx River Parkway, built from 1907 to 1923, was the nation's first controlled-access thoroughfare (meaning that it had no at-grade crossings). The parkway was originally conceived of as a recreational route for weekend drives. However, as with the routes built on Long Island to access parks and recreation, the Bronx River Parkway had an immediate impact on the residential fabric of the county, intensifying and deepening Westchester's suburban character (Panetta 2006: 48). As a direct result of the parkway, real estate property values tripled in the Bronx River Valley, and the driving time to New York City was cut in half; these results made the Bronx River Parkway a "model for twentieth-century highways and the template for Westchester's parkway system" (Panetta 2006: 52). After the Bronx River Parkway was completed, the Westchester County Parks Commission created a 1925 master plan of parks and parkways that would serve as the "skeleton plan for the orderly growth of Westchester" (Panetta 2006: 54).

Over the next ten years, three more parkways were constructed in Westchester County, with similar results. The Hutchinson River Parkway between Pelham and White Plains was built by 1928; the Saw Mill River Parkway between Yonkers and Elmsford was built by 1930; and the Cross County Parkway between Yonkers and Eastchester, connecting the Saw Mill River Parkway, the Bronx River Parkway and the Hutchinson River Parkway, was built by 1932. The Hutchinson River and Saw Mill River Parkways "both served as catalysts for automobile excursions, housing developments, and increased property values in their respective valleys" (Panetta 2006: 53). With these roads, Westchester remained at the forefront of highway development: "Quite simply, before 1940, the county had as fine a road network and transportation system as existed anywhere in the world" (Jackson 2006: *viii*). Due in

Figure 2.3

### Westchester County Highways and Parkways



(Data source: Westchestergov.com)

large part to the planning efforts on the state and county levels coupled with public support, Westchester had “reinvented itself as the nation’s most prestigious commuter automobile suburb” (Panetta 2006: 53).

The federal government played a large role in promoting new middle-class suburbanization at this time through aggressive marketing of the single-family home and through new housing finance mechanisms. Nationwide promotion of homeownership had started in 1919, when the U.S. Department of Labor launched an “Own-Your-Own-Home Campaign,” distributing pamphlets on ways localities could promote homeownership and distributing posters to workplaces to target individuals (Vale 2002: 20). New federal housing finance policy was made up of various elements: the introduction of the Federal Housing Administration mortgage insurance (1934); the extension of typical mortgage terms to thirty years plus the ability to amortize payments over the life of the mortgage; the creation of the government-sponsored enterprise Fannie Mae (1938) to buy mortgages and infuse cash into the lending markets; and the continued ability for homeowners to deduct their mortgage interest from their taxable income. With many veterans returning from World War II, the 1944 GI Bill also had a big impact on housing growth by guaranteeing veterans’ mortgages.

It was this combination of factors that began to change Westchester and the suburban landscape across America, opening up the single-family home to a newly democratized postwar American Dream: “While the central quest for the single-family home in the suburbs persisted, the prewar barriers of class, income, and ethnicity had to be breached” (Panetta 2006: 58). Panetta explains the multiple factors influencing suburbanization in this era:

“The confluence of innovative government-sponsored financing, the pent-up demand for new homes, the pool of returning veterans, and the mass production and simplified design of homes in the late 1940s and 1950s extended the possibility of single-family home ownership in fundamentally new ways, to constitute a new phase in the history of the American suburbs” (Panetta 2006: 58-59).

By the 1950s, “The door to America’s suburbs had been opened to those whose ethnic identity and class standing excluded them from Westchester’s boom of the 1920s” (Panetta 2006: 61)—specifically, immigrants and second-generation Americans could access single-family homeownership (whereas

they previously primarily only had access to other housing typologies and tenure types in the suburbs). That new groups of working and middle class were able to access single-family homes in new subdivisions should not be confused for ethnic or racial integration; homogeneity persisted in many of these new developments as much as it had in the old ones.

Car-oriented development continued in the 1950s, with the introduction and then proliferation of strip shopping malls around the county. Additional highways were built in the county, varying from their predecessors in both size and intended function. The Westchester section of the New York State Thruway (I-87), completed in 1956, was part of the state's larger superhighway system to connect all of the major cities in New York State. Similarly, Westchester's portion of the New England Thruway (I-95), completed in 1958, was part of a major interstate transportation network that connected all major cities on the eastern seaboard. The Cross Westchester Expressway (I-287), running east from the Tappan Zee to Port Chester and completed in 1960, was built as an expressway for suburban work commuting and regional shipping. These new highways reflected the strength of the highway, automobile and defense lobbies in securing federal transportation funds; they also reflected a growing population, most of whom were car owners. The population statistics make the same point: "From 1950 to 1970, the number of residences [in Westchester] increased by 40 percent and the population soared from 625,000 to 808,000" (Panetta 2006: 59).

Around the time of the mid-century highway construction, Westchester began to attract more corporate offices from New York City. This type of real estate was not entirely new for the county; Reader's Digest had its original offices in Pleasantville in 1922 and moved to Chappaqua in 1939. Sociologist Sharon Zukin notes two major factors that made Westchester attractive to corporations: de-gentrification (i.e., the introduction of working- and middle-class subdivisions) and deindustrialization (which caused a shift in the county towards a service economy) (Zukin in Panetta 2006: 64). These two elements made Westchester a "ripe location for corporations in the emerging service economy looking to leave New York City" (Panetta 2006: 64). Westchester was promoted as a

good place for business due to its “suburban setting with natural landscapes and open vistas, moderate and predictable tax policies, ease of transportation, better-trained and dependable work force, and access to suburban housing” (Panetta 2006: 71). Some major companies began to move their offices and headquarters to Westchester, notably Standard Oil (Pelham 1951), General Foods (White Plains 1953), and IBM (Armonk 1960s). William Whyte’s study of neighboring Fairfield County, CT suggests that perhaps there was also a spatial relationship in Westchester between a corporation’s relocation to the suburbs and the suburban residence of the corporation’s CEO; Whyte found an average of 8 miles distance between the new headquarters and the CEO’s home (Whyte 1988).

White Plains sought out federal urban renewal assistance in the 1970s to make room for new commercial development. Through urban renewal, the city bulldozed lower-class African American and Italian housing and small businesses to clear the areas for large-scale commercial redevelopment. In addition to the physical restructuring that would create space for businesses, the “city’s social restructuring would make White Plains more hospitable to corporate offices, department stores, and county government” (Panetta 2006: 69). White Plains has since seen major corporate and commercial investment, and it now resembles more of an independent edge city rather than a suburb of New York City.

Westchester gained national attention in second half of the 20<sup>th</sup> century for two prominent desegregation cases. In 1960, the New Rochelle school system was sued for gerrymandering school district lines to produce an entirely African American elementary school, in violation of the 14<sup>th</sup> Amendment’s Equal Protection Clause. As the first active desegregation case in the northern part of the country, New Rochelle became “the ‘Little Rock of the North’... when the city integrated its school system and bused black students to the city’s predominantly white schools” (Keller 2006: 339). In a 1980 desegregation suit, the City of Yonkers was charged with purposefully building all of its public housing units in a concentrated, already low-income African American area, causing de facto public school segregation. The court’s remedy ordered the city to build 200 units of low-income

public housing in the other sections of the city and to implement additional measures (such as busing) to integrate the schools. Vehement opposition to the ruling by white homeowners, echoed by their elected officials in the City Council, brought national attention to the case and further accusations of racism. This case will be discussed further in Chapter 4.

Although Westchester was prototypical of the American suburb in its early stages of development, from 1970 on, its trajectory does not follow continued suburban growth. With the exception of the municipalities farthest north in the county, which have continued to grow, “the county as a whole had matured by 1970, and its population grew slowly or not at all in the three decades before 2000” (Jackson 2006: viii).<sup>4</sup> This point about development history will be especially important in my later discussion of perceived barriers to the implementation of the fair housing plan—a lack of steady or significant growth in the past 50 years has solidified a notion of ‘status quo’ that is difficult to break when attempting to plan for new development of affordable housing.

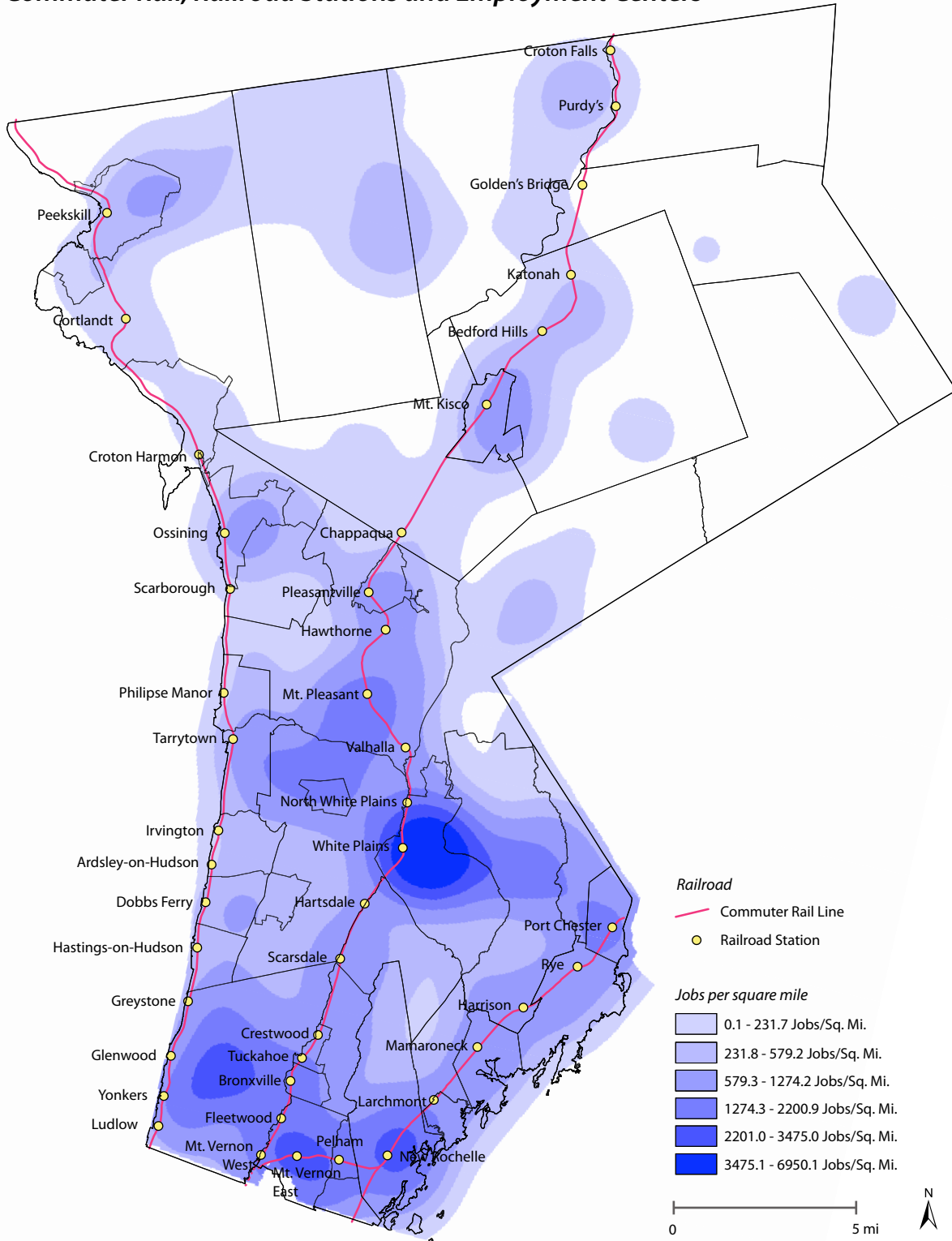
Despite this divergence from the prevalent suburban paradigm at the turn of the 21<sup>st</sup> century, prominent suburban historian Kenneth Jackson believes that Westchester will continue to play a “significant role as a suburban paradigm in the twenty-first century, as it did in the nineteenth and twentieth...” because it maintains several competitive advantages (Jackson 2006: viii). First, Westchester’s historic development pattern along rail lines, with commercial centers clustered around railroad stations (see Figure 2.3), mimics the smart growth models that planners are currently promoting as the goal for sustainable development and energy conservation. Second, Westchester’s proximity to New York City—“the capital of capitalism and the capital of the world” (Jackson 2006: ix)—continues to make the county a desirable place of residence; additionally, Westchester’s transportation infrastructure can support increases in reverse commuting from residents of New York City, creating an efficient use of an existing networks that will save on future infrastructure costs.

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<sup>4</sup> Note: Westchester has matured to the extent that its current zoning allows. Changes in zoning and allowable density could trigger new population growth in the future.

**Figure 2.3**

**Commuter Rail, Railroad Stations and Employment Centers**



(Data source: Westchester County Geographic Information Systems and U.S. Census Bureau - <http://lehdmap4.did.census.gov/themap4/>)

Finally, Westchester maintains a “natural beauty, replete with abundant woods and hills and streams,” which will remain appealing to families even as the dense urban neighborhoods of New York City become more livable and appealing (Jackson 2006: *ix*).

Beyond these competitive advantages that will keep Westchester relevant in the evolving 21<sup>st</sup> century suburban paradigm, localities across the country will be watching Westchester as it implements the Fair Housing Case settlement. Westchester’s successes or failures, combined with the responses they trigger from the court and the federal government, will play a key role in determining the future enforcement and impact of the Affirmatively Furthering Fair Housing requirement of the Fair Housing Act.



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### **Chapter 3: The history and role of federal housing policy**

The housing patterns we see in America today are not only the result of a free market; rather, the United States government has played a key role in the process of residential real estate development. The common notion of federally subsidized housing is that which targets low- and moderate-income persons, whether through public housing, Section 8 vouchers, or new affordable housing development. The reality is that almost all housing in the U.S. has some form of federal assistance attached—especially owner-occupied single-family homes. A patchwork of direct and indirect expenditures provides housing assistance to persons across all income levels—and together these programs make up the United States' federal housing policy.

This chapter will frame the Westchester Fair Housing Case in the context of the larger history of U.S. housing policy. It is important to examine the range of housing subsidies provided by the government in order to understand 20<sup>th</sup> century spatial development patterns, to appreciate the roots of residential racial segregation, and to appropriately put low- and moderate-income subsidies in context. The suburbanization and racial segregation we see in the residential landscape were not born from an organic process; rather, they are the result of active intervention in the housing market on the part of the government. This chapter will examine 20<sup>th</sup> century American housing policy to uncover the origins of where and how we live today.

#### *I. Homeownership promotion*

In the first half of the 20<sup>th</sup> century, government support and financial assistance for owner-occupied single-family homes in the expanding suburbs institutionalized and exacerbated racial segregation, providing homeownership assistance to the white middle class while denying this

opportunity to African Americans and other minorities. This point is fundamental to understanding the history of suburbanization in the U.S.:

“To talk about housing policy and the housing market without considering how past and present segregative practices have structured them is particularly misleading. We combine our myopia regarding segregation with a tendency to view it as somehow normal, as part of the growth of cities, the result of free choice, an experience that all groups have passed through as they blended into the melting pot of American life. Unfortunately, none of these statements is true...” (Denton 2006: 62-63).

Rather, government housing programs that actively encouraged homeownership were explicit in their segregative practices and denial of benefits to African Americans and other minority groups.

The federal government had been aggressively promoting homeownership since the 1920s, but it wasn't until the New Deal that the government laid the groundwork for financial assistance that would put homeownership within reach of the middle class after World War II (Vale 2007). Before these programs were in place, debt was difficult to finance due to the way it was commonly structured (with a large down payment, a 5-year loan term, and a balloon payment of the entire principal in the end). With the housing crisis of the Great Depression, the federal government initiated a number of changes that made homeownership more accessible. For example, the Home Owners Loan Corporation (HOLC) was created in 1933 to combat the foreclosure crisis of the Great Depression. This entity purchased mortgages in default from lenders and then rewrote the terms to be more affordable. HOLC's practice is “now the norm in housing finance—a fixed-rate, long-term, self-amortizing, low down-payment mortgage” (Schwartz 2006: 49). “HOLC is important to history because it introduced, perfected, and proved in practice the feasibility of” this mortgage structure (Jackson 1985: 196). By significantly expanding the term of the loan and by allowing for lower regular, even payments of the principal and interest over the life of the loan, this new mortgage structure put homeownership within reach for more Americans.

HOLC is also important to history as a model for segregative practices, formalizing for the larger market the standard real estate industry practices of racial discrimination and redlining: HOLC “created maps that coded areas as creditworthy based on the race of their occupants and the age of

the housing stock” (Denton 2006: 66). “They ‘red-lined’ or prohibited mortgages loans, in neighborhoods inhabited by people of color. Their highest classifications were reserved for all-white, all-Protestant neighborhoods and they refused loans in racially mixed neighborhoods” (Dolores Hayden, in Vale 2007: 36).

Hoping to bolster the struggling Depression-era construction industry by generating more demand in the housing market, the federal government enacted the National Housing Act of 1934, which established the Federal Housing Administration (FHA) to insure mortgage lenders against losses from mortgage default. This made loans less risky and therefore less expensive to homebuyers. This mortgage insurance mechanism has continued to make loans less expensive for homebuyers; however, another major legacy of the FHA stems from its discriminatory practices. “To safeguard its investments from threats posed by such ‘adverse influences’ as mixed social and racial classes,

“FHA recommended use of deed restrictions<sup>5</sup> designed to prohibit ‘the occupancy of properties except by the race for which they are intended’; and a model restrictive covenant was included in its underwriters manual” (U.S. Federal Housing Administration’s 1936 *Underwriting Manual* in Danielson 1976: 204).

Additionally, adopting the HOLC maps, the FHA deemed “properties located in predominantly black neighborhoods too risky to warrant mortgage insurance” (Schwartz 2006: 51), “preventing residents in black neighborhoods from obtaining long-term mortgages for their homes” (Denton 2006: 66).

While the FHA did not invent this practice, the federal government is guilty of failing to combat the discrimination happening in the market when it “was well positioned to try to reform these practices, with mortgage insurance providing potentially powerful leverage” (Schwartz 2006: 52).

This segregating mechanism also helped fuel the expansion of the suburbs: FHA’s racially-motivated underwriting policies made it difficult to get mortgage insurance in cities—which had minority and mixed neighborhoods—while making it easy to get mortgage insurance in the suburbs—where the growing neighborhoods were more white. The inability to get mortgage

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<sup>5</sup> FHA rules reflected practices already prevalent on the local level: “Restrictive covenants attached to deeds and enforceable in the courts were widely used to limit black access to white residential areas” until the late 1940s when they were outlawed by the U.S. Supreme Court (Danielson 1976: 13).

insurance in urban areas made these homes more expensive to finance and more difficult to sell, decreasing their value and discouraging homeownership in the city. At the same time, the ability to get mortgage insurance in the suburbs made these properties less expensive to finance and easier to sell, increasing their value and encouraging white flight to the suburbs. On top of this, FHA generally favored single-family homes over multi-family housing, putting multi-family housing into a separate category more risky to insure. In total, FHA incentivized single-family housing development in the suburbs, greatly contributing to and accelerating this pattern of development while at the same time determining which groups were able to move there.

Concurrently, the mortgage interest tax deduction and the property tax deduction were promoting single-family homeownership. These two tax deductions—dating back to a Civil War-era exemptions on interest and state and local taxes—were codified when the permanent federal income tax was established in 1913 (Schwartz 2006: 72). They did not have a significant impact on the housing market, however, until the 1940s, when average American incomes rose across the board (bringing more households to the level of earning that required them to pay income taxes) and homeownership rates increased (qualifying more households for the deduction). The mortgages interest tax deduction and the property tax deduction also contributed to the rise of single-family suburban development, as the benefits of these tax deductions are proportional to the amount of money spent on the land and house; in other words, higher mortgages and higher taxes amount to a larger sum of money to deduct from taxable income—incentivizing the purchase of units in the suburbs that were, while often modest in size, still larger than what was available to middle class households in the cities.

The standards and requirements of these mortgage programs dictated the housing patterns we see today; by emphasizing single-family homes in suburbia—and with assistance from new federal, state and local parkway and highway construction programs—these federal policies shaped the suburbanization that was the core of mid-century development: “Carried out on a tide of mortgage subsidies, the postwar suburban building boom rapidly took homeownership rates to more than 60

percent” (Vale 2007: 39). At the same time, these policies were highly discriminatory, institutionalizing segregative practices; in combination with local instances of “restrictive covenants,<sup>6</sup> violence and blockbusting” (Denton 2006: 66), these federal policies denied African Americans and other minorities the wealth-generating benefits of homeownership and facilitated segregated residential patterns.

*II. Housing assistance for the low- and moderate-income*

In addition to the homeownership subsidies targeting the middle class, federal housing policy has provided assistance for low- and moderate-income households; these next few sections will examine the evolution of housing policy targeting low- and moderate-income households to demonstrate how the affordable housing in question in the Westchester case fits into that history—and how it is distinct from some of its predecessors (namely, public housing). These sections also serve as a contrast to the middle-class homeownership housing policy described earlier in the chapter.

During the New Deal, the federal government funded direct construction of public housing to stimulate the economy. The Public Works Administration began constructing public housing in 1934, and such construction was continued by the Housing Act of 1937, “one of the last major pieces of legislation passed during the New Deal...Its passage owed nearly as much to public housing’s potential for employment generation and slum clearance as to its ability to meet the nation’s need for low-cost housing” (Schwartz 2006: 101).

Early public housing was conceived around a very different model than its current incarnation. Public housing was envisioned as “the modern alternatives to slums—enclaves of sturdy construction and carefully vetted households. Instead of cold-water flats and dark alleyways, public housing promised central heating, modern appliances, and wide-open spaces” (Vale 2002: 5). It was intended for the working class, who would be able to pay rents that covered the operating expenses of the

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<sup>6</sup> Robert Fogelson notes that there were “dozens of restricted subdivisions spread over Westchester County, southern Connecticut, northern New Jersey, and Nassau County” (Fogelson 2005: 73-74).

buildings. In these early years of the program, tenants were screened for suitability before being accepted to the housing, and it was meant to be a temporary stepping-stone along path of upward mobility.

The mechanism for supplying the public housing units was direct government construction through local authorities. The housing act “authorized local public housing authorities (PHAs) to issue bonds to finance the development costs of public housing. The federal government was to pay the interest and principal on these bonds. The cost of operating public housing was to be covered by tenant rental payments” (Schwartz 2006: 102). This point about public housing residents’ ability to pay is key in understanding the history of the program: “Congress premised the whole system on the ability of tenant rents to cover operating expenses.” (Vale 2002: 5). This premise presented a major challenge years later when the target population for the program changed (discussed below).

The siting and design of the public housing were dictated by policy as well. The structure of the federal program left the power to the localities to create their own public housing authorities, so it was easy for areas that did not want public housing to see it excluded. “As a result, public housing could be located only in jurisdictions that chose to participate in the program, virtually guaranteeing that public housing would be concentrated in central cities and working-class suburbs and absent from most affluent suburbs” (Schwartz 2006: 108). At the same time, concessions were made to the real estate industry in the negotiation of the housing act, impacting public housing design on the neighborhood and building scales: “To overcome opposition from the real estate industry, advocates for public housing agreed to have the program designed so that it would not compete with the private housing market” (Schwartz 2006: 105). This meant that the housing would target those too poor to access housing in the private market; and it dictated that the site locations, urban design and level of amenities provided in public housing would be substandard to what the private market could offer. Furthermore, to address concerns about the rent impacts of an oversupply of units on the



market, an elimination rule was imposed requiring one-to-one slum replacement; for every unit of public housing built, a slum unit was required to be torn down.

The Housing Act of 1949—which continued the direct federal production policy of 1937—is important in the history of U.S. federal housing policy for two reasons. First, it functionally (though not explicitly) changed the target population for public housing from the upwardly mobile working class to the very poor. Public housing reemerged after World War II “as a potential instrument for helping low-income families cope with the postwar housing shortage and for replacing housing in cleared slums” (Orlebeke 2000: 492). “Pressured by civil rights reforms...public housing authorities increasingly accepted those deemed neediest among the permanently destitute” (Vale 2002: 5). At the same time, this housing act “gave priority to those displaced by urban-renewal actions, which disproportionately uprooted the poor and nonwhite” (Vale 2002: 5). Combined, these changes signaled a major paradigm shift in public housing, from a desirable transitional housing option for the working class to a more permanent option of last resort for the poor and displaced. This change in income level of public housing residents would later prove to be a major funding problem for a program that was meant to rely on tenant rents for operating expenses

The second contribution of the Housing Act of 1949 was framing ‘housing’ as an amenity beyond just the physical home. The 1949 act established a national housing goal: “The implementation as soon as feasible of a decent home and a suitable living environment for every American family” (Denton 2006: 61). “This broader view of ‘housing’ as a package consisting of both dwelling and neighborhood attributes has consistently rested at the foundation of federal policy since the Housing Act of 1949” (Galster 1990: 139). This point about a ‘suitable living environment’ is a key ideological underpinning of later policies addressing discrimination in the housing market, putting responsibility on the federal government to address the disparities in living environments caused by segregation.

### III. *Addressing discrimination and segregation*

The middle of the 20<sup>th</sup> century marked a change in racial discrimination in housing, at least formally; this history is important to the Westchester case as it is the precursor to the federal regulations that triggered the lawsuit. In 1948, the Supreme Court outlawed the enforcement of racially restrictive covenants, which had been used in the private housing market to deny minorities the ability to purchase land and homes that had this type of restriction permanently written into their deeds. On the federal policy level, “[u]ntil the 1960s, housing policy in the United States reflected and reinforced the racial bias and discrimination that pervaded the private housing market” (Schwartz 2006: 215). “The Federal government made an initial step against housing discrimination in 1962, when the Kennedy administration issued an Executive Order prohibiting discrimination in federally funded housing programs, but this measure had minimal effect” until a 1980 enforcement mechanism was completed (Schwartz 2006: 239-240). The 1962 Executive Order did, however, open up the possibility of legal challenges from civil rights organizations such as the National Association for the Advancement of Colored People (NAACP) and the Congress on Racial Equality (CORE).

Desegregation efforts were happening through the courts as well. Responding to the 1964 Civil Rights Act protection against discrimination in federally- assisted programs, in 1966, there was a major class action lawsuit, *Dorothy Gautreaux v. Chicago Housing Authority*, accusing the housing authority of segregation for building all of its public housing in low-income, minority neighborhoods. The result was court-ordered desegregation through scattered-site public housing development; but the long-lasting impact of the case was a resulting randomized study that gave Chicago Section 8 (mobile housing voucher) households the opportunity to move to suburbs with low-concentrations of minorities and poverty. Successful findings on household outcomes from this study became the basis for the federal government’s Moving to Opportunity program 30 years later.

The major federal government step against housing discrimination in this era was the 1968 Fair Housing Act, which “marked a historic shift in the federal government’s stance towards racial

discrimination in the housing market” (Schwartz 2006: 239). Passed by Congress one week after the assassination of Martin Luther King, Jr., Title VIII of the Civil Rights Act of 1968, “known as the Fair Housing Act, prohibited racial discrimination in the sale or rental of housing on the basis of race, color, religious, or country of origin” (Schwartz 2006: 239). The Fair Housing Act sets up the requirement for federal funding recipients to ‘affirmatively further fair housing’—the requirement that Westchester County is accused of failing to meet in the fair housing lawsuit that is the topic of this thesis. The Fair Housing Act and the obligation to ‘affirmatively further fair housing’ will be discussed in depth later on in this chapter.

#### *IV. The beginnings of change in housing policy*

The 1960s also marked the beginning of a shift in strategy of how to best address the housing needs of the country. Whereas previous housing policy directed at low- and moderate-income populations had focused on public production of housing units, this was a period of policy experimentation testing other mechanisms, namely: below-market interest rates for the private development of moderate-income rental housing; project-based rent supplements for private developers to fill gaps between moderate-income affordability and fair-market rents; and subsidies to renters for standard market housing in the existing stock (Orlebeke 2000). Congress set ambitious housing production goals in 1968, fully funding two new programs: Section 235 to subsidize total housing costs of low-income homeowners and Section 236 to reduce the cost of debt service for owners of low-income rental units. These test programs would serve as the models for later scaled-up versions of the same mechanisms.

As these alternative mechanisms for addressing low- and moderate-income housing needs were being tested, public housing was also undergoing changes that would further marginalize the program. In 1969, with the intention of keeping rent payments affordable, a cap was placed on the percentage of income that public housing residents would be required to pay for their units (initially

25%, later changed to 30%), “but this well-intentioned act...only further squeezed the fiscal viability of housing authorities...The original financial premise of public housing proved completely unworkable during this era of diminished tenant rent-paying ability, rampant inflation, and deteriorating building systems” (Vale 2002: 6). These challenges facing the public housing system reinforced the emerging ideological shift in housing policy instruments.

V. *Devolution, private investment, and rethinking public housing*

The Nixon era marked a pivotal turning point in U.S. housing policy, and it was Nixon who created the housing funding program at the center of the Westchester case. While early in his administration he oversaw a massive increase in construction of affordable units born from the 1968 programs, Nixon implemented a moratorium on production-dominated subsidies for direct government construction in 1973. Criticism of housing policy leading up to the moratorium included: “high cost, shoddy construction, poor administration, inapplicability to big-city housing problems, failure to help low-income families, and lack of planning on a metropolitan scale” (Orlebeke 2000: 499). Nixon’s post-moratorium housing programs took federal policy in a new direction, focusing on “demand-side subsidies and devolution of low-income production decisions to state and local governments” (Orlebeke 2000: 502). Since Nixon’s moratorium, three strategies have been at the core of federal housing policy: vouchers, block grants and tax credits (Orlebeke 2000).

Housing vouchers are a form of rental assistance meant to fill the gap between the market price of private housing and what is affordable to the household. They were promoted in the late 1960s and early 1970s for having the potential to be “less costly and easier to administer than production programs” and for opening up “new opportunities for both geography mobility and economic—perhaps even racial—integration” (Orlebeke 2000: 503). Housing vouchers have evolved over time; while they are most commonly referred to as Section 8, formally they have been “known variously as housing allowances, rent certificates, housing payments, and currently as housing choice

vouchers” (Orlebeke 2000: 491). Housing vouchers can be attached to a specific development and utilized by landlords to reduce tenants’ rent, or individual households can use housing vouchers to find units on the private market. Vouchers are now the “largest housing subsidy program for low-income Americans” (Schwartz 2006: 149), and demand for vouchers greatly outweighs the supply provided by the government.

Block grants were a key strategy of Nixon’s devolution of control from the federal to the state and local level. The Community Development Block Grant (CDBG) program was created in 1974, combining Department of Housing and Urban Development’s (HUD) spending on urban renewal, model cities, open space, water and sewer grants, and housing rehabilitation into one program. Its structure as a block grant—rather than a formula grant—means that localities have broad jurisdiction over how the money gets spent. Jurisdictions are able to use CDBG funds for several types of housing activity: land acquisition, disposition or retention; housing rehabilitation; new construction by non-profit developers as part of larger revitalization work; and housing of last resort. “Since its inception, about 28% of the program’s funds have gone towards housing, mostly for housing rehabilitation” (Schwartz 2006: 181). The HOME Investment Partnership was established in 1990 as a housing-specific block grant funding a wider range of housing assistance activities. CDBG funds for affordable housing are at the center of the Westchester Fair Housing case and will be discussed in more detail at the end of this chapter.

Tax credits for the development of low- and moderate-income rental housing “is a relatively new variation on an old theme—namely, the use of the tax system to induce desired housing outcomes” (Orlebeke 2000: 491). Depreciation and accelerated depreciation had been the major tax shelter mechanism for investment in both low-income and market-rate rental housing, attracting capital by allowing investors to offset taxes owed on rental income and potentially other income as well. The Tax Reform Act of 1986 eliminated this mechanism but created the Low-Income Housing Tax Credit (LIHTC), which “allows investors to reduce their federal income taxes by \$1 for every dollar of

tax credit received” (Schwartz 2006: 83). LIHTC has been the “single largest subsidy for low-income rental housing” (Schwartz 2006: 83), pumping private funds into affordable housing development; however, the decline in profits, development and demand from the housing crisis that began in 2008 has decreased the value and utilization of LIHTC.

Public housing policies changed during this period as well. In the 1970s and 1980s, “the federal government accelerated [the] trend toward concentrated impoverishment by passing legislation that skewed public housing admissions to favor the least advantaged applicants” (Vale 2002: 6). These changes gave preferences to those living in substandard housing (including the homeless), those earning less than half the median income, the disabled, the mentally ill, and households paying more than 50% of their income on rent (Vale 2002). The 1990s signaled a change in strategy around public housing, and “hundreds of public housing projects across the nation have been transformed since the 1990s into housing developments that defy popular conceptions of public housing” (Schwartz 2006: 117). The HOPE VI program was established in 1993 to “demolish and redevelop distressed public housing” (Schwartz 2006: 117). Across the country, older distressed public housing developments are being replaced by new, low-rise, mixed-income housing modeled around the principles of New Urbanism and Oscar Newman’s Defensible Space Theory. They are being built “to a design standard that would have been condemned as excessively lavish throughout the postwar period” (Schwartz 2006: 117). One criticism of the HOPE VI program is that, by tearing down low-income high rises and replacing them with less dense mixed-income housing, it decreases the total number of public housing units available to low-income households, in particular displacing pre-renovation tenants (Crowley 2009).

#### *VI. Housing subsidies today*

The breakdown of spending on housing assistance today does not align with the common perception of government housing subsidies. “Most Americans think that federal housing assistance is

a poor people's program. In fact, relatively few low-income Americans receive federal housing subsidies" (Dreier 2006: 105). Rather, the vast majority of spending on housing assistance goes to homeownership programs for middle- and upper-income households through tax expenditures. Approximately three-fourths of wealthy Americans receive housing assistance in the form of tax deductions (Dreier 2006). In 2000, the federal government spent \$103.1 billion (in 2001 dollars) on tax breaks for homeowners; this includes "the deductions on mortgage interest payments (\$61.5 billion), deductions on property tax payments (\$22.6 billion) and the deferral of capital gain on home sales (\$18.9 billion). About 31.8 million homeowners received at least one of these deductions" (Dreier 2006: 107). Compare this to the total sum that the federal government spent on low- and moderate-income housing assistance in 2000: \$45.79 billion (in 2001 dollars) (Dreier 2006: 106). \$30.8 billion of that are in the HUD budget for low-income housing, and the balance is spent on investor incentives through the tax system. Simply put, over twice as much money is spent on housing assistance for middle- and upper-income households as it is on low- and moderate-income households.

As a point of clarification, while the homeownership tax benefits are technically available to homeowners across all income groups, functionally it is only a benefit for middle- and upper-income groups. The deductions are only available to households that itemize their tax returns, and lower income households tend not to itemize their taxes because the standard deduction is larger than the deductions they would qualify for if they did itemize and included the homeownership tax deductions. Even among middle- and upper-income households, these

"tax breaks are quite regressive. The highest income taxpayers with the largest houses and biggest mortgages get a disproportionate share of these federal tax expenditures. Over one-half (59 percent) of the mortgage interest deduction subsidy goes to the richest 10.2 percent of taxpayers, those with incomes over \$100,000. The 2.2 percent of taxpayers with incomes over \$200,000 received 22.4 percent of the entire amount" (Dreier 2006: 107).

These homeownership tax deductions are criticized as being inefficient, as they "subsidize many households who can afford to buy homes without it" (Dreier 2006: 105).

Furthermore, all those eligible for the homeownership tax deductions are able to receive it: the “programs to promote middle-income and upper-income homeownership have essentially been entitlements—available to all those who meet the eligibility standards” (Dreier 2006: 113). In contrast, the subsidies for low- and moderate-income households have functioned as a lottery, because HUD’s subsidies “can only serve a small fraction of those who meet eligibility criteria. In the late 1990s, about 15.8 million low-income renter households were eligible for federal housing assistance. However, only about 4 million household received HUD housing assistance” through public housing, subsidized developments, and rental vouchers (Dreier 2006: 111).

It is important to understand the federal housing assistance available across the range of income levels in order to put affordable housing for low- and moderate-income households in perspective. The Westchester Fair Housing case deals with affordable housing (no more than 30% of income spent on housing costs) for households making 50%, 65% or 80% of the Area Median Income. However, it is essential to remember the fundamental role that federal homeownership assistance to the middle- and upper-income levels played in the development and suburbanization of Westchester County in the 20<sup>th</sup> century. It is also important to remember the discrimination and segregation long embedded in these homeownership benefits, in order to understand that the racial segregation seen in Westchester is in part due to the legacy of these early- and mid-century federal housing policies.

#### *VII. Enduring discrimination and segregation*

The Westchester Fair Housing case addresses racial segregation in the county. This section of this chapter will look at the enduring existence and impact of discrimination and segregation in the nation’s housing market. It is important to take a close look at these issues to understand that the segregation in Westchester is not just incidental but rather part of a larger pattern in the United States. While “integrated neighborhoods, though still relatively rare, are becoming more common” (Denton 2006: 72), segregation remains the reality in many parts of the country. While Westchester



County as a whole is diverse, and the level of integration is somewhat higher than some other places in the country, a pattern of segregation does exist in Westchester.<sup>7</sup> That the segregated housing patterns seen in Westchester are replicated nationwide makes its fair housing case even more important—as the success of the implementation of the settlement has implications far beyond housing within the county.

Beyond the fundamental issues of equality and social justice, residential segregation is significant in the context of housing because of the importance of the neighborhood that extends beyond the individual home. Because of the services, amenities and opportunities linked to neighborhoods, the 1949 housing goal of providing a ‘suitable living environment’ encompasses not just a decent physical structure of the home but also issues like school quality, job opportunities, transportation access, health, crime and safety and wealth accumulation. Due to “the long history of residential segregation and discrimination in the housing market” and the disinvestment and denial of resources to minority neighborhoods, at “low-income levels, particularly for people of color, it cannot be assumed that ‘a decent home’ will automatically imply ‘a suitable living environment’” (Denton 2006: 61). Therefore, segregation must be addressed to deliver to “every American family” the basic standards put forth in that 60-year-old housing goal.

Even 40 years out from the 1968 Fair Housing Act, discrimination and segregation persist. “We would expect that, especially in the years since the Civil Rights Movement, the segregation of African-Americans would have declined... Unfortunately, these expectations are not borne out by the research” (Denton 2006: 64). There is “considerable agreement among researchers” that the segregation that persists today “is the result of four factors: discrimination...[and] differences in suburbanization, income and attitudes” (Denton 2006: 69); Peter Schuck notes similar categories, labeling them “racial prejudice,” “the complex dynamics of white flight,” “classism,” and “traditional

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<sup>7</sup> This pattern of segregation will be discussed in detail in Chapter 4.

residential clustering,” although he also notes that “there is little consensus on the relative significance of each of them” (Schuck 2002: 295-296). Each of these four factors is discussed below.

First, while overt discrimination had decreased substantially in the past 40 years, minorities still face subtle discrimination in their housing search. “The real estate and mortgage markets provide multiple opportunities for discrimination. At each step in the process of finding an apartment to rent or a home to buy, minorities may confront barriers that deny them access to housing, constrain their choices, or increase their costs” (Schwartz 2006: 215-216). Fair housing testing has shown that these barriers include:

“substantial differences in the availability of housing (including whether or not any units were available or the number of units that were shown), the neighborhoods in which homes were shown (steering or directing people to neighborhoods where most of the people ‘look like them’ has increased in recent years) the price of monthly rents, interest rates and fees for mortgage loans, premiums and terms and conditions of home insurance policies (e.g. full replacement cost versus market value policies), accuracy of home appraisals and other features of the home purchasing and renting procedures” (Squires 2010).

The National Fair Housing Alliance estimates that “four million instances of housing discrimination occur each year” (Squires 2010). Furthermore, the disproportionate prevalence of subprime mortgages and housing loss amongst minorities in the mid-2000s indicates racial discrimination in the lending market; a Pew Research Center report from 2009 found that “blacks and Hispanics were more than twice as likely to have subprime mortgages as white homeowners, even among borrowers with comparable incomes” (Leland 2009).

Second, uneven rates of suburbanization between white and minorities and uneven rates of suburbanization among minority groups originate from the discriminatory real estate practices and government homeownership policies discussed earlier in this chapter. On top of this, suburban areas have often used exclusionary techniques such as minimum lot size requirements and restrictions on multifamily and low-cost housing, which “add to segregation and discrimination” (Denton 2006: 70). African Americans remained the least suburbanized group in 2000, with only 39 percent of the black

population living in the suburbs, compared to “58 percent of Asians, 49 percent of Hispanics and 71 percent of non-Hispanic whites” (Denton 2006: 70).

Third, some critics would contend that segregation is primarily driven by income differentials, not race; in other words, while areas may appear to be segregated on racial lines, this only happens because minorities generally have lower incomes than whites and areas are actually just segregated by income (as a free real estate market would predict). However, “...the role of income is at best modest compared to that of race in explaining segregation” (Denton 2006: 70). This is true in Westchester as well; in an “analysis of income and racial segregation in Westchester County, sociologist Andrew Beveridge concluded: “it is obvious that racial segregation and concentration in Westchester County is not simply the result of income segregation” (Beveridge 2009: 12). Beveridge uses a dissimilarity index<sup>8</sup> to compare the level of segregation by income to the level of segregation by race:

“the level of segregation by income...is 0.38. If income functioned as an adequate proxy for race, one would expect that the level of segregation by income group would be similar to the level of segregation found as between black households and white households. In fact, the level of segregation as between black households and white households is 0.64, more than two-third higher than that found for income” (Beveridge 10-11).

His findings show that “racial segregation levels are higher than segregation by income;” he finds the same is true when comparing just affluent (annual household income greater than \$100,000) blacks to just affluent whites (Beveridge 2009: 11). So in response to the oft repeated comment from opponents of the Westchester Fair Housing settlement that any minority is already able to move into the heavily white towns as long as they can afford it: the racial segregation experienced in these towns is not primarily about income; there is a racial component that must be addressed.

Fourth, attitudes about residential preferences impact housing patterns to a certain extent.

“[W]hites agree in principle that blacks have the right to live anywhere they want and can afford to,

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<sup>8</sup> “The most commonly used index of segregation is called the *Dissimilarity Index*. Technically, it is the proportion of a minority group that would need to move to make the distribution of that group the same over all units. It thus can vary from 0.0, representing no segregation at all, to 1.0, representing total segregation... Generally, when the dissimilarity index is around 0.30 one can say that ‘low levels’ of segregation exist” (Beveridge 2009: 7-8).

but they are not in favor of laws that would enforce this principle in practice” (Denton 2006: 70). This is consistent with the opinions and behavior of some of the opposition to the Westchester case. In terms of black attitudes toward integration, they are “mixed, but studies...show that blacks remain willing to live in neighborhoods that are between 90 percent and 10 percent white. However, their first preference would be for neighborhoods that are 50:50 white and black” (Denton 2006: 70).

What is the impact of segregation? The literature links segregation to social and economic costs for society as a whole (Galster 1990) and to “disastrous individual, family, wealth and political consequences” for those who experience discrimination and segregation (Denton 2006: 71). Residential segregation is problematic because of the opportunities associated with neighborhoods and the reinforcing nature of segregation on inequality (Denton 2006). “As *American Apartheid* states, ‘residential segregation is the institutional apparatus that supports other racially discriminatory processes and binds them together into a coherent and uniquely effective system of racial subordination’” (Massey and Denton in Yates 2006: 236). Anthony Downs argues that “Facilitating the ability of low- and moderate-income people to move to more prosperous, largely white suburbs...would increase their social and economic mobility and opportunities” (Downs in Schuck 2002: 307). Peter Schuck concludes that “A broad consensus had long existed that greater residential mobility and access to suburban jobs for low-income families and racial minorities, especially blacks, is essential not only for them but also for American society as a whole” (Schuck 2002: 307).

The next section will look in depth at the Fair Housing Act and other pieces of legislation intended to address housing discrimination and segregation.

### *VIII. The Fair Housing Act*

As discussed earlier, the 1968 Fair Housing Act marked an important shift in federal policy on housing and was “intended to promote integration and the elimination of discrimination” (2009

*Advocacy Guide* 26). Including protected classes added by amendment in 1974 and 1988, the Fair Housing Act:

“prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians, pregnant women, and people securing custody of children under the age of 18), and handicap (disability)” (*Fair Housing Laws and Presidential Executive Orders*).

The Fair Housing Act “expressly prohibited the kinds of discrimination that had evolved over the years to deny blacks equal access to housing:

- “It made it unlawful to refuse to rent or sell a home to any person because of race.
- “It prohibited racial discrimination in the terms and conditions of any rental or sale.
- “It banned any and all discrimination in real estate advertising.
- “It banned agents from making untrue statements about a dwelling’s availability in order to deny a sale or rental to Blacks [and other minorities].
- “It contained specific injunctions against blockbusting, prohibiting agents from making comments about the race of neighbors or those moving in order to promote panic selling” (Schwartz 2006: 239).

The Department of Housing and Urban Development (HUD) is the main administrator and enforcer of the Fair Housing Act, and it investigates complaints about violations of fair housing rights. However, much of the on-the-ground responsibility for pursuing complaints and conducting testing happens on the local level: “Enforcement of the nation’s laws and regulations against discrimination in the real estate and mortgage markets is largely left to state and local governments and to nonprofit organizations” (Schwartz 2006: 247). HUD contracts with private non-profits across the country to do fair housing testing, where undercover testers are sent to realty agents to evaluate whether discrimination is occurring; these groups sometimes operate independent of HUD, with private or other grant funding.

The Fair Housing Act also addresses segregation (which is key in the Westchester case): recipients of federal housing and community development funds through HUD programs are required to Affirmatively Further Fair Housing (AFFH) by conducting an Analysis of Impediments (AI) to comply with the Fair Housing Act. The AI must look at public and private policies and actions that create barriers to fair housing, which are to be addressed in a jurisdiction’s plan for developing federally

funded housing. The AFFH obligation as it pertains to Community Development Block Grants (CDBG)—the federal funding program and certification requirement in question at the center of the Westchester case—will be discussed in detail later in this chapter.

The Fair Housing Act came under a lot of criticism in its first 20 years. Primarily, this criticism was about its lack of ability to enforce the principles and requirements of the act; the Fair Housing Act “committed the federal government to fair housing goals at a symbolic level” (Massey and Denton 1993: 195), but its “enforcement mechanisms fell far short of its sweeping language” (Schwartz 2006: 240). George Galster described the original act as “but a baby step” towards the goal of “equal housing opportunities for all citizens” (Galster 1990: 137). The Fair Housing Act was amended in 1988, and the changes “significantly strengthened the federal government’s ability to pursue discrimination cases and provided greater incentive for individual victims of discrimination to seek redress” (Schwartz 2006: 241). Even with the amendment, enforcement of the Fair Housing Act has been described as “far from adequate;” while the act served “to move discrimination from the completely overt situation that had previously existed...subtle discrimination remains” (Denton 2006: 66-67).

On January 13, 2009, a bill was brought before Congress to strengthen the Fair Housing Act by increasing funding for testing and support for advocacy groups:

“The Housing Fairness Act of 2009 (HR 476) would require HUD to conduct a nationwide paired-testing program and take other investigative actions to identify areas and levels of discrimination in housing and mortgage lending markets, strengthen education and outreach efforts, promulgate and enforce new rules to assure that recipients of federal housing funds take steps to affirmatively further fair housing, and provide additional support for private fair housing organizations” (Squires 2010).

The bill was referred to the House Committee on Financial Services in January 2009, where it remains as of May 2010 (*Bills, Resolutions – Search Results*).

#### IX. *Affirmatively Furthering Fair Housing*

The Department of Housing and Urban Development’s (HUD) federal housing and community development programs—Community Development Block Grant (CDBG), HOME Investment

Partnership, Emergency Shelter Grant (ESG), and Housing Opportunities for Persons with AIDS (HOPWA)—encourage “the adoption and enforcement of State and local fair housing laws” and “the reduction of separation by race, ethnicity, or disability status” (U.S. Department of Housing and Urban Development 1996: 14). Attached to the CDBG program in particular is the requirement to Affirmatively Further Fair Housing (AFFH): “The Housing and Community Development Act of 1974... requires that each [CDBG] federal grantee certify to HUD’s satisfaction that (1) the awarded grant will be carried out and administered according to the Fair Housing Act, and (2) the grantee will work diligently to affirmatively further fair housing” (*Promoting Fair Housing*). The AFFH obligation extends beyond the use of federal housing and community development funds: “The obligation to affirmatively further fair housing applies to all of the housing-related activities of a jurisdiction, not just to the activities that are carried out with federal funds” (Pratt 2009: 11). The CDBG program and the AFFH requirement are at the center of the Westchester Fair Housing case.

While the AFFH requirement is based in legislation, the “extent of the AFFH obligation has never been defined statutorily” (U.S. Department of Housing and Urban Development 1996: 14); this leaves HUD in charge of defining both the goals and specific requirements of AFFH. HUD has defined the “broad objectives” of the AFFH requirement to mean:

- “Analyze and eliminate housing discrimination in the jurisdiction
- “Promote fair housing choice for all persons
- “Provide opportunities for inclusive patterns of housing occupancy regardless of race, color, religion, sex, familial status, disability and national origin
- “Promote housing that is structurally accessible to, and usable by, all persons, particularly persons with disabilities
- “Foster compliance with the nondiscrimination provisions of the Fair Housing Act” (U.S. Department of Housing and Urban Development 1996: 15).

HUD interprets the AFFH as requiring a grantee to:

- “1. Conduct an analysis to identify impediments to fair housing choice within the jurisdiction
- “2. Take appropriate actions to overcome the effects of any impediments identified through the analysis
- “3. Maintain records reflecting the analysis and actions taken in this regard” (U.S. Department of Housing and Urban Development 1996: 14).

This requirement means that “all jurisdictions receiving funds through the CDBG program...must conduct an Analysis of Impediments (AI) to Fair Housing Choice through which they examine housing opportunities and levels of segregation and accessibility in the community...[And] each jurisdiction must develop and implement a plan to eliminate the impediments to fair housing that are identified” (2009 *Advocacy Guide* 27). It is difficult to enforce these requirements, however, because “HUD has never issued regulations for implementing these requirements” (Schwartz 2006: 248).

HUD does not define what the Analysis of Impediments (AI) should look like, but rather provides a suggested format with a guiding outline in its *Fair Housing Planning Guide*. The guide defines an AI as “a review of impediments to fair housing choice in the public and private sector” (U.S. Department of Housing and Urban Development 1996: 25). An impediment is defined as an action or inaction that restricts or has the effect of restricting housing choice or the availability of housing choices (U.S. Department of Housing and Urban Development 1996:26). The analysis of these impediments should include:

- “A comprehensive review of a State or Entitlement jurisdiction’s laws, regulations, and administrative policies, procedures, and practices
- “An assessment of how those laws, etc. affect the location, availability, and accessibility of housing
- “An assessment of conditions, both public and private, affecting fair housing choice for all protected classes
- “An assessment of the availability of affordable, accessible housing in a range of unit sizes” (U.S. Department of Housing and Urban Development 1996: 25).

The Analysis of Impediments is not submitted to HUD; instead, a summary of its findings and the actions taken to overcome impediments are included in the annual performance report for federally funded community development, known as the Consolidated Plan. In this report, “jurisdictions must certify that they are affirmatively furthering fair housing” and the certification must be “signed by the authorized official” (2009 *Advocacy Guide* 170). HUD can withhold funds if the certification is inaccurate (i.e. the AI is wholly or partially incomplete or it shows evidence of actions or policies negatively impacting fair housing); however, this certification challenge and/or denial of



funds by HUD are extremely rare. HUD is considering making changes in the way that it enforces the fair housing obligation, as outlined in Chapter 4.

The Westchester Fair Housing Case, which will be discussed in detail in Chapter 4, is based on the obligation to Affirmatively Further Fair Housing and the certifications of AFFH made by former County Executive Andrew Spano. The County is responsible for the AFFH obligation because it administers the CDBG funds for Westchester's Urban County Consortium, which includes all of the county's towns and villages (with the exception of the unincorporated part of the Town of Mount Pleasant, which chooses not to receive CDBG funds at all).<sup>9</sup> As an indication of how significant the Westchester case is in the realm of fair housing, the National Low Income Housing Coalition highlights the Westchester case in its advocacy guide for 2009: "Advocates should be aware of and impress upon their jurisdictions that a judge has recently ruled that 'the AFFH certification was not a mere boilerplate formality, but rather was a substantive requirement'" (2009 Advocacy Guide 169). The Westchester ruling is, in effect, being used to scare other jurisdictions into compliance with AFFH, and therefore many eyes will be watching Westchester's implementation to determine how serious of a threat a similar lawsuit is to their own jurisdictions.

The next chapter is a detailed case study of the Westchester fair housing lawsuit.

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<sup>9</sup> The cities of Mount Vernon, New Rochelle, White Plains and Yonkers are entitlement communities and each has an individual relationship with HUD through which they receive CDBG funding.

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## Chapter 4: False Claims Act Lawsuit and Settlement

*“There’s a big problem up South” – Anti-Discrimination Center Executive Director Craig Gurian*

This chapter takes an in-depth look at the Westchester Fair Housing Case itself, looking at the history of fair and affordable housing in the county, explaining the lawsuit and settlement requirements, and discussing the implications of the case in and beyond Westchester. The County describes its work as a successful model of affordable housing development and preservation; this chapter will examine its record and explain how the County can do a good job in affordable housing development while still failing to affirmatively further fair housing. The lawsuit was brought as a False Claims Act case, not a Fair Housing Act case, and this chapter will explain the legal mechanisms involved in the suit and the innovation of using it in a civil rights context. Up to this point, the story has been told for the most part through legal documents and newspaper articles; this chapter will outline the chronology of the case and the players involved. It then looks at the settlement requirements and the implementation plan before discussing the case in the larger context of fair housing nationwide.

### *I. Affordable housing precedents in Westchester*

This section will frame the Westchester Fair Housing Case in the context of previous housing-related legal cases within the county; these cases help explain the legal precedents for affordable housing development in the county and begin to parse out the attitudes and assumptions associated with court-ordered housing desegregation in Westchester. There have been two notable housing-related legal cases in Westchester County in the last 30 years.

The first case is the 1975 *Berenson vs. the Town of New Castle*—the leading New York State exclusionary zoning case—brought by a developer who wanted to build multi-family housing in a

town whose local zoning did not allow for it. The plaintiff argued that “the state derived its power to zone from the state constitution and that the authority to zone had to be exercised in the interest of all of the people of the state. The plaintiff further claimed that zoning prohibiting construction of affordable types of housing unconstitutionally excludes a large portion of the state's population” (Nolon 2009: 3). The New York Court of Appeals ruled that The Town of New Castle’s zoning ordinance was exclusionary, and the court’s finding stated that “consideration must be given [in the town’s zoning ordinance] to regional needs and requirements” (Mallach 1984, 138). While there may not be demand for additional multifamily units in the Town of New Castle, “residents of Westchester County as well as the larger New York City metropolitan region may be searching for multiple family housing in the area to be near employment or for a variety of other social and economic reasons” (Mallach 1984, 138). This case created a legal requirement that “all municipalities had to share in the responsibility of providing affordable housing” (Fessenden 2007), which is reflected in the county’s 1993 and 2005 fair share housing plans. In short, “every municipality has to plan for a portion of regional need for housing, and it has to be housing of all types: so single family, multi-family, condo, town home, retirement housing, etc., and at all income levels.” (Allen). The *Berenson* framework was adopted in the 1987 *Continental Building Co., Inc. v. Town of North Salem* and the 1998 *Trigalia vs. Town of Cortlandt* cases.

The second notable case involved court-ordered desegregation in Yonkers. In 1980, the U.S. Department of Justice and a local National Association for the Advancement of Colored People (NAACP) chapter brought a lawsuit against the City of Yonkers and the U.S. Department of Housing and Urban Development (HUD), charging that the city, with HUD’s approval, built all of its public housing units in the already low-income, heavily minority southwest quadrant of Yonkers, causing de facto public school segregation in Yonkers’s neighborhood-based school system. The judge found in favor of the plaintiff, and, in 1985, the city was ordered to build 200 units of low-income public housing in the other sections of the city and to implement additional measures (such as busing) to integrate the

schools. The City Council, responding to vehement opposition from white homeowners concerned about property value and crime, refused to take any action in designing or implementing the plan, and the City spent over \$20 million just fighting the case. Ultimately, the court hired Oscar Newman as an outside housing advisor to design and build the scattered-site units, which were completed in 1993 (Briggs 1999).

These cases are important for different reasons. The *Berenson* case sets the legal precedent for regional fair share requirements and the legal precedent against exclusionary zoning. This regional fair share requirement sets the standard that all Westchester municipalities are responsible for providing affordable housing opportunities. This is reflected in the county's affordable housing allocation plans, which will be discussed in detail in the next section. The precedent on inclusionary zoning established a legal recourse for developers who want to build multi-family affordable housing where the zoning doesn't allow for it. This mechanism has yet to be widely used across the county, but it will prove important later in the implementation of the Fair Housing Case settlement requirements.

The *Yonkers* case is important because of how it continues to shape public perception of government-subsidized housing in Westchester. Even though there are many differences between the Yonkers desegregation case and the Westchester Fair Housing Case, for many Westchester residents the 2009 Fair Housing case immediately triggers memories of the divisive 1980s Yonkers desegregation battle. It is important to distinguish the two cases to correct popular assumptions and expectations about the 2009 Fair Housing settlement. First, the Yonkers case was about public housing, whose residents tend to be at the extreme low end of the income scale (generally <30% of Area Median Income or AMI), while the Fair Housing case addresses the housing needs of low-income (<50% AMI) and moderate-income (50-80% AMI) households. Second, the design of modern affordable housing is often conflated with imagery of mid-20<sup>th</sup> century non-contextual public housing towers (like the segregated ones in question in the Yonkers case), but this old Yonkers architecture has nothing to do with the way the Fair Housing units will be built. Third, the Yonkers mandate

resulted from a guilty verdict, making it contentious from the start, whereas the Fair Housing case was settled outside of court with the County's input. Lastly, as pointed out by Ken Jenkins, the current Chair of the Westchester Board of Legislators, who was president of the local NAACP during the Yonkers case, the City of Yonkers fought the court-order tooth and nail, while Westchester County "was not being recalcitrant in its dealing with trying to provide Affordable Housing as a whole" (Jenkins). When people in opposition to the Fair Housing settlement claim that Yonkers nearly went bankrupt because of the desegregation court-order, they usually fail to mention that this massive expenditure went towards fighting the order, not building the housing; because Westchester County settled and is cooperating with implementation, the county will not face the same level of financial burden that Yonkers did.

## *II. Westchester's housing record*

Westchester County government employees describe its behavior in the arena of affordable housing development and preservation as "exemplary" (*Housing Carrots and Sticks*). Westchester County Department of Planning Deputy Commissioner Norma Drummond describes Westchester as "one of the more progressive counties in the country as it relates to providing and building and funding Affordable Housing...in a category with just a handful of other counties" (Drummond 2009). Considering the County's planning efforts, dedicated resources and development record, these descriptions seem to at least approximate the truth. The issue at stake in the Westchester Fair Housing Case, however, is about the County's work on fair housing, and whether the County satisfied its obligation to Affirmatively Further Fair Housing as part of receiving federal funds through the Community Development Block Grant (CDBG) program.

This section will look at the County's record to explain both the county's assertions that it is a model for affordable housing development and the plaintiff's allegations that the county did nothing to Affirmatively Further Fair Housing in terms of race. It's important to understand that they can both



be right—because affordable housing and fair housing are not one and the same. This section outlines the affordable housing planning and development work that the county has been engaged in over the last 50 years. It will then look at the county’s work related to the Affirmatively Furthering Fair Housing obligation of the CDBG program.

### County’s planning for housing

Over the last 50 years, Westchester County’s Department of Planning has been engaged in the issue of affordable housing. In the late 1960s, it was “clear from empirical data that the housing situation in Westchester County was increasingly unbalanced, with the housing market addressing only the needs of those who could afford new, market rate housing” (Eschweiler 1993: 643). The planning department developed a housing-problem index for census tracts based on substandard units, percentage of families below the poverty line, percentage of minority families, and overcrowding (Eschweiler 1993). These tracts were concentrated in the cities, and it was clear that “through unwillingness or inability,” “municipal action alone had no reasonable chance of alleviating the problem” (Eschweiler 1993: 643). They focused further analysis on “those areas of the county which were most patently unable to help themselves to better housing” (Eschweiler 1993: 643). Based on the New York State Constitution, however, the county-level government could not engage in several important housing-related activities such as urban renewal or the creation of a public housing authority, and the planning department searched for alternative avenues of authority. The New York State Urban Development Corporation (now known as the Empire State Development Corporation) was established in 1968 and had the necessary authority to impact the housing needs of the county, although its plans failed because it “adopted policies and programs that brought it into direct confrontation with the municipal officials of Westchester County” (Eschweiler 1993: 647).

In the mid-1970s, “with some trepidation...Westchester undertook a housing needs analysis program with the objective of providing a ‘fair share’ allocation among Westchester’s forty-three

municipalities” (Eschweiler 1993: 649). Based on 1970 census data and supported by the Mount Laurel, NJ decisions around the same time, the planning board “sought to develop a county housing plan that would assign municipal housing responsibility, in terms of new housing construction and housing rehabilitation, based on a rational assignment of municipal need” using a criteria developed by consensus (Eschweiler 1993: 649). This specific needs analysis was never completed because of a change in federal program funding, and because the *Berenson* decision came out and caused the Board of Legislators to begin its own process to develop a countywide plan. The Chairman of the Board Andrew O’Rourke (who would later become County Executive) appointed a Blue Ribbon Panel to develop a county-level housing policy, and the panel included a “full spectrum of housing interests represented, from rent-control advocates to conservative builders, and from a municipal attorney known for his conservative view of county-municipal relations to [Peter Q. Eschweiler] as County planning director” (Eschweiler 1993: 654). The panel concluded that ““Yes, Westchester County should have a County housing policy, and that policy should help the municipalities implement their local housing plans with the full force and assistance of the County’s operating and capital budgets” (Eschweiler 1993: 655). The target rate of growth would be 0.5% per year, or 5% in a decade, which at the time of issue in 1979 amounted to 53,000 units over the next ten years (Eschweiler 1993). The Board of Legislators adopted the panel’s recommendations and targets, promoting them to official county policy.

Concurrently, the federal government’s housing and community development programs were undergoing change, as all categorical grants were consolidated into HUD’s Community Development Block Grant (CDBG) program in 1974. As large cities, Mount Vernon, New Rochelle, White Plains and Yonkers are entitlement jurisdictions and qualify for CDBG funds on their own. The rest of the towns and villages are only eligible for federal CDBG housing and community development funds through an Urban County Consortium, which Westchester established in 1977 with a portion of municipalities only. Municipality membership in the consortium has grown since 1977, now including all of the

county's towns and villages with the exception of the unincorporated part of the Town of Mount Pleasant, which chooses not to participate in CDBG. To belong to an Urban County Consortium, a municipality must sign a cooperation agreement with the county, in which the municipality agrees to certain activities prescribed by HUD:

"The agreement must contain a provision obligating the county and the cooperating unit of general local government to take all actions necessary to assure compliance with the urban county's certification required by...the Fair Housing Act... The agreements shall also contain a provision prohibiting urban county funding for activities in, or in support of, any cooperating unit of general local government that does not affirmatively further fair housing within its own jurisdiction or that impedes the county's actions to comply with the county's fair housing certification. This provision is required because noncompliance by a unit of general local government included in an urban county may constitute noncompliance by the grantee (i.e., the county) that can, in turn, provide cause for funding sanctions or other remedial actions by the Department" (U.S. Department of Housing and Urban Development 2009).

Westchester has set up an Urban County Council for "the administration of housing and community development grants" for the consortium; the council is "made up of the mayors and supervisors, or their designees, of each member community of the consortium" (*Westchester Urban County Council*).

The countywide housing goal of 53,000 units over ten years was established in 1979 to meet the general demand for housing across income levels as the county's population grew. A 1991 Rutgers University report found that only 34,000 units had been built by 1990 "because of community resistance and a sluggish economy" (Melvin 1991); the units that were built were mostly for middle-income households. The same Rutgers report projected that the county would need to build 4,826 units of affordable housing by 2000 to meet demand; some builders and housing policy professionals criticized this number for being too conservative and ignoring the regional needs outside of the county (Melvin 1991). In 1993, the County proposed building 5,000 new affordable units over a 10-year period, and a 22-member Housing Implementation Commission was appointed to draft a regional fair share plan for the units, in keeping with the *Berenson* decision.

The Housing Implementation Commission drafted a fair share plan in 1993 for the 5,000 units using a formula giving equal weight to four factors:

"1. The land area of the municipality after deducting the aggregate area of interior water bodies, New York City-owned watershed lands, dedicated park lands and cemeteries.

2. Growth in employment within the municipality during the previous decade.
3. That portion of the aggregate 1989 household income of the municipality that exceeds the amount resulting from multiplying the total number of households by 80% of the median income in the County.
4. The number of overcrowded units (occupied by more than one person per room) in the municipality" (*Affordable Housing Allocation Plan 2000-2015*).

The table at the end of this section shows the specific allocations of units for each municipality. It is important to note that these allocations were guidelines only and that development required voluntary action on the part of the municipality. Commission Chairman George M. Raymond stressed that the "county won't go into any municipality against its wishes. There is no compulsion in this concept;" the only pressure the commission could offer was a reminder that if the municipalities "don't do this voluntarily, then the courts can charge them" (Rosenberg 1993) under *Berenson*. In 1994, the Housing Implementation Commission was transitioned into the Westchester Housing Opportunity Commission and tasked with enlisting "local civic and government support for the implementation of the County Board's goal of 5,000 fair and affordable housing units during the 1991-2000 decade" (*Westchester Housing Opportunity Commission*).

By 1998, policies favoring affordable housing had been adopted by 19 municipalities: "the cities of Mount Vernon, New Rochelle and Peekskill, the towns of Eastchester, Greenburgh, Mamaroneck, New Castle and Ossining and the villages of Ardsley, Briarcliff, Croton-on-Hudson, Dobbs Ferry, Elmsford, Hastings-on-Hudson, Irvington, Mamaroneck, Ossining, Rye Brook and Tarrytown" (Brenner 1998).

By 2000, however, only 33% (1,639) of the 5,000 allocated units had been built, and the distribution was highly uneven across the municipalities. 60% of the completed units were built in just six jurisdictions (Yonkers, Mount Vernon, Peekskill, Elmsford, Mamaroneck and Tarrytown); furthermore, across these 6 municipalities, an additional 670 units beyond their total allocation were

built.<sup>10</sup> Seventeen other municipalities built some but not all of their allocated units—just 31.8% of their total combined allocation—and twenty municipalities built no affordable housing units at all (Beveridge 2008). Sociologist Andrew Beveridge, who wrote an expert report for the plaintiff in the fair housing case, categorizes the municipalities into three groups: the over allocation jurisdictions, the under allocation jurisdictions, and the zero unit jurisdictions.

“When one looks at the racial composition of these three groups...the differences are stark: the ‘over allocation jurisdictions’ were 24.2 percent non-Hispanic Black, and 46.8 percent non-Hispanic white; the ‘under allocation jurisdictions’ were 11.5 percent non-Hispanic black and 65.9 percent non-Hispanic white; and the ‘zero unit jurisdictions’ were 2.5 percent non-Hispanic black, and 84.3 percent non-Hispanic white” (Beveridge 2008: 14).

Beveridge concludes that the “lion’s share” of affordable units built between 1991 and 2000 were “in areas with high concentrations of non-Hispanic blacks,” while little or no housing was built in areas of low concentrations; he says that this exacerbates “the current high levels of segregation” (Beveridge 2008: 16) in Westchester.

In 2004, Rutgers University’s Center for Urban Policy Research (CUPR) completed another affordable housing need study for the years 2000 to 2015. Working with the Westchester County Housing Opportunities Commission, CUPR analyzed data from the 2000 Census plus other sources to determine existing need and future demand for affordable housing. The findings focus on the affordable housing needs of low-income household (those making 50% or less of the household median income) and moderate-income households (those making between 50 and 80% of the housing median income). The analysis of existing demand looked at four categories of household need: deficient living conditions, overcrowding, cost burden, and homelessness. The evaluation of deficient housing conditions was based on the HUD standards looking at the year the structure was built, the presence or absence of plumbing, the presence or absence of kitchen facilities, and the type of heating fuel used. Overcrowding, as defined by HUD, is having more than one person per room

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<sup>10</sup> For clarification: 1,639 of the 5,000 affordable units allocated by municipality in the original plan were built. These 6 municipalities built a total of 670 units on top of the number that was allocated to them in the original plan, bringing the total number of affordable units built in Westchester from 1990-1999 to 2,309.

(including all rooms in a unit, not just bedrooms). Note that the cost burdened households are not included in the final demand assessment; CUPR stated that this demand can “be alleviated through policy interventions other than housing unit creation,” (i.e. financial assistance) (*Westchester County Affordable Housing Needs Assessment* iv). The report found that the existing demand in 2000 for affordable housing was 10,431 units, “consisting of 2,418 deficient units, 7,273 overcrowded units, and 677 homeless households” (*Westchester County Affordable Housing Needs Assessment* iv).

The report also looked at the demographic characteristics of those in need of affordable housing, which is relevant to the discussion about which groups would take advantage of new fair and affordable housing units. Of the total households in Westchester in 2000, 75.3% have a white head of household, 13.5% have a black head of household, and 11.2% have an “other” head of household; 11.3% of heads of all households are Hispanic (*Westchester County Affordable Housing Needs Assessment* 27).<sup>11</sup> The following statistics look only at low-income (<30% AMI), moderate-income (50-80% AMI) and middle-income households (80-100% AMI). Of the housing with deficient living conditions, 49% have a white head of household, 28.4% have a black head of household, and 22.6% have an “other” head of household. 23.9% of heads of housing deficient households are Hispanic (*Westchester County Affordable Housing Needs Assessment* 29). Of the overcrowded households (not including housing deficient households, to avoid double counting), 35.8% have a white head of household, 22.3% have a black head of household, and 41.9% have an “other” head of households. 56% of heads of overcrowded housing households are Hispanic (*Westchester County Affordable Housing Needs Assessment* 34). Of the cost-burdened households (not including housing deficient households or crowded households, again to avoid double counting), 64.4% have a white head of household, 20.8% have a black head of household and 14.8% have an “other” head of household. 17.1% of heads of cost-burdened households

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<sup>11</sup> Note: It would be more accurate to use information on total low-, moderate- and middle-income households as baseline data for comparison with the deficient, overcrowded and cost-burdened low-, moderate- and middle-income households, but the CUPR report only provides the baseline data as all households across all income levels.

are Hispanic (*Westchester County Affordable Housing Needs Assessment* 37). Across all of these affordable housing need categories in 2000, black and Hispanic heads of households are disproportionately represented.

**Table 4.1: Percentage of low-, moderate-, and middle-income households in each housing condition, by race/ethnicity, 2000**

	<b>All Households</b> <i>(all incomes)</i> <sup>12</sup>	<b>Deficient living conditions</b>	<b>Overcrowded living conditions</b>	<b>Cost-burdened households</b>
<b>White</b>	75.3%	49.0%	35.8%	64.4%
<b>Black</b>	13.5%	28.4%	22.3%	20.8%
<b>“Other”</b>	11.2%	22.6%	41.9%	14.8%
	100%	100%	100%	100%
<b>Hispanic</b>	11.3%	23.9%	56.0%	17.1%

(source: *Westchester County Affordable Housing Needs Assessment*)

The report also projected that between 2000 and 2015, 8,652 additional low- and moderate-income units would be required. For this future projected growth in demand for low-, moderate- and middle-income households, 82% of the new household demand would have white heads of household, and 16% would have black heads of household. Only 3% of these new households would have a Hispanic head of household (*Westchester County Affordable Housing Needs Assessment* 45). It is also important to note that “the vast majority of future housing demand will be accounted for by households headed by persons aged 55 and up” (*Westchester County Affordable Housing Needs Assessment* 45).

Including existing and future needs, CUPR determined that the total affordable housing demand for 2000-2015 was 19,083. Subtracting the 8,315 units expected to be supplied between 2000 and 2015 through primary sources (new construction) and secondary sources (filtering, conversions, spontaneous rehabilitation), CUPR found that a total of 10,768 units of affordable housing remained needed in Westchester County between 2000 and 2015 (*Westchester County Affordable Housing Needs Assessment* iv).

<sup>12</sup> See previous footnote regarding use of all households of all income levels as baseline data.

The Westchester Housing Opportunity Commission notes that the Rutgers study “represents a very conservative estimate since it does not include the more than 72,000 Westchester households determined in the 2000 Census to have been cost-burdened” (Affordable Housing Allocation Plan 2005: 1). Furthermore, some criticize the Rutgers as understating the demand because the reports’ methodology does not take into account regional affordable housing needs beyond the Westchester County borders (Gurian).

Despite these critiques, Westchester County used the Rutgers study to inform its new affordable housing targets. In 2005, the Westchester Housing Opportunity Commission, working with the Westchester County Department of Planning, issued its Affordable Housing Allocation Plan for 2000 to 2015. The plan uses CUPR’s 10,768 number as the target for new affordable units over the 15 year period. The regional fair share allocation methodology in the 2005 plan is similar to that used in 1993, although it has some notable differences. First, the plan acknowledges that many municipalities did not meet their assigned targets for the previous 10-year period, and so the “3,360-unit unmet 1990-1999 need will continue as an obligation of the under-performing municipalities” (Affordable Housing Allocation Plan 2005: 2). Second, the plan then subtracts these 3,360 units from the 10,768 unit total demand, and the remaining 7,408 are distributed across all municipalities according to a formula. This formula uses the same four equally-weighted criteria from 1993, and adds an equally-weighted fifth: “the availability of public transportation (capacity)—as measured by the B-Line Bus road mileage within the municipality as a percentage of its County-wide mileage” (Affordable Housing Allocation Plan 2005: 2). Third, a unit-for-unit credit is given for the 2000-2015 period to the six municipalities that built more than their allocation between 1990 and 1999. Fourth, credit is given to all municipalities for affordable units already built between 2000 and 2005.

Fifth, and perhaps most importantly, the distribution strategy is shifted from municipality-based allocation to a sub-region-based allocation. In 1996, the County’s planning document *Patterns* defined five geographic sub-regions in Westchester (the municipalities within each sharing similar



**Table 4.2: Units of Affordable Housing Allocated & Built in Westchester 1990-2015, by municipality**

Municipality	1990-1999 Allocation	Units Built 1990-1999	2000-2015 Allocation	Units built or under construction 2000 - 2009	Remaining Obligation (1/2010)
<i>BRONX RIVER VALLEY</i>	496	332	844	430	590
Bronxville*	42	0	101	0	101
Eastchester*	60	0	104	0	104
Mount Vernon	183	323	249	424	(175) <sup>c</sup>
Pelham (Village)*	22	0	74	0	74
Pelham Manor*	32	0	101	0	101
Scarsdale*	135	0	160	0	160
Tuckahoe*	22	11	56	6	50
<i>CENTRAL COUNTY</i>	1,592	306	4,192	336	3,855
Ardley*	23	0	100	2	98
Elmsford	31	80	48	10	38
Greenburgh	294	112	701	209 <sup>a</sup>	492
Harrison*	307	0	756	0	756
Mount Pleasant*	321	0	975	0	975
North Castle*	132	0	712	0	712
Pleasantville*	28	3	129	24	105
Rye Brook*	112	14	171	32	139
White Plains	344	97	599	59	540
<i>HUDSON RIVER</i>	1,211	1,176	2,645	2,025	1,138
Briarcliff Manor*	67	0	141	0	141
Buchanan*	10	0	56	0	56
Cordlandt*	180	43	403	118	285
Croton*	32	16	115	17	98
Dobbs Ferry*	39	32	105	0	105
Hastings*	30	0	97	18	79
Irvington*	35	22	156	0	156
Ossining (Town)*	39	0	113	0	113
Ossining (Village)	40	6	194	204 <sup>a</sup>	(10) <sup>c</sup>
Peekskill	73	105	132	320 <sup>a</sup>	(188) <sup>c</sup>
Sleepy Hollow	53	0	113	234	(121) <sup>c</sup>
Tarrytown*	67	123	111	6	105
Yonkers	547	829	908	1,108 <sup>a,b</sup>	(200) <sup>c</sup>
<i>LONG ISLAND SOUND</i>	591	349	1,135	279	856
Larchmont*	35	0	105	0	105
Mamaroneck, Town*	65	54	125	0	125
Mamaroneck, Village	86	197	33	10	23
New Rochelle	188	77	481	225	256
Port Chester	96	21	224	35	189
Rye (City)*	121	0	167	9	158
<i>NORTH COUNTY</i>	1,109	144	1,952	172	1,780
Bedford*	198	68	396	73	323
Lewisboro*	129	8	239	0	239
Mount Kisco	59	0	124	0	124
New Castle*	168	65	255	3	252
North Salem*	83	3	152	4	148
Pound Ridge*	80	0	184	12	172
Somers*	188	0	224	0	224
Yorktown*	204	0	378	80	298
<b>TOTAL</b>	<b>5,000</b>	<b>2,309</b>	<b>10,768</b>	<b>3,242</b>	<b>8,219<sup>d</sup></b>

(Table adapted from *Affordable Housing Allocation Plan 2000-2015* and *Table C Status of 2000-2015 Allocations* (Drummond 2010))

\* Indicates eligible towns for fair housing settlement units

<sup>a</sup> Includes units affordable in 2000 being rehabilitated and having affordability period extended

<sup>b</sup> Includes affordable units under the Yonkers Housing Remedy Court Order since 2000

<sup>c</sup> Units over allocation to be credited in next Allocation

<sup>d</sup> Total Remaining Obligation is not reduced by units over allocation

physical and economic characteristics and issues; see Figure 2.2): the Long Island Sound communities, the Hudson River Shore communities, the Bronx River Valley, the Central County, and the North County Watershed. The sub-region allocations are just aggregations of the numbers produced by the formula for each municipality within the sub-region (due to data and analysis constraints). The municipalities within each sub-region are then meant to decide how the allocation gets distributed: “within each sub-region the municipalities should have the opportunity of negotiating their respective responsibilities provided the sub-regional totals remain the same... If no inter-municipal agreements modifying those numbers are arrived at, the municipal obligations underlying the sub-regional allocation plan will be deemed to be final” (Affordable Housing Allocation Plan 2005: 3).

Similar to the 1993 allocation plan, the 2005 plan is non-binding and there are “no penalties for failing to achieve the goal” (Fessenden 2007); citing the 1996 *Patterns* document, the allocation plan is only “guidance, including recommended allocations, to assist [the municipalities] in meeting a share of the need for affordable housing” (Affordable Housing Allocation Plan 2005: 1). However, Community Housing Innovations Inc. Executive Director Alexander H. Roberts says that these goals can “provide affordable-housing developers some valuable legal ammunition if they decide to sue communities that resist their plans” (Philippidis 2005).

### County's housing programs and resources

This section will look more specifically at the housing programs and resources that Westchester County uses in creating affordable housing. These are a combination of direct investment of County resources, programs with State or Federal funding, advocacy, and technical assistance. The County takes a lot of pride in its housing work, as demonstrated through comments by various members of the county government: Deputy Planning Commissioner Norma Drummond described Westchester as “one of the more progressive counties” in the way they fund, build and provide affordable housing, placing it “in a category with just a handful of other counties like Montgomery County, MD [and] Fairfax County, VA” (Drummond 2009); Westchester County Board of Legislators

Chairman Ken Jenkins described Westchester as a model held up “at HUD for the way we were doing things” (Jenkins); and an aide to then-County Executive Andrew Spano described the county’s behavior as exemplary given the authority they possess (*Housing Carrots and Sticks*). This section will outline the types of programs and resources dedicated to affordable housing. Note that multiple funding streams from different sources are typically required to create the affordable housing.

The County’s capital investment in affordable housing is provided through two programs: the New Homes Land Acquisition Fund and the Housing Implementation Fund. Through the New Homes Land Acquisition Fund, the County buys property at the market rate or an appraised price and sells it to affordable housing developers for \$1. Through the Housing Implementation Fund, the County helps fund municipal infrastructure to support the development of affordable housing. Both of these resources can be used for new construction, redevelopment or adaptive reuse of single or multi-family affordable homeownership or rental units. These can also be mixed-income developments as long as the affordability requirement for a certain number of units is met. Drummond also highlighted adaptive reuse as “one of the more progressive things” the County has done; they have converted churches, old schools, factories and a bank into affordable units, and she noted that there continue to be opportunities for this type of development (Drummond 2009).

On a typical affordable housing project, the County will contribute—from its own resources—10 to 20% of the total development cost (DeLong 3). The County has put “tens of millions of dollars” into these programs (Drummond 2009): between 1989 and 2009, the County put \$45,243,869 into its Capital Budget for the Housing Implementation Fund, and between 2000 and 2009, the County put \$37,370,000 into its Capital Budget for New Homes and Land Acquisition (Westchester County Budget Office 2010: D2-4). On a per unit basis, the County is typically contributing \$41,354 (11% of Total Development Cost (TDC)) for a “Low Westchester County Cost” homeownership unit; \$109,530 (28% of TDC) for a “High Westchester County Cost” homeownership unit; \$93,167 (23% of TDC) for an adaptive reuse homeownership unit; \$67,000 (20% of TDC) for a “Low Westchester County Cost” rental unit; and

\$59,949 (17% of TDC) for a “High Westchester County Cost” rental unit (Westchester County. *Appendix E-2(ii): 1-2*). With these types of direct investments, the County is able to leverage “significant other funds” from additional outside sources (DeLong 3).

The other subsidies come from Federal and New York State programs. The Federal programs from HUD include the HOME Investment Partnership for property acquisition and rehabilitation of units, Section 8 Rental Assistance, Section 8 Housing Choice Vouchers for assistance with homeownership mortgage payments, the Community Development Block Grant (CDBG) Property Improvement Program for rehabilitation and property acquisition, and the American Dream Downpayment Initiative for first-time homebuyers. Westchester County was allocated \$30,894,605 in CDBG and \$9,023,787 in HOME funds between 2004 and 2008 (*CPD Formula Planning Estimates for FY 2008*) and expects \$27,150,420 in CDBG and \$8,069,380 in HOME funds between 2009 and 2013 (*Consolidated Plan 2008: 3*).

Low-Income Housing Tax Credits (LIHTC) for the development of rental housing are funded by the federal Department of Treasury’s Internal Revenue Service (IRS), but allocated through the New York State Housing Finance Agency; between 1994 and 2007, 535 affordable units—representing \$3,789,849 in tax credits—were financed in Westchester with LIHTC (*NYSHFA LIHTC Projects*). The Affordable Housing Corporation (AHC), a New York State housing lender, has a Home Improvement Program for the repair and improvement of owner-occupied units. Several other non-governmental or quasi-governmental subsidies are available to developers, and ten municipalities have Public Housing Authorities that operate on a local level independent of the County.

The County also does affordable housing advocacy work. In 2008, the County Executive’s Office and the Department of Planning created a video entitled “Housing Alive” as a virtual tour of affordable housing development throughout the county; the goals of this video are to acknowledge the importance of affordable housing for Westchester communities, to demonstrate the need for more affordable housing, to show that the developments blend in with their surrounding neighborhoods,

and to “get local communities to recognize their responsibility” (Drummond in Fessenden 2007). The County also publishes “A Roof Over Your Head,” a pamphlet of frequently asked questions about affordable housing. The guide targets landlords and tenants as well as homeowners, with additional information for the elderly and the disabled (*A Roof Over Your Head*).

In addition, the County contracts and works with multiple not-for-profit housing agencies that do housing advocacy, provide a variety of housing-related services to clients (such as eviction prevention), and have technical assistance programs for housing developers. Drummond described these housing counseling services as another way Westchester is “ahead of the curve” (Drummond 2009). While it is not a typical requirement in other jurisdictions, for years Westchester has been requiring “anybody who is interested in living in any affordable housing unit...to receive counseling from one of [Westchester’s] HUD-certified counseling agencies” (Drummond 2009). Additionally, the Housing Action Council, a technical assistance not-for-profit with which the County works closely, runs a Community Housing Resource Center that “provides information, technical assistance and education in constructive ways to local public officials, residents and other stakeholders to develop affordable housing plans and projects that will receive broad-based community support” (*Housing Action Council*); fourteen Westchester communities are working closely with the CHRC on affordable housing in their localities.

A major constraint that the county has faced in developing affordable housing in Westchester is the New York State tradition of Home Rule. This intense local control explains much of why some municipalities have been successful in creating affordable housing while others have not—despite the county resources available to all municipalities. Home Rule is discussed in more detail in Chapter 2.

Most of the affordable housing successes are located in the municipalities that have identified a local need for it; explained Rose Noonan of the Housing Action Council: support is built for affordable housing when a community acknowledges that “there’s a need for Affordable Housing in

our community because our seniors can't afford there, our adult children can't afford to stay there, our workers can't afford to buy here or rent here" (Noonan). The communities that see this are the ones building the affordable housing, and they are setting local preferences for who can occupy the units to make sure that housing is addressing their own community needs. The local preferences can be problematic because they can function as an exclusionary technique, only providing opportunities to those who are already connected to the municipality; but at the same time the local preferences are what drives the support for the affordable housing to be built in many communities in the first place.

The municipalities where there is little or no affordable housing development are those that lack community support for it, because they do not see a local need for it. Because of Home Rule, the County has few to no options for developing affordable housing in these disinterested or resistant communities. Developers have the opportunity to sue these municipalities under *Berenson* for the right to build more densely than the zoning allows (to make it feasible to build affordable units into a development), but the risk, expense and controversy of a lawsuit deters developers from taking this type of action. With limited control, resources and capacity, it is not surprising that the County has taken the practical approach of working with communities that are interested in and open to affordable housing development—those with whom they can use a cooperative approach.

The question in the Fair Housing Case is not about how successful Westchester County was at developing affordable housing, but it's a question worth looking at to understand the defendant's perspective going into the case. A 2007 *New York Times* editorial describes the County's efforts as "rhetorically pleasing" but with results "far from inspiring" (*Housing Carrots and Sticks*). Compared to the County's own goals from 1993 and 2005, the pace of development and the resulting units also fall short. Compared to the county-level work being done in Montgomery County, MD or Fairfax County, VA—which have similar populations to Westchester (although vastly different general growth trajectories) and with which the County has compared its affordable housing work—the number of units produced or preserved in Westchester are very small (*Fact Sheet; Housing Programs*); the

difference in development numbers between Westchester and these counties highlights the degree of impact that Montgomery and Fairfax Counties' progressive inclusionary zoning programs have on their ability to produce affordable housing in their rapidly expanding suburban contexts. In order to evaluate Westchester's record, it is important to consider the restrictions that Home Rule places on the County's efforts; with this in mind, the best measure of the County's efforts is the amount of its own money that the County has invested in affordable housing. For the 20-year period between 1989 and 2009, the County has put \$82,613,869 in its Capital Budget for the Housing Implementation Fund and New Homes and Land Acquisition (Westchester County Budget Office 2010: D2-4). Compared to the \$75,138,192 the County receives from the HUD in CDBG and HOME funding for the ten-year period of 2004-2013 (*CPD Formula Planning Estimates for FY 2008; Consolidated Plan 2008: 3*), it is clear that Westchester County is at least investing significant amounts of the County's own money in its affordable housing effort.

In evaluating the County's work in affordable housing over the past several decades, two things become clear: one, that the county was doing a lot of work in the general affordable housing arena; and two, there was an absence of affordable housing focus—in analysis, policy and planning—specifically dealing with issues of race and segregation. It is this second point that the Westchester Fair Housing Case addresses: claiming that the County did not explicitly acknowledge or address its Affirmatively Furthering Fair Housing obligation. Both the 1993 and 2005 affordable housing allocation plans deal with 'regional fair share' requirements (that municipalities must help meet the regional affordable housing needs), but they do not mention 'fair housing' (dealing specifically with race and segregation). While a 'regional fair share' plan must functionally address 'fair housing' concerns, the obligation is for dedicated analysis of 'fair housing' issues and a plan for addressing those issues. Rose Noonan acknowledged that the County's emphasis historically has been on the development of affordable housing generally, not necessarily focusing on opening up opportunities to minorities in particular (Noonan). Jenkins felt that the County was doing analysis around race in its

delivery of affordable housing, but that it was just not being documented it in its Analysis of Impediments (Jenkins). Whether or not the County was considering race, it is clear that race was not explicitly considered in the documented analysis, policy or planning around affordable housing development. This point will be detailed later in the chapter during a discussion of the plaintiff's argument in the lawsuit. The next section will explain the legal mechanism used in the Westchester Fair Housing Case.

### *III. False Claims Case*

What I have titled the 'Westchester Fair Housing Case' throughout this document is actually somewhat misleading in terms of the technical legal mechanism used in the lawsuit; while the case is about 'fair housing,' it is not officially a 'Fair Housing' lawsuit. I chose this name because it describes the larger issues at stake in the case; however, the lawsuit is actually a False Claims Act case. This section will explain the False Claims Act to create a foundation for understanding the exact legal mechanism used in the case.

The False Claims Act is a Civil War-era federal statute that says it is illegal for a contractor to present false claims to the U.S. government with the intent to obtain payment from the government different from what is actually owed (Lahman). In other words, the False Claims Act is a "whistleblowing" mechanism that allows private entities to sue contractors that are defrauding the government. The False Claims Act is not traditionally the way that fair housing violations have been pursued in court. Fair housing suits are usually brought under the Fair Housing Act, where a developer can claim that a certain barrier in a town preventing affordable housing development has a discriminatory or segregative impact on minority populations. In New York State, developers can bring a similar suit under the *Berenson* doctrine, claiming that a municipality is not meeting its regional obligation for affordable housing. Anti-Discrimination Center (ADC) Executive Director Craig Gurian explained that, from a legal perspective, there were other legal doctrines upon which a fair



housing case could be built against Westchester (Gurian). However, ADC pursued this as a False Claims Act case because it needed a plaintiff (Gurian), and the False Claims Act is a private attorney general statute, which “allows a private party to sue on behalf of the United States” (Allen)—in other words, a private citizen can act as a private attorney general to bring suit against a false claim.

Michael Allen, a partner at the D.C. law firm Relman, Dane & Colfax, said that he and others “have talked about the concept of using the False Claims Act to challenge fraudulent or false certifications of civil rights compliance for many years” (Allen). As it relates to fair housing, he said that it became apparent over the years that “there had to be a huge disconnect” between the “certification that every one of the 1,200 recipients of federal housing community development funds signed every year and the reality of what’s going on in their communities” (Allen). Gurian identified the Westchester case and brought Relman & Dane<sup>13</sup> on to litigate the case.

ADC brought the Westchester Fair Housing Case under the False Claims Act using the following argument: by receiving federal CDBG funding from 2000-2006, Westchester County is obligated to Affirmatively Further Fair Housing (AFFH); the County Executive signs certifications as part of the Consolidated Plan that the County is, in fact, affirmatively furthering fair housing; there was evidence that Westchester County was not meeting its AFFH obligation; therefore, by signing the certification, the County was making a false claim against the government for federal funding received. The original complaint states that Westchester made a false claim when certifying that it would “conduct an analysis of impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting that analysis and those actions” (*False Claims Act Complaint* 2006). Explained Gurian, “Westchester County was defrauding the Federal Government, just like any other contractor who promises that it’s going to do something and doesn’t” (Gurian).

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<sup>13</sup> Relman & Dane changed its name to Relman, Dane & Colfax on March 15, 2010.

The innovation of using this argument in a civil rights context surprised many people; “the spokeswomen for Westchester called it ‘garbage’ and people even within HUD suggested that perhaps it was an illegitimate use of the False Claims Act” (Allen). Allen explained two sources of this type of response. First, there was the question of how a private party could be trying to enforce fair housing regulations through the False Claims Act. Second was a question about the strength and substance of the AFFH requirement if HUD, the department responsible for the CDBG program, was not itself enforcing the obligation. He supports the second point with an anecdote from a conference where he was invited to speak about the Westchester case:

“And then I asked half seriously and half rhetorically to an audience of about 100 people or 120 people, ‘How many times has HUD actually cut off funds to a recipient because it was not complying with its civil rights certifications?’ And I think the answer was zero. And then I asked, ‘How many times has HUD threatened to do so?’ and a guy in the audience raised his hand and said, ‘I think the answer is three.’ Three times over roughly 20 years that HUD had flexed its muscles at all about this particular issue...[And these instances were] slap in the face, egregious kind of stuff, and it was still, I think, suspensions or conditioning of funds rather than termination and debarment” (Allen).

In other words, there was a sense in the field that the AFFH obligation was not strictly enforced, and so there was surprise when a private entity brought a suit to enforce a requirement that the government was not monitoring itself. Gurian explains, however, that a lack of enforcement on the part of HUD does not negate the obligation to AFFH: “Individuals in government can’t undo laws or regulations” (Gurian).

The general lack of enforcement also contributed to Westchester County’s surprise at the case and a feeling that they were singled out for behavior in which everyone else was also participating. Then-County Executive Andrew Spano accused ADC of “using Westchester as a ‘test case’ to promote its agenda” (Brenner 2009). Jenkins said that, while he did not feel this way, some other people “felt [Westchester was] being treated unfairly...like someone did some analyses and just said, ‘Hey, these guys can afford to deal with this particular problem and we can start with them’” (Jenkins). A *New York Times* article cited legal experts that said the Westchester case “was attractive for another reason: judges in the Northeast are considered more sympathetic to fair-housing litigation than their

counterparts elsewhere in the country;" the article also cites UCLA Law School dean and fair housing litigation expert Michael H. Schill saying "The second circuit as a whole has a fairly expansive view of the Fair Housing Act, and that may be part of the reason why it was filed there"(Fessenden 2007)

Admits Allen, "It's not as if Westchester is necessarily any worse than any other jurisdiction" (Allen); however, the County did, "in a particularly egregious sort of way," promise "each year that it was dealing with these problems" while, at the same time, it was "absolutely closing its eyes to race" (Allen). Gurian described the County's Analysis of Impediments as "a complete joke. So Westchester was certainly an appropriate entity to sue" (Gurian).

Jenkins, who believes that the County had been considering race issues in its affordable housing planning process even if this analysis wasn't documented, said that "what it comes down to" for him in his analysis of the case is that Westchester "did not fill out the paperwork right...[However,] whether that's a technicality or not is irrelevant from my perspective. We did not do what we needed to do, based on the guidelines as set forth" (Jenkins).

Another common question has been about why the County was sued instead of the municipalities themselves. Allen explains that it is "because the obligation to Affirmatively Furthering ran principally to the County. And it was the most efficient way to raise the issue that the County, by its failure of oversight, was permitting 40 municipalities essentially to run their programs and spend their money however they saw fit, without any consciousness about its connection to expanding housing opportunity" (Allen). He continued that individual municipalities "could be liable on their own failure to affirmatively further because that obligation goes down with every dollar that they receive. But [suing the County] was the most effective and efficient way to approach the question" (Allen).

The next section will present the chronology of the False Claims Act lawsuit.

#### IV. *Chronology of the lawsuit*

The Anti-Discrimination Center began with the hypothesis that “for a variety of political reasons, the County was unwilling to confront issues of race and municipal resistance” (Gurian). While most cases rely on a “smoking gun” piece of evidence, Gurian “thought that the most important thing in [this] Case was going to be that which was not there. Because if Westchester had been doing some version of what it should have been doing...there would have been paper” documenting communications between the County and the Towns and Villages about affirmatively furthering fair housing (i.e., identifying sites, requesting assistance in AFFH, and/or cutting funds for noncompliance) (Gurian).

In 2005, ADC filed a Freedom of Information Law (FOIL) request with the County in order to investigate this hypothesis. Westchester County Department of Planning Deputy Commissioner Norma Drummond invited ADC to her office July 7, 2005 to discuss the requests and the issues underlying the request (Gurian). Gurian said that, as per ADC’s hypothesis, “there weren’t any documents, and [Drummond] also made a series of frank admissions about the County’s policies...that their view was ‘hands off the municipalities,’ a view that was entirely inconsistent with their obligations and inconsistent with their certifications” (Gurian).

ADC’s complaint was initially filed on April 12, 2006 with the United States District Court for the Southern District of New York, and it was sealed at this point while the federal government did an investigation to determine if it would intervene in the case. The federal government subpoenaed Westchester County in August of 2006 for documents relating to the case (Drummond 2009). In December 2006, the federal government decided it was not going to intervene. The case was unsealed on December 18, the County was served on January 8, 2007, and discovery commenced shortly thereafter. The County had to produce “hundreds of thousands of pages of documents” during discovery (Drummond 2009). In discovery, the plaintiff was able to find evidence that the County knew about its obligations, which is key in a false claims suit, and that the County knew about the facts on the

ground such as the municipal resistance (Gurian). The County filed a Motion to Dismiss on the grounds that “the HUD regulations did not require it to consider race” (*Memorandum in Support of Motion for Partial Summary Judgment* 5), but the court denied this on July 13, 2007, “holding that ‘an analysis of impediments that purposefully and explicitly, ‘as a matter of policy,’ avoids consideration of race in analyzing fair housing needs fails to satisfy the duty affirmatively to further fair housing” (*Memorandum in Support of Motion for Partial Summary Judgment* 5).

Two expert reports filed in 2008, one by sociologist Andrew A. Beveridge and the other by fair housing consultant Sara K. Pratt, evaluate Westchester County’s Analysis of Impediments and explain the County’s shortcoming in Affirmatively Furthering Fair Housing (AFFH); these reports get to the core of the plaintiff’s argument and illustrate the type of evidence presented in the case.

Pratt’s report discusses the key components of a proper Analysis of Impediments and evaluates Westchester’s documents against this. Pratt explains that a jurisdiction must conduct a legitimate Analysis of Impediments to order to meet its obligation to AFFH; “A failure to conduct an analysis of impediments...means that the jurisdiction has failed to act affirmatively to further fair housing” (Pratt 8). Pratt details what the Analysis of Impediments (AI) is meant to do:

“...the AI collects information about what [affordable housing] is available and where, looks at what the needs of [protected classes] are and what [the barriers are to offering] them unimpeded fair housing choices, and makes a list of specific actions targeted to those populations. Then...it identifies the actions needed to remove the barriers, and tracks and records whether those actions have been taken or not and by whom” (Pratt 8).

It is essential for AIs to identify barriers to fair housing, “...not just barriers to general housing opportunities or affordable housing opportunities, but barriers to people because of immutable characteristics, like their race, that should not, but often do, result in limitations of housing opportunities” (Pratt 8). Westchester County was aware of these requirements, both through letters from HUD to the County Executive in 1996 and 2000 explaining the requirements of an AI and letters from HUD to the County Executive in 2000, 2001 and 2002 repeatedly advising “that [the County’s] submissions failed to meet those requirements” (Pratt 17).

Pratt states that Westchester County's Analyses of Impediments in both the 2000-2004 and the 2004-2008 Consolidated Plans are deficient in analyzing barriers to fair housing, because they are just a "listing of barriers to affordable housing" (Pratt 9). An analysis of barriers to fair housing would include the following elements that Westchester County's AI does not have:

"an assessment of zoning and land use practices, including density restrictions, lot size, zoning procedures and requirements, and other requirements that could discriminate...an assessment of restrictions or practices imposed by housing providers or municipalities, such as residency preferences or occupancy requirements, tenancy assignment plans, eligibility requirements, rental housing costs for Section 8 voucher holders and their effect on housing mobility, and other similar practices" (Pratt 11).

Furthermore, Westchester's AI "does not contain actions that are designed to...remove barriers to fair housing choice, and it fails even to identify documents" that describe the removal of impediments (Pratt 9). In short, Pratt concludes that the document submitted as their Analysis of Impediments "does not meet the requirements of an analysis of impediments and therefore is not correctly referred to as an analysis of impediments" (Pratt 9).

In Westchester's document, the only explicit reference to classes protected under the Fair Housing Act<sup>14</sup> is a reference to housing opportunities for people with disabilities (Pratt 12); as Beveridge's report points out, "Nowhere in [the AI] is the subject of race mentioned, much less assessed as a potential impediment to 'fair housing'" (Beveridge 5). Michael Allen adds to this that the only reference to race as a point of tension in housing matters is a graphic (see Figure 4.1) featured on the "Local Opposition (NIMBY)" page of Westchester's AI that features a black man and a white man being held apart by an umpire (Allen).

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<sup>14</sup> The Fair Housing Act: "prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians, pregnant women, and people securing custody of children under the age of 18), and handicap (disability)" (*Fair Housing Laws and Presidential Executive Orders*).

**Figure 4.1: “Local Opposition (NIMBY)” Graphic from Westchester Analysis of Impediments**



*(Westchester County Urban Consortium Consolidated Plan FY2004-2008, Chapter 9, page 10)*

Beveridge continues that Westchester County failed to discuss or analyze race and segregation, even though the data and tools for analysis were readily available to them (Beveridge 2009: 5). The County possessed the maps that showed the high levels of racial segregation in the county, but the AI never mentions race or these patterns of segregation observed. Beveridge explains that “Once it was obvious that a pattern of segregation existed, the County needed to measure it, and then to begin to understand its genesis and how it is perpetuated” (Beveridge 7). The County chose to ignore race in its AIs, despite the evidence that an impediment to fair housing existed; “Such a policy does nothing to ‘affirmatively further fair housing,’ rather it does just the opposite” (Beveridge 16). In sum, Pratt states that Westchester County’s AIs are “silent on actions to remove barriers to fair housing,” indicating “a completed abdication of the County’s obligation to affirmatively further fair housing” (Pratt 25).

On October 17, 2008, ADC filed a motion for partial summary judgment. The standard for granting a motion for summary judgment is 1) there is no dispute on a material issue of fact; and 2) the moving party is entitled to judgment as a matter of law. Because the court had established in the July 2007 denial of the County’s motion to dismiss that the only remaining issue “is whether Westchester considered race’...the central question on summary judgment is whether there is any evidence the County did so” (*Memorandum in Support of Motion for Partial Summary Judgment* 5). ADC states in this

memorandum that, after completing all depositions and reviewing all the materials produced in discovery, they could “detect no genuine issue of material fact concerning the County’s noncompliance with its AFFH obligation, or with respect to its knowing false claims made to HUD that it was complying” (*Memorandum in Support of Motion for Partial Summary Judgment* 5). In other words, ADC was stating that it felt that Westchester County had no provable facts with which to make its case.

Westchester County filed a cross-motion for summary judgment, fully submitted to the court on November 14, 2008, stating that “it did analyze race, determined that racial segregation and discrimination were not significant barriers to fair housing choice, and concluded that the most pressing impediment to fair housing was the lack of affordable housing stock” (*Opinion and Order* 4).<sup>15</sup> On February 24, 2009, District Court Judge Denise Cote granted part of ADC’s motion for partial summary judgment and denied part of it; Judge Cote held that the “county’s certifications were false claims, but fact issue as to whether [the] county knew its certifications were false precluded summary judgment” (*Partial Summary Judgment* 1), which means that the question about whether Westchester County knew it was making false claims was still open. In the same filing, the judge denied the County’s motion for summary judgment in full (*Partial Summary Judgment* 3), noting “County’s AIs during the false claims period utterly failed to comply with the regulatory requirement” of performing and maintaining a record of its Analysis of Impediments in terms of race (14). Explains Gurian: “The reality was at the end of February of [2009], their case was gone. The only issue not formerly resolved was, ‘were there false certifications made knowingly?’ And knowingly is defined under the False Claims Act extremely broadly. It’s not just actual knowledge; it’s either reckless disregard of the truth or falsity of the certification or deliberate ignorance” (Gurian).

On April 10, 2009, ADC filed a “motion for a pretrial order that [the County’s] AFFH certifications during the false claims period were material as a matter of law” (*Opinion and Order* 9);

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<sup>15</sup> Beveridge does an analysis showing that income segregation is not the underlying factor causing racial segregation (Beveridge 2009: 10-12). This analysis is discussed in detail in Chapter 3.



and on April 22, 2009, "... Judge Cote decided that as a matter of law, meaning essentially no jury could decide otherwise—it's absolutely, conclusively established—that the claims were false and that Westchester had really closed its eyes even as it signed that Certification every year that it was not doing so" (Allen).

Around the same time in the spring of 2009, "the County in earnest decided to say to the Federal Government, 'Not for nothing, but we did our [CDBG] agreement, HUD has reviewed our agreement'" and HUD continued to fund Westchester year after year despite the deficiencies in the AI; explained Drummond: "We kind of went back to HUD and asked for their assistance in resolving the differences here" (Drummond 2009). Allen also points to the change in administration that happened around the same time when "the Department of Justice and HUD reconsidered the initial decision and did intervene in the case and said that they were doing so for purposes of trying to reach a settlement in the case" (Allen). Settlement discussions started in the spring of 2009 (Drummond 2009). It was established during this time—through discussion and research—that the government could "impose civil rights remedies " in "the settlement of a False Claims Act case," and once this was established, the settlement was negotiated (Allen).

On August 7, 2009, the federal government filed "its own complaint-in-intervention against Westchester, joining the Center in suing the County for having defrauded United States taxpayers" (*Westchester False Claims Case*). The government filed the complaint-in-intervention to "recover, under the False Claims Act...damages sustained by, and penalties owed to, the United States as the result of Westchester, from in or about 2000 through 2009, having knowingly presented or caused to be presented to the United States false claims to obtain federal funding for housing and community development...[and to] appropriate remedies, including mandatory or injunctive relief, for Westchester's non-compliance with community development requirements during that time period" (*Complaint-in-Intervention 2*). In addition, the federal government brought claims "under the common law for fraud, unjust enrichment, and payment under mistake of fact" (*Complaint-in-Intervention 2*).

On August 10, 2009, Judge Cote filed the final settlement that had been negotiated, entitled the *Stipulation and Order of Settlement and Dismissal*. By settling the case, the County does not admit any guilt. The settlement imposes financial penalties on the County, the overwhelming majority of which, however, goes towards the development of affordable housing in a way that properly Affirmatively Furthers Fair Housing. Explains Allen:

“From very early on, the Anti-Discrimination Center made clear that...its intention was not to essentially deprive Westchester County and its residents of millions of dollars of federal funds and potentially triple damages, but rather to find a means by which that money could be put to the use that it was supposed to be put in the first place” (Allen).

The settlement mandates the number of affordable “Affirmatively Furthering Fair Housing” units that Westchester must build as part of the remedy, and it sets strict criteria based on racial demographics for the eligible municipalities in which development of units can count towards this goal. The settlement requires the County to adopt certain pro-AFFH policies and to actively confront municipalities that resist affordable housing.

The following is my summary of the details of the settlement (*adapted from the “Stipulation and Order of Settlement and Dismissal”*):

### **Financial requirements**

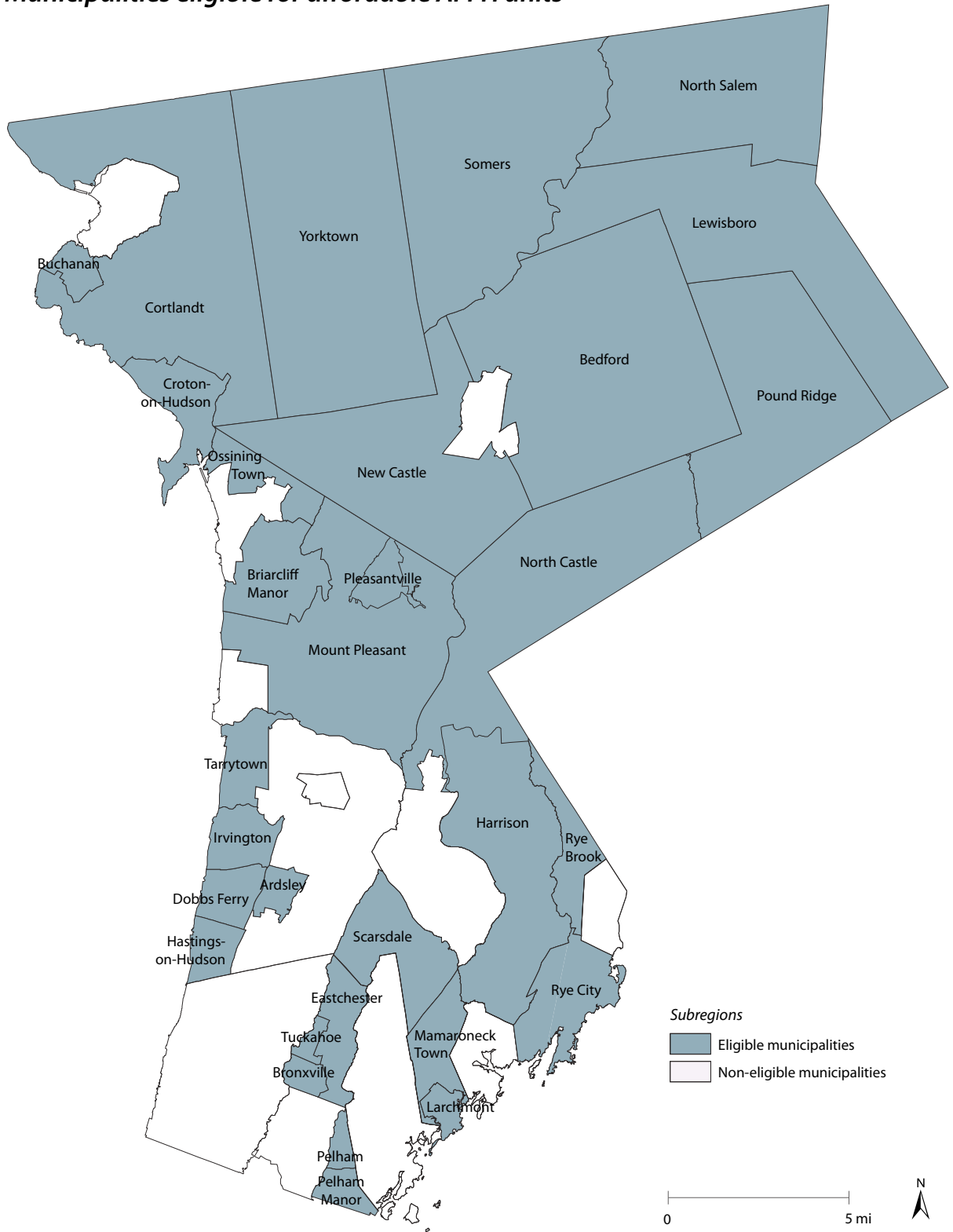
- Westchester County must pay the U.S. Department of Housing and Urban Development \$21.6 million, which will in turn be placed in Westchester County’s HUD account, to be used for the development of new affordable housing that Affirmatively Further Fair Housing (AFFH).
- The County must pay the U.S. Department of Justice a settlement amount of \$8,400,000, \$7,500,000 of which will go to the Anti-Discrimination Center of Metro New York, Inc.<sup>16</sup> and \$900,000 of which goes to the federal government for administrative expenses.
- The County must pay the plaintiff’s lawyers Relman & Dane<sup>17</sup> \$2,500,000 for expenses, attorneys’ fees, and costs.
- The County must secure an additional \$30 million of its own money for “land acquisition, infrastructure improvement, construction, acquisition, or other necessary direct costs of development of new affordable housing units that AFFH.”

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<sup>16</sup> A “key provision” of the False Claims Act is that the realtor (in this case, ADC) gets a share of the funds recovered (“15-25 percent of the recovery in intervened cases”); the share of funds given to the realtor is to encourage and reward “exposing and prosecuting the fraud” (Lahman).

<sup>17</sup> Relman & Dane changed its name to Relman, Dane & Colfax on March 15, 2010.

**Figure 4.2**  
**Municipalities eligible for affordable AFFH units**



(Data source: Westchester County Geographic Information Systems)

### **Unit development requirements**

- The County is required to build a minimum of 750 units of “affordable AFFH housing” in municipalities selected under the following criteria:
  - At least 630 of the affordable AFFH units must be built in municipalities that, based on the 2000 Census, have a population that is both less than 3% “single-race African-American only” and less than 7% Hispanic (removing those persons living in group quarters from the population counts<sup>18</sup>). Within these municipalities, the units cannot be developed in census blocks whose population is more than 10% “single race African-American only” and has a total African American population of 20 or more, or whose population is more than 10% Hispanic and has a total Hispanic population of 20 or more (again, persons living in group quarters are removed).
  - A maximum of 60 units may be developed in municipalities that, based on the 2000 Census, have a population that is both less than 7% “single-race African-American only” and less than 10% Hispanic (removing those persons living in group quarters from the population counts). The same census block restrictions as above apply.
  - A maximum of 60 units may be developed in municipalities that, based on the 2000 Census, have a population that is both less than 14% “single-race African-American only” and less than 16% Hispanic (removing those persons living in group quarters from the population counts). These units cannot be built before 175 units of the 630-unit requirement above have received building permits (if built before this point, they will not count towards the mandated new stock of affordable AFFH units). A maximum of \$4,000,000 can be spent from the County’s designated AFFH capital funds on these units, and no funds from the County’s HUD AFFH account may be used on these units.
- No more than 25% of the total AFFH units may be achieved through the acquisition of existing housing units. The County may not any acquire units already affordable to households at 80% AMI through deed restrictions or other legal mechanisms. If the units acquired are already affordable to households at 80% AMI (by way of market pricing, not a subsidy mechanism), then the County must make the acquired units affordable for 50 years to households at 65% AMI instead.
- Units in developments already underway cannot count towards the affordable AFFH unit requirement. This includes developments that have “preliminary or final land use or financing approval” at the time of the settlement. For developments that were previously approved in land use or financing but have since become unviable, the Monitor has the option of allowing the County to include in their affordable AFFH unit numbers developments that the County is able to “resuscitate” through financing or other means.

### **Tenure and affordability requirements**

- 50% of all affordable AFFH units developed must be rental units.
- Of the rental units, at least 20% must be affordable<sup>19</sup> to and occupied by households at or below 50% of the Area Median Income (AMI).<sup>20</sup> The balance of the units must target households at or below 65% AMI.

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<sup>18</sup> The Census 2000 includes in group quarters Correctional Institutions, Nursing Homes, Hospitals, Juvenile Institutions; Group homes for the mentally ill, mentally retarded or physically handicapped; College dormitories; Military quarters; Emergency shelters; among others (*American FactFinder Help*).

<sup>19</sup> Affordability defined by the HOME program

- The rental units must remain affordable for no less than 50 years. Rental units may, however, be converted to cooperative or condominium during the 50-year period as long as the units remain affordable at the same levels, tenants are given the option to purchase their units, and tenants who chose not to purchase their units are allowed to remain in their units.
- The balance of the units are to be homeownership, affordable<sup>21</sup> to and occupied by households at or below 80% AMI.

### **Senior housing**

- No more than 25% of the units can be for senior housing (age-restricted for senior citizens). No AFFH money can be used for these units until at least 175 units of the non-senior units requirement above have received building permits, and AFFH funds cannot be spent to build more than 90 senior units until at least 350 non-senior units have received permits.

### **Transportation**

- Priority must be given to sites with access to public transportation, but no site can be taken out of consideration for not being near public transit.

### **County policy**

- The County must acknowledge “the importance of AFFH” and adopt “a policy statement providing that: (a) the elimination of discrimination, including the present effects of past discrimination, and the elimination of de facto residential segregation are official goals of the County’s housing policies and programs; (b) AFFH significantly advances the public interest of the County and the municipalities therein; and (c) the location of affordable housing is central to fulfilling the commitment to AFFH because it determines whether such housing will reduce or perpetuate residential segregation.”
- The County must amend its planning document, *Westchester 2025*, so that the Long Range Land Use Policies reflect the goals of the settlement, the model ordinance described above, and the importance of AFFH.

### **Promotion of AFFH in the County and municipalities**

- The County must use “all available means as appropriate” to promote AFFH, such as 1) creating financial and other incentives, 2) making other County funding available in exchange for cooperation and participation in AFFH development, and 3) leveraging other funding sources to make projects financially feasible.
- If a municipality does not act to promote the affordable AFFH units, the County must use “all available means as appropriate,” including legal action, to respond to the municipalities’ active or inactive resistant behavior. “The County shall initiate such legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH.”

### **Monitor to the Court**

- The federal government, with input from Westchester County, will appoint a Monitor to the Court, who has “all powers, rights and responsibilities necessary to achieve the AFFH purposes” of the Stipulation order. This includes 1) monitoring compliance with the settlement through

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<sup>20</sup> Westchester’s 2009 Area Median Income for a 4-person household is \$105,300 (*Income and Rent Program Guidelines*)

<sup>21</sup> Affordability defined as “no more than thirty-three (33) percent of the adjusted income of a family” (*Stipulation and Order of Settlement and Dismissal*).

the review of the County's policies, programs and procedures, 2) making recommendations about additional actions or remedies needed to comply, and 3) using outside experts for technical assistance on review, advice, and recommendations for County action. The Monitor and related expenses will be paid out of the AFFH fund the County has allocated for the settlement.

- The Monitor has authority to “resolve disputes between the County and the Government” about implementation that the two entities cannot work out on their own.
- The Monitor will review the County's progress every two years (the first report is due December 31, 2011). If the Monitor finds that the County is making a good faith effort to comply with the requirements of the settlement, but that for reasons outside of the County's control (i.e. the real estate market) it is not able to meet the interim benchmarks, the Monitor can, with consent of the County and the federal government and approval by the Court, make modifications or refinements to certain elements of the stipulation order. These elements are limited to: 1) the specific allocation of the County's \$30 million capital investment; 2) the census blocks requirement (as long as the changes are consistent with the purpose of the AFFH settlement); 3) the municipalities eligible for the 630 units in consideration of new 2010 Census data, or the geographic distribution of units if they are found not to comply with the purpose of the AFFH settlement (note that no originally eligible municipality may be deemed ineligible by these changes); 4) the “terms, conditions and criteria” regarding the rental-ownership breakdown of the total units developed and the income eligibility targets and criteria for each tenure type; 5) the interim benchmarks and final deadlines for the development of units; 6) the total number of units required to be developed, if the deadline extensions already received “will not be sufficient to permit the possible satisfaction of the County's obligations” due to factors beyond the County's control; and 7) the County's mechanisms for AFFH advocacy, education, outreach, affirmative marketing and intake.
- The County must submit quarterly reports to the Monitor on progress on implementation efforts. Included in these reports must be: “(a) the location of the Affordable AFFH Units (i) for which there are sites with financing in place, (ii) which are under construction, and (iii) which are completed, and the racial and ethnic demographic information of the municipality and the census block in each location; and (b) racial and ethnic demographic information of the occupants of the Affordable AFFH Units.”

### **Implementation**

- The County must submit an Implementation Plan to the Monitor and the federal government within 120 days of the settlement filing, with one deadline extension allowed.
- This implementation planning process must include: 1) an assessment of vacant land available for development and real estate available for adaptive reuse in the eligible municipalities, considering the amenities available at each site (such as “access to services and facilities that will promote sustainable, inclusive communities, such as employment and educational opportunities, medical and other family services, and public transportation”); 2) meetings with property owners and for-profit and not-for-profit developers to gauge interest in new AFFH developments; 3) meetings with key municipal officials in the communities eligible for the 630 units to discuss development opportunities; 4) meetings with the New York State Division of Housing and Community Renewal (DHCR) and the NYS Housing Finance Agency to discuss the potential for targeted state financing and other state assistance for affordable AFFH projects; 5) Development of a revolving fund for the funds allocated by the County for the AFFH projects, and/or identification of the challenges to creating a revolving fund; and 6) an assessment of “the means by which the County can maximize the development of Affordable

AFFH Units in the eligible municipalities and census blocks with the lowest concentrations of African American and Hispanic residents.”

- The Implementation Plan must include “proposed timetables and benchmarks for the first 6-month and one-year periods and for each year thereafter.” The Monitor has the ability to accept or reject the implementation plan. If rejected, the County must meet with the Monitor and submit a revised plan; if the revised plan is insufficient, the Monitor must “specify revisions or additional items” for the County to incorporate.
- The approved Implementation Plan will be incorporated into the County’s Analysis of Impediments (AI).
- The Implementation Plan must include a model inclusionary housing ordinance that the County will “promote to municipalities to advance fair housing.” The model ordinance should include: 1) a requirement that new developments include “a certain percentage of affordable units” with “criteria and standards for the affordable housing units and definitions of who is eligible” for the affordable units; 2) “standards for affirmative marketing” to reach “racially and ethnically diverse households;” 3) standards for “streamlining the approval process for the design, permitting, and development” of affordable AFFH units (i.e. expedited review for these projects); and 4) standards for ensuring long-term affordability of affordable AFFH units, including legal mechanisms.
- The Implementation Plan must include a new plan and/or process for allocating CDBG funds in such a way that incentivizes municipalities to take AFFH actions (i.e. prioritization of developments with affordable AFFH units).
- The Implementation Plan must include a commitment on the part of the County to amend county local law to eliminate municipal right of first refusal as it pertains to land for AFFH. In other words, the local law must be amended such that the municipalities no longer have the first opportunity (before any person or private entity) to choose to purchase county land that is being sold if the land is being sold or transferred for affordable AFFH units.
- The Implementation Plan must include a new County policy on the conditions under which municipalities can receive and use public funds and resources (such as CDBG and County Open Space funds). In the funding agreements between the County and each municipality, the municipalities must: 1) eliminate local preferences (and other selection preferences that do not AFFH) in tenant selection for affordable housing; 2) give the County right of first refusal to “retain and/or purchase [municipal] land acquired in rem to be used for affordable housing that AFFH;” and 3) “actively further implementation” of the settlement requirements “through their land use regulations and other affirmative measures to assist development of affordable housing.”
- The County must complete a proper Analysis of Impediments that complies with HUD’s Fair Housing Planning Guide.
- The County must also engage in other activities that Affirmatively Further Fair Housing: 1) soliciting AFFH CDBG proposals from community groups; 2) advertising fair housing rights and publicizing ways to address instances of housing discrimination; 3) education and advocacy for fair housing and the “equitable distribution of affordable housing in all communities, including public outreach specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities;” 4) affirmative marketing of affordable units (by both the county and developers) to areas in and around Westchester with large non-white populations; 5) creating a central intake method for potential affordable housing home buyers and a centralized service providing information on affordable housing resources; 6) support

the legislation to ban “source of income” discrimination in housing; and 7) spend at least an additional \$400,000 of County resources and/or CDBG funds on education, outreach and advertising to AFFH.

**Benchmarks**

<i>By end of calendar year</i>	<i>Units with financing in place</i>	<i>Units with building permits</i>
2010		
2011	100	50
2012	200	125
2013	300	225
2014	450	350
2015	600	525
2016	750	750

- The County’s Implementation Plan must include steps needed to achieve these benchmarks.

**Penalties**

- If the County fails to build the affordable AFFH units as specified, or if the County misses the interim benchmarks, “on the first day of failure,” the County must allocate an additional \$30,000 towards the development of additional units beyond the initial 750 required; if the failure to meet the unit goals or the benchmarks is not remedied within 30 days, the County must allocate an additional \$60,000 for affordable AFFH housing for each month of continued non-compliance. This penalty is doubled if the County fails to comply by more than 50%. The Monitor will determine the calculation for additional units required for each instance of penalty, and the Monitor has the ability to “waive or alter the imposition of penalties or the number of additional Affordable AFFH Units required.”

**Approval by the County’s Board of Legislators**

- The settlement must be approved by “a simple majority of the County’s Board of Legislators.
- This Board of Legislators must approve by a two-thirds majority a Bond Act for \$32.9 million.
- If the Board fails to approve either or both of these measures, “the Stipulation and Order shall be null and void.” If this happens, the case will go to trial.

*V. Approval by the Westchester County Board of Legislators*

The August 10, 2009 settlement required Westchester County to gain approval by a simple majority of the County’s Board of Legislators within 45 days of the agreement, making the deadline for the vote September 24, 2009. The Board had not been involved with the case from the beginning, but in August 2009, when the County Executive’s Office had “a semblance of a Final Agreement, it was presented at the Board of Legislators for their discussion and review” (Drummond 2009). Then-County Executive Andrew Spano framed the lawsuit to the Board and to the public as something his office had



no choice but to settle; he said “he had signed the agreement,” in which the County does not admit any fault, “to avoid further litigation and possible penalties” (Roberts).

In September, William Ryan, then-Chairman of the Board of Legislators, described the settlement as perhaps “the most complex matter that has ever come before the Board of Legislators” (Ryan). The legislators had many concerns and questions, ranging from the requirement of legal action against municipalities that would not cooperate, to the process for coming up with an implementation plan, to the extent of financial penalties the County could incur if they did not settle. Chairman Jenkins explained that “due diligence was done by those legislators” who were against the settlement; “They worked really hard. They listened to many, many and many hours of meetings and with people coming in to hear the things that would help them support it or not support it” (Jenkins).

During this period of discussion, the Board received two letters from the U.S. Department of Justice clarifying questions from the board, and the Board had the opportunity to meet with the newly appointed Monitor of the Court, attorney James. E. Johnson. Said Board Chairman Jenkins (who was not Chairman at the time), it did “give people more comfort in hearing from the Justice Department and meeting the Monitor and understanding the Monitor’s role, understanding what could be done and couldn’t be done” (Jenkins).

ADC Executive Director Craig Gurian was displeased with the responses being given to these questions by the County Executive’s Office; “everything that was talked about in the period of time when the legislature was considering it...[was] designed to show that, ‘Don’t worry, these things are not really going to be built;’” for example, “the [Spano] administration described the cost per unit [for the County] as \$450,000” (Gurian), implying that the County would never be able to achieve the 750 units required with the \$51.6 million it allocated for the affordable AFFH units. However, said Gurian, “the cost per unit is not going to be \$450,000” for the County because of the cross-subsidy that will be available (Gurian). Gurian had also been displeased by the Monitor’s interactions with the County,

characterizing Johnson's comments as assurance to the legislators that "Everything's going to be okay, don't worry. I could make changes in Agreement" (Gurian).

Even though then-County Executive Spano had framed the settlement as something he had no choice but to agree to, Deputy Planning Commissioner Drummond described Spano as "so committed to making this happen" (Drummond 2009). While the Board of Legislators was discussing the plan,

"the County Executive was actively meeting with the elected officials of every single municipality in this County to...help them understand the Agreement, help them understand why the County made the decision that it did to try to settle it...And he even had the Monitor come around and meet with some of the Municipalities too, to be able to answer some of the questions that the Municipalities had" (Drummond 2009).

Spano would be up for re-election in November 2009, putting an increased pressure on him to explain the settlement to people around the county and make them understand the position that his office was in that made him enter into the settlement agreement.

In the end of what Gurian described as "the tortured process of getting legislative approval of the Settlement" (Gurian), the Board of Legislators ran down the clock to the last days before the approval deadline. The Board was initially scheduled to vote on the settlement on Monday, September 21, 2009, but the vote was postponed due to remaining questions about "what would happen if the county could not build the required housing for the amount of money mentioned in the settlement. Legislators also expressed concern that the county could be forced to sue municipalities that did not cooperate" (Brustein). Up against the 45-day deadline, the legislators met again on Tuesday, September 22, and they finally took a vote after 1 a.m. on Wednesday, September 23, approving the settlement 12 to 5 (Brustein). The Board also passed a \$36 million bond act, as required, to "fund costs related to the settlement agreement" (*Highlights of Action*). Several of the legislators framed their approval votes the same way Spano had: to avoid the "potential of costly litigation," which the Board estimated could result in "damages of at least \$180 million" charged to the county if the county was found at fault in the litigation (Brustein). Other legislators feared the stigma that could be attached to them if they had rejected "a measure on desegregation" (Brustein).

Jenkins commented that, had the Board of Legislators not had enough votes to approve the settlement, “we would have had different people stepping forward to vote for it,” specifically the attorneys on the Board, who understood that, from a legal perspective, Westchester County was “in a pretty locked-in spot that it was going to cost us \$180 million dollars or higher” (Jenkins).

Reflecting on the whole process of the lawsuit, Drummond described it as “a nightmare,” but explained that, personally, she was not sure that she was happy with the fact that the County settled, “because ultimately we don’t have the ability to clear our name. But on the one hand the whole process was so awful that you know that you just didn’t want it to continue anymore” (Drummond 2009).

#### *VI. Implementation*

In what was a surprise to many throughout the county, on November 4, 2009, 3-term Democratic incumbent Andrew Spano lost to Republican challenger Rob Astorino by 15 percentage points in the race for Westchester County Executive. Spano said that Astorino campaigned on three issues: high property taxes, Spano’s spending on his personal security team, and the fair housing plan (Robbins). Board of Legislators Chairman Ken Jenkins thought that Spano “did not lose because of this housing Stipulation Order—he lost because of how he was talking about the Stipulation Order;” rather than taking the time to address people’s “real questions that deserved real answers,” Spano took the stance that “anyone who disagreed with this must be a racist” (Jenkins).

In the run up to the election, Astorino had been vocal against the fair housing settlement. He described the federal government as “Big Brother,” called the precedent established by the settlement “alarming,” and emphasized that the Town of Mount Pleasant, where he previously was a councilman, had a “firm policy of declining CDBG money” because “a federally subsidized playground or sidewalk wasn’t worth it, if it meant surrendering jurisdiction over local zoning” (Astorino 2009). Once Astorino was elected County Executive, however, he was put in the position of being obligated

to move forward with the approved settlement requirements. Jenkins explained that “two days after he was elected, [Astorino] called me and said, ‘Hey Ken, you know I understand that this Stipulation Order exists. I did not like the Stipulation Order, but I understand that we have to implement it’” (Jenkins). Jenkins continued that Astorino’s framing of the settlement isn’t so different from Spano’s; Astorino’s approach is that “we’re going to get this thing done because we have to” (Jenkins).

The County Executive’s Office is principally responsible for the creation of the Implementation Plan. Sue Gerry, Senior Assistant to County Executive Spano, stayed on with the Astorino administration for several months to help facilitate the creation of the implementation plan, which was due shortly after Astorino took office in January. The Westchester County Board of Legislators passed a resolution stating its interest in being “intricately involved” with the implementation planning moving forward, and Legislators John Nonna, Peter Harckham, and Judith Meyers, who sit on the Board’s Committee of Housing and Planning, were the liaisons on the housing order (Jenkins). The Westchester Municipal Officials Association, an organization of the mayors and supervisors of Westchester County, also got involved in planning, with a subcommittee of its members working with the County on the Model Zoning Ordinance.

Relman, Dane & Colfax partner Michael Allen described the implementation planning process as one that would be challenging for the County: with the new Analysis of Impediments required by the settlement, the County is “actually have to take a serious look at its own situation, its history and current condition. And it’s going to have to be honest about it. And it’s going to have to say stuff that’s uncomfortable about itself” (Allen). Furthermore, in the Implementation Plan, “Westchester is going to actually have to commit to doing stuff that’s hard” (Allen). Chairman Jenkins, however, saw the requirements not as such a challenge but rather as “all things that we could do, and over a 7 year period it wasn’t going to decimate anything” (Jenkins). Similarly, Deputy Planning Commissioner Drummond described the number of units required to be developed as “in the scheme of things...really nothing” (Drummond 2009).

Drummond explained the County's perspective on the settlement; she says it's "a positive thing that we can actually have now a pot of money available to spend to be able to help get units built in these communities" (Drummond 2009). Drummond also explained the extent to which municipalities were cooperating: some, but certainly not all, municipalities have had positive reactions, many of them identifying specific sites or creating local ordinances to designate certain areas "where they'd like the County to focus its efforts;" she characterized the municipalities' behaviors as "using this as an opportunity to say, 'Okay, we've got to do something. So maybe we need to be proactive before the County comes and tells us what we're going to do'" (Drummond 2009). She thinks that "the elected officials of most every community...have seen somebody personally who has needed...affordable housing, whether it's their parents...adult children...other relatives or...people that work for them, from the folks who clean the village halls to the bus drivers to the schools to the EMTs and the volunteer firefighters;" and as long as these elected officials feel "they can help shape the plan, [the County] can get a little more buy-in from them as we put it together" (Drummond 2009).

ADC Executive Director Craig Gurian was critical of the County post-settlement actions on several counts. First, he disapproved of what he considers only cosmetic changes to the County's language in speech and on its website: "Instead of saying 'Affordable Housing,' now people say, 'Fair and Affordable Housing' without changing the meaning at all. Wow, we've added the words, 'Fair and'" (Gurian). Second, he objected to the County's October 2009 settlement fact sheet, which states that the County does not have authority to change local zoning and that the federal government has acknowledged this fact;<sup>22</sup> both points, he said, are "factually untrue" (Gurian). Third, on a similar note, he said that Housing Action Council Executive Director Rose Noonan, who was appointed as housing technical assistance consultant to the Monitor, "was quoted in...a newspaper, 'I'm not aware of anything that can force towns'" to change their local zoning (Gurian). Fourth, Gurian was disturbed by

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<sup>22</sup> This fact sheet states that "The federal government recognizes that there are forces beyond the control of the county, such as local zoning and home rule, and has therefore left it up to a monitor to lower the number or give the county more flexibility as to the time period and location" (County Executive's Office 2009).

the fact that “no leaders whatsoever on the Federal or State level” spoke up against the “hundreds of race-based and class-based stereotypic comments” that emerged in the internet in response to the news articles published on the case—as they would have stood up against racist graffiti by passing a resolution condemning the incident.

Gurian also disagreed with the concept of negotiation and/or buy-in by stakeholders, which is an approach being discussed by the County. He explained that the term ‘stakeholder’ “is misleading in an important way. If you imagine Stakeholders coming together, you are imagining a process whereby there’s negotiation, give and take, [with] peoples’ interest. The interest of the Stakeholders needs to be accommodated. That’s an interesting hypothesis, but that is not the Federal Court Order that exists” (Gurian). He continued that the starting point for implementation of the fair housing settlement is that “there are legal obligations. And those legal obligations that are enforceable by the court that retains jurisdiction are not a starting point or a series of suggestions for a group sing-a-long. That’s what was negotiated as between and among the Anti-Discrimination Center, the government and Westchester County” (Gurian).

Gurian was also critical of various points having to do with the Court Monitor. Gurian commented that, since the settlement was signed, the Monitor’s words and actions have put forth the message that “There really isn’t going to have to be that much change [on the part of the County and municipalities]. Now, you can’t keep [your affordable AFFH housing units at] zero. Everybody’s going to have to do something. But basically, you’re not going to have to change things” (Gurian). Gurian said that the Monitor has given “no signal that [the settlement is] going to be taken seriously,” which is encouraging resistance and making everything “much, much more difficult than it had to have been” (Gurian). Gurian was also critical of the choice of Noonan to serve as consultant to the Monitor,

because of her ties to the County<sup>23</sup> and because she “is universally understood in Westchester to represent the status quo” (Gurian).

As per the settlement agreement, the County’s Implementation Plan was due on December 8, 2009; however, the Monitor granted the County’s October 2009 request for a one-time extension of the deadline to January 30, 2010, as allowed in the settlement agreement. The County produced an Implementation Plan for the January 30, 2010 deadline, which included the following sections: Introduction; Financial Obligations; Legislative Requirements; Policy & Planning Tools; Affirmative Marketing & Outreach; General Outreach & Education Efforts; Analysis of Impediments; Plan for the Development of Required Fair & Affordable Housing Units; Status of Sites Presently Under Active Consideration for the Development of Fair & Affordable Housing; and Long-Range Timetables & Benchmarks (*Implementation Plan January 2010, p.2*). The main body of the plan was 20 pages, with over 25 appendices of supporting documentation.

In early February 2010, the Anti-Discrimination Center (ADC) released a report, which it also sent to the Monitor, entitled *Prescription for Failure: A Preliminary Report on Westchester’s Attempt to Ignore and Evade the Requirements of the Historic Desegregation Order Entered in U.S. ex rel. Anti-Discrimination Center v. Westchester County, a/k/a Westchester’s “Implementation Plan.”* In this report, ADC calls the Implementation Plan document that Westchester released in January “a series of documents that reprise Westchester’s litigation arguments and attempt to avoid the obligations of the Settlement Order” (*Prescription for Failure 6*). ADC further states that a “preliminary review” shows that

“Westchester’s submission: (1) fails to meet the requirements for an Implementation Plan; (2) tells the Monitor that Westchester does not intend to comply with the substantive requirements of the Settlement Order; and (3) tells HUD that Westchester is still not meeting the AFFH obligations that exist separate from and independent of the Settlement Order” (*Prescription for Failure 6*).

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<sup>23</sup> Noonan is Executive Director of Housing Action Council, which receives funding through the County; and Noonan and Deputy Planning Commissioner Norma Drummond both sit on the Policy Board of the Community Housing Resource Center (*Community Housing Resource Center*).

ADC accused Westchester County of submitting what they knew was an incomplete document in hopes of using its deficiencies as a starting point for negotiation.

On February 10, 2010, Court Monitor James E. Johnson sent County Executive Rob Astorino a letter rejecting the January version of the Implementation Plan that had been submitted, stating “there is more work to be done before I can accept the plan, and I am directing the County to take steps to revise it” (*Comments on Implementation Plan 1*). Acknowledging the Anti-Discrimination Center’s *Prescription for Failure* report as the only comments received on the plan, Johnson states that “the primary shortcoming of the current [Implementation Plan (IP)] is a lack of specificity with respect to accountability, timeframes, and processes” (*Comments on Implementation Plan 1*). Here is a list of the key deficiencies Johnson points out:

- **Strategy and Benchmarks:** “The current IP lacks any concrete short-, medium- or long-term strategies for how the County plans to develop the 750 Affordable AFFH Units required by the Stipulation” (2).
- **Resources and Accountability:** “The IP is not transparent as to who within the County government will be responsible for the various tasks that must be addressed to implement the Stipulation’s requirements. For example, it is not clear which person or department is responsible for identifying and assessing sites, meeting and coordinating with developers, or engaging with municipalities regarding local approval processes” (2).
- **Site Identification and Assessment:** “...a revised IP should include general information about sites under active consideration, including the estimated number of potential units, the locational category into which they fall, and the processes being used for identification and assessment, in a manner that will not jeopardize the development of the units” (3).
- **Dealings with Municipalities:** “The IP’s discussion of the model inclusionary zoning ordinance emphasizes the County’s lack of authority with respect to zoning and land use controls” even though the settlement “explicitly states” that the County “shall use all available means as appropriate,” including legal action, “to address a municipality’s failure to act to promote” AFFH (3).
- **Reporting:** “...the IP does not lay out a plan for ongoing reporting to the Monitor about the development of Affordable AFFH Units outside the quarterly reporting schedule” (3).
- **Outreach:** “The current IP is vague as to how the County will carry out marketing, outreach and education activities” (4).

In this letter, the Monitor gave the County a March 12, 2010 deadline to submit a revised plan.

Johnson had a brief meeting with Astorino on February 16, 2010, after which they held a press



conference where Johnson called their meeting “productive” and Astorino said “he welcomed the monitor’s engagement;” Johnson went on to say that he “expected teams from the county and HUD to conduct a ‘series of meetings and discussions’ aimed at revising the implementation plan” before it was resubmitted in March (*Astorino and Federal Housing Monitor Hold Productive Meeting*).

Westchester County resubmitted the implementation plan on March 12, 2010. The County summarized its revisions and additions to the implementation plan:

- “Selection criteria: Provides more details around the actions the county will take to identify sites and developers...
- “Financing: Outlines the ways the county will leverage the \$51.6 million in the settlement to acquire properties, clear and demolish outdated structures, provide infrastructure support to new units and rehabilitate existing units.
- “Development process: Provides a general framework around the steps needed to move projects forward, including reviews of environmental considerations, as well as limitations placed on rehabilitating existing units.
- “Management: Identifies the responsibilities that the staff members of Westchester County will have throughout the implementation process...
- “Marketing: Describes the roles of the county, municipalities, and developers in affirmatively marketing all new fair and affordable housing developments.
- “Enforcement: Acknowledges the remedies set forth in the settlement for non-compliance, including legal action if appropriate” (“Housing Settlement Plan Revised”).

Explains the County’s website regarding the Monitor’s pending response: “The submission, March 12, meets the deadline set by the federal monitor. He can now accept the implementation plan, reject it or ask for further modifications. No date has been set for when he will complete his review” (“Housing Settlement”). The U.S. Department of Housing and Urban Development (HUD) released a statement on March 16, 2010 signaling that the plan was inadequate and would require more work (U.S. Department of Housing and Urban Development 2010), but it is ultimately up to the Monitor to decide if it is sufficient. As of the State of the County speech on April 22, 2010, the Monitor had not released any comments on the plan, but County Executive Rob Astorino stated: “We expect to hear from the monitor shortly on the progress of the implementation plan and will announce the next steps as soon as they become clear” (Astorino 2010).

To facilitate the implementation process, Pace University Law School’s Land Use Law Center is setting up training sessions for mayors and supervisors, other public officials, civic leaders, developers,

advocates and other important stakeholders in the development of affordable AFFH units. They are bringing in experts on a variety of issues and using case studies to educate people about the options for affordable AFFH unit development (Mallach). The first workshop was held on April 16, 2010, and several others will be held throughout the spring of 2010.

*VII. Changes in policy at the U.S. Department of Housing and Urban Development*

In part a response to the Westchester case, and in part because of changes in policy that come with any new administration, in the spring of 2010 the U.S. Department of Housing and Urban Development (HUD) is updating its policies on the enforcement of the Affirmatively Furthering Fair Housing (AFFH) obligation. In the early years of the Fair Housing Act and the Community Development Block Grant (CDBG) program—the 1960s, 70s and 80s—“HUD was not a place where there was much energy to actually enforce these [AFFH] obligations” (Allen). The Clinton Administration was the first to issue public regulations for CDBG, specifying in 1993-1994 “very specific planning requirements” for the AFFH obligation (Allen). HUD published the *Fair Housing Planning Guide* in 1996, which provided a “recipe” for doing the Analysis of Impediments required for federal funds recipients (Allen). Still, this planning guide gave suggestions rather than mandates for meeting the Analysis of Impediments obligation, because there was “great reticence to enforce the obligations or to specify them with any more clarity or mandatory natures” due to the general notion that the “block grant program was supposed to be basically funny money for local politicians to do as they wished” (Allen). Simply put: “there’s been no sustained Fair Housing Enforcement...at any level of government for the 40 years after the Fair Housing Act” (Gurian).

In practice, this weak oversight means that, traditionally, “HUD assumes good faith by recipients with this obligation and with their certification; when a certification is made, HUD generally conducts a ‘completeness’ check to ensure that the certification has been made” but does not look further into the jurisdictions behavior unless there is specific cause to, such as a complaint

(Pratt 6). However, since the 2008 presidential election, “lots of people” coming into HUD and the Department of Justice with the new administration “think that the government generally has taken its eye off the ball civil rights-wise;” the Westchester Fair Housing case “was an opportunity to come in and really sort of get on the right side of history” (Allen).

Beyond the Westchester-specific case, Relman, Dane & Colfax partner Michael Allen said “it appears at this moment that HUD is eager to get...back into the field of enforcement” (Allen).

Consistent with this, HUD Assistant Secretary for Fair Housing and Equal Opportunity John Trasviña wrote an op-ed in Westchester County’s local newspaper on March 1, 2010 stating:

“To ensure all cities and suburbs around the nation can meet their own fair housing obligations, HUD — and the Obama administration as a whole — is committed to providing clearer expectations and guidance and more support to communities than ever before. Toward that end, HUD is in the process of developing a new rule that would bring the enforcement and implementation of the Fair Housing Act up-to-date” (Trasviña).

Trasviña did not indicate in the op-ed when the new rule and guidelines would be released, although ADC Executive Director Craig Gurian had heard that they would come out in the winter or spring of 2010 (Gurian).

#### *VIII. Implications of the Westchester Fair Housing Case in Westchester County and beyond*

The Westchester Fair Housing Case will impact Westchester County as well as jurisdictions across the country. Craig Gurian of ADC explained the significance of the settlement: “The Westchester Case represents the high water mark of Federal leverage. This is not the regulations in general. This is not incentives in general. This is a remedial federal court order. There’s not going to be another circumstance where there is more power and authority” (Gurian).

Despite the significance of the rulings and the strength of the settlement requirements, Gurian emphasized that the importance of this case lies in how it is implemented: “all the...promise will be lost, and not just lost for Westchester, but lost for the rest of the country, if there isn’t serious implementation” (Gurian). Explained Gurian that, despite the policy changes happening at HUD,

“Fundamentally, what happens in Westchester is still going to be the most important piece of business, because Westchester is going to signal one way or another as a practical matter what’s going to be happening in terms of enforcement. So, it’s not as if people paid attention in August and are now saying, ‘Gee, that was quite the lawsuit. We’re changing everything.’ It certainly got jurisdictions to wake up and some jurisdictions may be changing some things already. But, everybody’s going to be looking at how it pans out” (Gurian).

Weak implementation on the part of the County and/or weak enforcement by the monitor, the court or HUD, would amount to a wasted opportunity to use the power and authority of a federal court order to make serious progress in the realm of fair housing and civil rights; Gurian stated that ADC will not “let this opportunity be wasted without putting up a very big and very loud fight through all the means that we can possibly imagine; whether that’s through the Court or through press” (Gurian). ADC has already demonstrated its willingness to fight against weak implementation with its *Prescription for Failure* report from February 2010.

There is a sense on the ground in Westchester that the county is being watched by entities across the country. Rose Noonan, Executive Director of the Housing Action Council and consultant to the Monitor, said that, while it wasn’t apparent at first, she became aware of the fact that “everybody’s watching” Westchester when she was “down in Washington and everybody’s talking about this case” (Noonan). Board of Legislators Chairman Ken Jenkins described the sense on the ground: “If we don’t hit those benchmarks, I think that people are concerned we will be made an example of” (Jenkins). Gurian puts a number on the general sense that people are watching: “It’s been said that every jurisdiction in the country is looking at this Case—eleven to twelve hundred jurisdictions. I think that’s true actually. That’s the promise of the Case and it’s also the peril” (Gurian). Jenkins himself, while aware of the onlookers, interprets the imperative differently: “So as opposed to saying, ‘We got to get it right because people are watching,’ I think it’s more, ‘We can’t get it wrong, because if we get it wrong, the penalties are swift and severe’... But I don’t believe that we’re under any more pressure than trying to do the right thing for people” (Jenkins).

Within Westchester, the impact of proper implementation of the settlement will be both on the units built directly under the agreement as well as the units that are able to be built in the future

because of changes in regulations resulting from the fair housing settlement. Explained Gurian, “just as a matter of planning and market and policy, the bang for the buck that you get, doesn’t come from the units [which number only 750]...The bang for the buck is that these units are the leading edge of confronting zoning barriers that had not previously been confronted” (Gurian). In other words, the 750 units required under the settlement will benefit 750 households, but the real potential for impact here is in the major changes to zoning and other exclusionary tactics that have previously prevented affordable units from being built throughout the county. Gurian added that these changes to the exclusionary regulations, in opening up the real estate and development market, “is going to set private developers—for-profit and not-for-profit—loose” in the development of affordable units (Gurian).

Beyond Westchester, the impact will be felt through three channels. First, and already underway, are changes at the U.S. Department of Housing and Urban Development (HUD). As part of the Westchester lawsuit, “...[ADC] was interested in establishing some greater presence on the part of the federal government to enforce its own regulations to ensure that, as Judge Cote said in her opinion, this is a precondition, not only certifying that you’re going to comply, but actually complying is a precondition to getting this money” (Allen). In other words, ADC was seeking changes in HUD policy so that enforcement happened not only in response to violations—as it did in the Westchester Case—but also on the front end of the funding cycle, where jurisdictions could not receive federal money unless they complied with the obligations (Allen). The policy changes at HUD are still pending, but there is evidence that greater enforcement will be standard throughout the funding process. Allen also mentioned that HUD is “saying that it will make compliance a routine part of its consideration about all of these Housing [and] Community Development programs” such as public housing money, housing and community development programs that are part of the stimulus package, and disaster recovery funds (Allen).

Second, the Westchester Case has a legal impact. The case uses an innovative legal mechanism to pursue civil rights violations, and Allen thinks that there will be similar litigation in the future, “not only in the field of housing, but just across the whole range of the human services programs affecting poor people” (Allen). Also, the judge’s opinions in the case revive a requirement that had not been enforced for many years:

“there are two very strong opinions which the court has published which say, basically, this Affirmatively Furthering Requirement—that had just been laying dormant for 20 years or more as far as HUD was concerned—is real, it’s live, it’s enforceable, there are consequences for not complying with it. I think that by itself...will benefit people beyond Westchester County for many years to come. It’s sort of breathing new life into a doctrine that certainly needed...that reinforcement” (Allen).

Furthermore, Allen anticipates that Judge Cote’s opinions will be influential because she “is so scholarly and both her opinions are just so well reasoned” (Allen).

Finally, the impact of the Westchester Fair Housing Case will be felt on the ground in jurisdictions across the country. The current impact is that advocates and civil rights organizations are using the Westchester Case to “impress upon their jurisdictions” (*NLIHC Advocacy Guide*) the importance of compliance with AFFH obligations, rolling out “grassroots and local pressure to make sure that the planning process is done right and that the appropriate impediments are studied and that there’s actual community conversation on the appropriate actions to be taken” (Allen). Jurisdictions themselves have also been pursuing assistance to “construct Affirmatively Furthering Programs that will keep them on the right side” (Allen). The long-term impact on fair housing outcomes is still to be determined and will rely, to a certain extent, on the implementation question in Westchester that Gurian stressed.

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## **Chapter 5: Barriers to implementation of the fair housing settlement**

*"The settlement for 750 is going to be difficult because the units have to be built in some of the areas that are the most resistant to Affordable Housing." – John Saccardi, Saccardi & Schiff*

*"To me, those are legitimate concerns, but they're not legitimate concerns [enough] to say, 'We're not doing it.'" – Westchester Board of Legislators Chairman Ken Jenkins*

*"I mean, you tell me what the other barriers are. I honestly don't believe that they exist." – Anti-Discrimination Center Executive Director Craig Gurian*

As of May 2010, Westchester County is at the point of implementing the requirements of the settlement. As of the County Executive's State of the County address on April 22, 2010, the Monitor has yet to respond to the revised implementation plan the County submitted on March 12.

Nonetheless, this chapter will look at major barriers to implementation that the County will face when implementing the requirements of the False Claims settlement. In each interview conducted, I asked the interviewee what he or she thought were the biggest challenges or barriers to implementing the False Claims settlement. Several major themes emerged from these conversations, and I have added a few others based on my observations during the research and analysis of this case.

Through this process, I have identified seven major barriers to implementation of the settlement:

- I. Lack of affordable housing
- II. Resistance to appearance of density
- III. NIMBYism
- IV. Political expedience
- V. Commitment to the status quo
- VI. Limits of court-ordered requirements
- VII. Unintended consequences

Chapter 6 will look at ways to overcome these barriers and make recommendations to the County.

*I. Lack of affordable housing*

During the lawsuit, Westchester claimed that the greatest impediment to fair housing was the lack of affordable housing in the county. While this thesis has already established the distinction between fair housing and affordable housing—and that the two should not be conflated when doing an analysis of impediments—It is true that barriers to developing affordable housing constitute one of the multiple impediments to fair housing. This section will describe the challenges the County will face in building the affordable housing that is part of the False Claims settlement.

Land Availability

Concern about the limited land available for the development of affordable housing was one of the challenges I heard most frequently from the interviewees. The specific land challenges vary across the five sub-regions of the county (the Central Region, the Long Island Region; the Hudson River Region; the North County Region; and the Bronx River Valley Region) but they can generally be divided into two categories: 1) limited land due to established zoning; and 2) limited land due to infrastructure constraints. The former tends to be a problem in the south part of the county, whereas the latter is a problem in the northern part. The claim is that it will be difficult to build affordable housing in the 31 eligible communities<sup>24</sup> because of this limited land; Relman, Dane & Colfax partner Michael Allen explained: “...you’ll hear this piece about...[how] there simply aren’t enough parcels available” (Allen). However, Anti-Discrimination Center Executive Director Craig Gurian counters: “...it turns out that there are well over 125,000 acres comprising census blocks where the African-American population is less than 3 percent and the Hispanic population is less than 3 percent. If you can’t build 750 units of housing on 125,000 acres, something is terribly, terribly wrong” (Gurian). This section will explain both types of perceived land limitations in detail.

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<sup>24</sup> The 31 eligible communities are those that meet the population race and ethnicity breakdown requirements of the settlement, as outlined in Chapter 4.

The claim in southern Westchester is that the municipalities are, for the most part, “built out,” meaning that there has already been so much development on the land that there are no opportunities for additional development. A more accurate description of the situation, however, would be to say that these municipalities are, for the most part, built out *according to current zoning* (see Figure 5.1). Allen explained that, as in many suburban communities, the zoning that has been established is only “a political decision... so that they could maintain somewhat more exclusive community” (Allen). The zoning in these towns establishes a certain density, requiring minimum lot sizes and limiting the number of units allowed per acre. Low-density zoning with minimum lot sizes serves to raise the cost of lots and housing units, functioning as an exclusionary technique, while at the same time vastly increasing the amount of land needed for the development of a unit. Using an exaggerated example, Allen explained, if a municipality has 20-acre minimum zoning, then building 50 units would require 1000 acres, so “in that context, [the municipality doesn’t] have any parcels that are available” (Allen). However, if the municipality was to decrease (or eliminate) the minimum lot size requirement or increase the number of units allowed per acre, less land would be required for development and the municipalities would no longer appear “built out.”

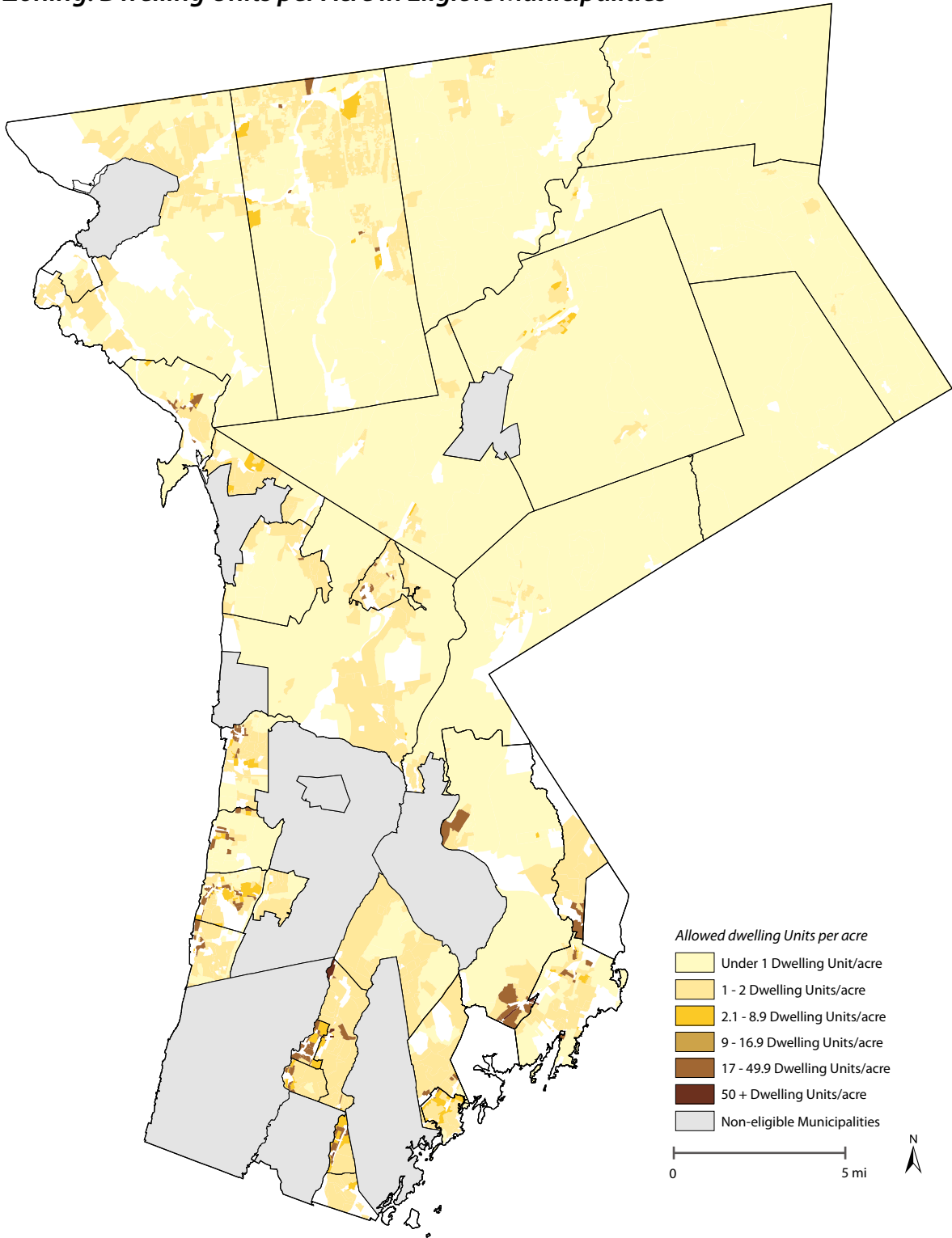
A second issue within the zoning category is a lack of land that is zoned for multifamily housing (see Figure 5.2). The predominant suburban housing typology in Westchester County is the single-family home (as explained in Chapter 3), but multifamily housing (buildings with more than one housing unit) is typically the most efficient and effective way to create affordability.<sup>25</sup> The *Berenson* case (explained in Chapter 4) resulted in a ruling that is meant to eliminate exclusionary zoning in New York State, but multifamily zoning remains limited in many of the 31 eligible communities. Allen said that, even in the municipalities that do have multifamily zoning, they “typically do it in a way that there are two blocks available on the wrong side of the tracks” (Allen). A third issue in the zoning category is the high number of parking spots per unit required by the zoning uses up an “enormous

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<sup>25</sup> Housing unit prices tend to decrease as housing density increases.

**Figure 5.1**

**Zoning: Dwelling Units per Acre in Eligible Municipalities**

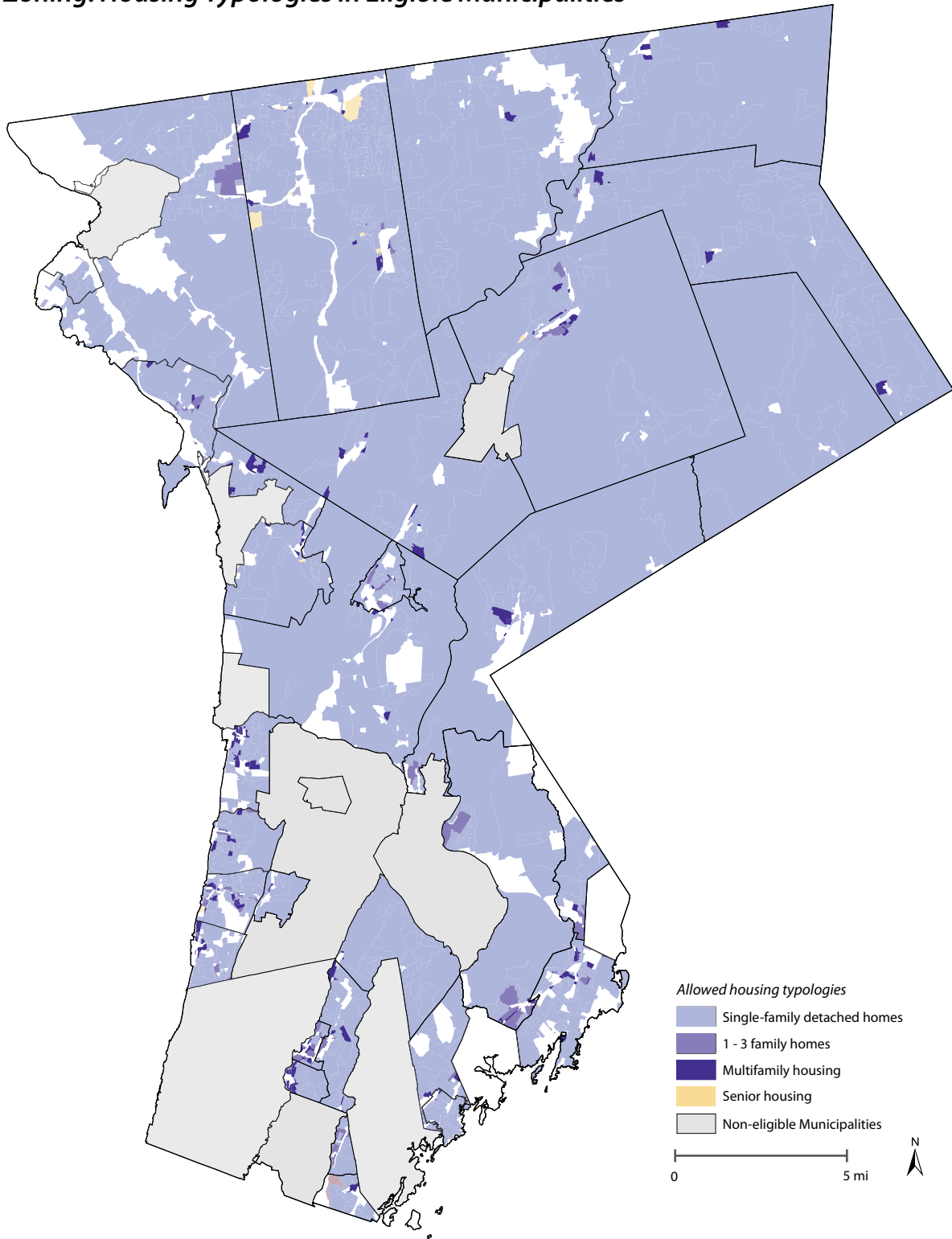


*(Data source: Westchester County Geographic Information Systems)*



**Figure 5.2**

**Zoning: Housing Typologies in Eligible Municipalities**



*(Data source: Westchester County Geographic Information Systems)*

amount of land” (McGrath), increasing the amount of land required for development.

While some places in southern Westchester may be built out with a high level of density, most of the discussion about limited land is predicated on the assumption that the underlying zoning is permanent and unchangeable. Commented Gurian: “Basically, the reason that people talk about barriers is an inability or unwillingness to realize that zoning regulations are not handed down from God” (Gurian). Gurian continued that developers aren’t concerned about a lack of land that would be “physically buildable;” rather, developers “just can’t conceive of a circumstance where they can get hold” of enough land to build on in the context of the current underlying zoning (Gurian). Allen predicted that “when it’s clear that there is money available to develop and when it’s clear that...the county is actually going to require municipalities to build notwithstanding whatever impediment they’ve thrown up, I think that you will see people in the private sector ready to act and you’ll see that this, ‘there isn’t enough parcels’ thing is just really an excuse” (Allen). In short, the land shortage in the southern part of the county is due to policy decisions at the municipal level, which makes it difficult but not impossible to develop affordable housing there; a policy change around zoning may pose political challenges, but ultimately this is not an intractable barrier to implementing the settlement requirements.

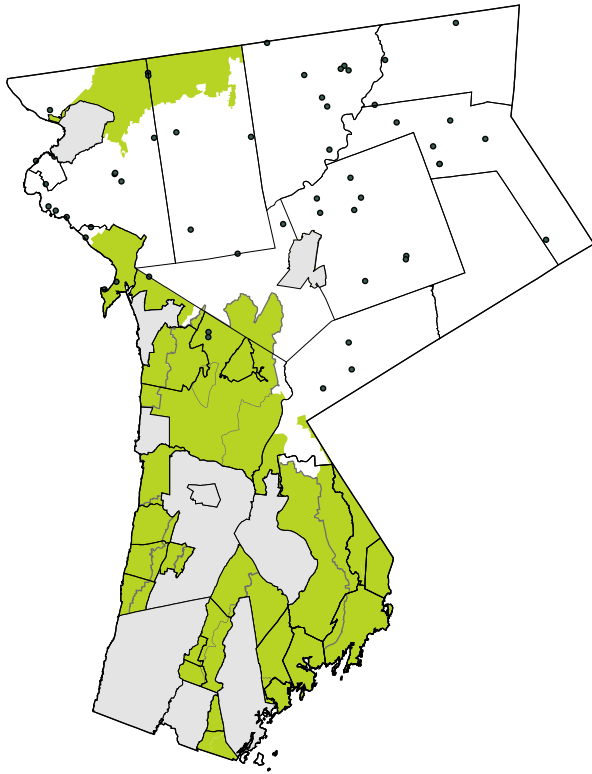
The northern portion of the county faces a different set of land challenges. Unlike the southern portion, Northern Westchester has “a number of communities that still [have] large tracts of land” that are undeveloped (Drummond). The major challenge with these undeveloped areas in the north, however, is that “there’s really not basic infrastructure” in place (Drummond). While some of the infrastructure constraints pose practical problems to development, Allen characterized the typical narrative around these limits to development as exaggerated: “...they will expansively look at wetlands protection and say, ‘There’s simply nothing available here.’ Or, ‘We’re in the watershed that makes it impossible to have any development here at all.’ Or...where there isn’t public water and sewer available, ‘limits on well and septic say that it can’t happen,’...sort of liberally on and on like

that” (Allen). This section will breakdown each infrastructure challenge to understand the core issues around each.

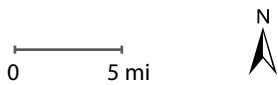
The lack of sewers and/or public water systems came up frequently in interviews as one of the main constraints to developing affordable housing in Northern Westchester. While some municipalities provide these services to part or all of their jurisdictions, Norma Drummond, Deputy Commissioner of the Westchester County Department of Planning, explained that “In many of these communities...you don’t have sewers...you don’t have public water” (Drummond) (see Figures 5.3 and 5.4). In the absence of these services, residents rely on public wells and septic systems. Thomas McGrath, Senior Vice President at the Community Preservation Corporation and Chairman of the Board of the Blue Mountain Housing Development Corporation in Bedford, NY, described the challenges of building affordable housing in the context of public wells and septic systems: septic systems use “an enormous amount of land” and must be distanced away from the water wells; with “...the amount of land that gets used up for septics and the distance keeping away from wells, we just can’t create any kind of density in the northern part of the County” (McGrath). Given the high cost of the land, it is challenging to maintain affordability in the units without utilizing density in the development. Despite this challenge, McGrath said that the Blue Mountain Housing Development Corporation, an affordable housing developer created by the Town of Bedford in 1980, is able to produce affordable housing “in small bites; two units here, three units there; that kind of thing” (McGrath). The successes of the Blue Mountain Housing Development Corporation demonstrate that, while the water and sewer constraints are real, a model does exist for overcoming these challenges.

The next logical question is about why these communities don’t build modern sewer infrastructure to serve the municipalities, independent of the context of affordable housing development. There are two answers to this question. Bedford Town Supervisor Lee Roberts explained that, while Bedford’s “long-term goal is to get sewers,” residents are resistant to sewers because they

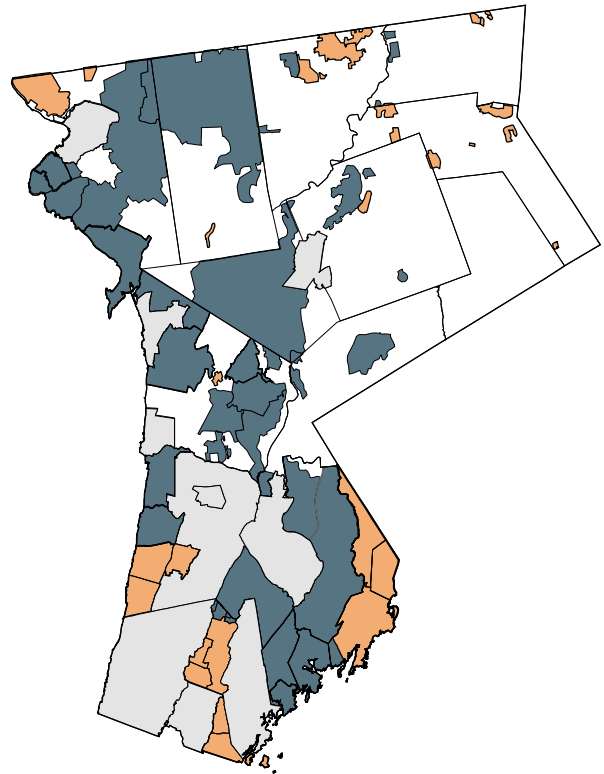
**Figure 5.3: Sewer Systems**



- Municipal Sewer Systems
- Private Sewage Treatment Facilities
- Non-eligible Municipalities



**Figure 5.4: Water Supplies**



- Municipal Water Supply
- Private Water Supply
- Private Individual Wells
- Non-eligible Municipalities

*(Data source: Westchester County Geographic Information Systems)*

fear the additional density that the sewers would support; they are concerned about the densification of their historic downtowns, even though Supervisor Roberts explained that this densification would not happen because the volume of development is limited by a stormwater and wastewater permitting process (State Pollutant Discharge Elimination System, or SPDES) (Roberts). Gurian found humor in this: “I mean what an irony that some of the wealthiest towns in Westchester boast of the fact in 2010 that they don’t have sewers” (Gurian).

The second reason these municipalities aren’t building sewer systems is their location in or proximity to the New York City Watershed, “which controls actually building sewers up there...” (Saccardi). Explained McGrath: high levels of phosphate coming from sewage treatment plants were turning up in the New York City reservoirs located in the middle of Westchester County; so in the 1990s, the City, along with New York State and the Westchester County Health Department, created a new rule that “you couldn’t create any new sewage treatment plants and they also weren’t allowing any increases in the size of the existing sewage treatment plants without really extensive hearings” (McGrath). Prior to this ruling, development on larger pieces of land could have been accommodated by their own new sewage treatment plants and water plant facilities, but “you can’t do that anymore” (McGrath). This constraint means that new developments must rely on septic systems, the challenges of which were previously discussed.

Beyond the watershed and sewer issues, there are other environmental constraints having to do with steep slopes, rocks, drainage and wetlands, which themselves make portions of parcels unusable or which require setbacks that limit the amount of the parcel that can be used; these constraints contribute to the challenges of creating density and affordability in the northern part of the county (McGrath). As Allen pointed out, however, the Westchester Housing Opportunity Commission took into account many of the “environmental and wetland problems” when creating its allocation plan and “still assigned hundreds of units” to these areas (Allen).

Interviewees also talked about the limited transportation infrastructure in the northern part of the county. While the Metro-North Hudson and Harlem Commuter Rail Lines serve northern Westchester, this area lacks the more robust bus system present in the southern part of the county. Drummond said that the County recognizes public transportation as one of the infrastructure constraints up north; she said one would not “put rental property there if you’re miles and miles and miles away from any kind of public transportation because that household is not going to be able to afford a car” (Drummond). Drummond mentioned transit-oriented development as one of the planning strategies the County is pursuing (Drummond). Ann Seligsohn of Westchester Residential Opportunities, Inc., however, doesn’t take the existing transportation infrastructure as a static barrier: “If we have to put in more bus lines, so be it” (Seligsohn). Gurian challenges the concept that these households—especially those at 80% AMI purchasing the affordable homeownership units—aren’t going to be able to afford cars, given that the Area Median Income in Westchester County is high at \$105,300 for a family of four (Gurian).

Northern Westchester also faces the multifamily and low-density zoning challenges previously described for southern Westchester. Allen told, anecdotally, of developers already having difficulty developing modest town homes in northern Westchester, indicating the difficulty they will have in getting approvals for “something that is really multifamily” (Allen). Supervisor Roberts acknowledged that, while Bedford has been proactive in affordable housing development, one of their big development challenges—that 75% of the town has four-acre zoning—is self-imposed (Roberts).

Across the entire county, both north and south, another rebuttal to the ‘land availability as a barrier to building affordable housing’ argument is that the County’s development of affordable housing is not solely contingent upon finding parcels of land to develop. As Drummond explained, “we’re not looking at just land. We’re looking at redevelopment. We’re looking at air rights. We’re looking at all sorts of different opportunities,” including adaptive reuse and existing property acquisition and preservation (Drummond). So while many of the zoning and infrastructure constraints

described cause practical challenges for development, the overall question of land availability does not impose insurmountable barriers to developing affordable housing.

### High development costs

Concerns about the cost of developing affordable housing in Westchester were frequently cited in the interviews as a barrier to building the units. This includes the actual costs of development, plus the time costs of the process plus the costs associated with risk.

Land values in Westchester are “hugely expensive and that’s always been a problem” (McGrath). High land costs lead to higher total development costs, which make affordability more difficult. This is especially true in an environment like Westchester that has predominantly low-density zoning (as described in the Land Availability section above); higher allowable densities would reduce the per unit land costs, facilitating affordability. However, as described above, many of these communities are resistant to higher density zoning; without changes to the zoning regulations, the per unit cost of land remains high.

Westchester County has a New Homes Land Acquisition Fund (NHLA), through which the County will buy property at market rate or at an appraised price and then sell it to an affordable housing developer for \$1. This program can be tremendously helpful for developers, and it is one of the ways the County invests substantial sums of its own money into affordable housing development. Between 2000 and 2009, the County put \$37,370,000 into its Capital Budget for this program (Westchester County Budget Office 2010: D2-4). On a per unit basis, the summary of historical funding sources included in the County’s settlement implementation plan shows that the County typically invests between \$12,000 and \$67,000 per unit through the NHLA subsidy (Westchester County. *Appendix E-2(ii): 1-2*).

There are limits, however, to the amount of money available in this fund; and there are limits to how competitive the recipient developers can be in bidding for available land. Thomas McGrath

recounted a story about a property the Blue Mountain Housing Corporation identified for affordable housing development that, during the process of the County appraisal of the land value, was “bought out from under us” by a market rate developer (McGrath). He also explained how it is easy for the affordable housing developers to be outbid by others who have fewer cost constraints (McGrath).

Scarsdale Village Manager Alfred Gatta questioned the cost-efficiency of using public subsidy to purchase expensive land for the purpose of affordable housing when less expensive land is available in other places in the county: “If your objective is to produce the housing and not necessarily to produce the housing at the lowest cost...then I say, it is worth it to spend public funds to buy an acre of land for a million and a half dollars to build whatever number of units. That same acre of land in Mount Vernon is...going to cost \$200,000. So you see the economics” (Gatta).

Many of the time-costs associated with building affordable housing are common across all types of development in Westchester, although some are extended due to the particular challenges of getting approval for affordable housing. New York State’s required environmental study—the State Environmental Quality Review Act (SEQRA)—for example, is time and cost intensive. Each project goes before the municipality’s planning board, and the planning board can suggest what studies need to be done for that particular project (generally traffic studies, impact on schools, drainage); once these issues are studied, the reports are reviewed by various State and County agencies, which may come back to the developer with questions (McGrath). McGrath explained that it is considered “lightning fast” to get through the SEQRA process in one year; usually, if the community is in favor of the development, “you’re probably looking at two to three years and there are tons of examples that developers had taken 10 years or longer” (McGrath). Some municipalities have tried to expedite affordable housing developments, but the state-level SEQRA process makes it difficult to do so (McGrath). Drummond added that the process on the municipal level can be extended because of turnover of elected officials that need to be educated about affordable housing; she also noted that getting support from the elected officials does not mean gaining support from the planning boards:



“getting approval out of any board is always difficult. So that’s probably more of where we’ll expect the difficulties is how long will it take to actually get the approvals in some communities” (Drummond).

I expected to hear in my interviews more concern about the financial risks that developers face when doing an affordable housing development. I expected to hear that developers would be hesitant to get involved with an affordable housing development, especially one coming out of the False Claims settlement, because of the controversy surrounding the projects that could trigger costly litigation and/or cause expensive time delays. These concerns did not really materialize, however, in the conversations that I had. McGrath explained that all development—affordable and market rate—is controversial in Westchester because “there aren’t too many municipalities in the County that are always looking to add new development” (McGrath). He said that “developers traditionally have stepped up in the past and overcome those issues,” and that, with the False Claims settlement, “if anything [developers will] view that the County’s greater desire to create this housing will help them to move a process along” (McGrath). McGrath did acknowledge, however, that “it is tiresome from a developer’s standpoint” to do work “in a community that is not interested” where the developer will end up “sort of banging their heads against the wall” trying to get a project through (McGrath). Allen thought that it might take some “courting” and “warming up the water” to get multifamily housing developers interested in working in an environment which had previously been unwelcoming (Allen).

#### Inconsistent regulations and processes across Westchester County municipalities

Affordable housing developers working in Westchester County—like in most metropolitan areas—cannot create a development model for building affordable units in the region because the development regulations and review processes vary from municipality to municipality. This, of course, is true for all developments, but the affordable developments in particular suffer by not being able to take advantage of economies of scale in planning for these developments. The specific requirements

in each municipality may allow for positives such as contextual development, but the inconsistencies among the municipalities present affordable housing developers with a cost-burden that gets passed through to the total development costs that need to be subsidized.

### Financing

The key piece of any affordable housing development is the financing—how the deal is put together with a combination of equity and debt. Through multiple sources, which may include some combination of development cost subsidies, tax credit subsidies, debt service subsidies, operating subsidies, rental assistance subsidies, and mortgages, developers are able to achieve various levels of affordability for owner-occupied and rental developments. Subsidies can come from the local, county, state or federal level, and they can be provided by the public or private sector. There are two types of challenges I heard in the interviews regarding financing: 1) the ever-present challenge of filling the gap between what the household can pay and what the development costs; and 2) the particular challenges of developing in the weak housing market of 2010.

The challenges of filling the gap on an affordable housing development vary depending on whether the project is owner-occupied or rental, whether it is mixed-income or affordable-only, and the specific subsidy mechanisms that are being used. This thesis will not go into detail on the challenges of each situation and mechanism, because ample literature exists on this topic (see Schwartz 2006). The particular challenge that Westchester faces in financing the gap is the high costs of development described above; in particular, the high land costs coupled with the existing low-density zoning means that affordable housing developments—within the current zoning framework—require a lot of expensive land. McGrath explained that “You really have to use subsidy and every vehicle” available to offset the costs (McGrath). While Gurian acknowledged that affordable housing financing is not “the easiest thing to put together,” he thinks that it could be made easier by

increasing allowable density to decrease the amount of land needed per unit, therefore decreasing overall costs and reducing the amount of subsidy needed (Gurian).

My questions about finance in a weak housing market received a mix of responses. Some saw the state of the housing market and economy as a challenge, while others saw it as an opportunity. On the challenge side, three main issues were identified. First, the tight state of the credit market has made it difficult to access credit across the board for all developers. Second, a weak market-rate housing market makes it more difficult to leverage market-rate development for the production of affordable units; for example, the Town of Bedford has had no market-rate subdivisions in the four years since it enacted a subdivision ordinance that mandates a certain number of affordable housing units be built per development on-site, off-site, or through a fund (Roberts). Third, a weak market for Low-Income Housing Tax Credits has limited their value and therefore limited their utilization as a subsidy mechanism.

On the flip side, Deputy Commissioner of Planning Drummond explained how “the economy as a whole right now has opened up more opportunities than we might have seen even just two or three years ago” (Drummond). The County is able to acquire foreclosed properties and turn them into units with maximum resale limits, creating permanent affordability. Drummond and Westchester Board of Legislators Chairman Ken Jenkins both mentioned the opportunity presented by the weak real estate market, which has left many market-rate developers without financing and with sites they cannot develop or sell; these developers have approached the County about using these sites for affordable housing (Drummond; Jenkins). So in the weakened housing market in Westchester, “affordable housing in some cases the only housing that is being built” (Drummond). It appears that the weakened state of the economy and the housing market has closed some opportunities while opening up others.

### Administrative challenges for the County

The Westchester County government may face additional administrative challenges as a result of the housing settlement. Drummond explained that the affordable housing developers the County has historically worked with have a range of capacity in terms of developing the housing and developing it well. There a number of experienced affordable housing developers doing work in Westchester that have capacity to take on the affordable AFFH units. However, some other developers have always been “a nightmare to deal with” because of their lack of capacity; furthermore, Drummond said she anticipates that, with the housing settlement, even more “developers who don’t necessarily have the experience” will come forward with sites they own that they want to develop themselves (Drummond). She said that the County also has to be careful about land speculation, where owners inflate the values of property because they know that the County is looking to build: “we have to be very careful...we don’t want to be creating scarcity of land because now...folks know we need it” (Drummond). Lastly, Drummond said she expects that the County will be “dealing with a lot more smaller developments” because of the infrastructure constraints and density limitations in the northern part of the county previously described; Drummond said that this situation will be “more staff intensive” for the county, because the smaller developments “take the same amount of time [as the larger development] on our part to be able to get them done” (Drummond). In short, the per-unit requirement of County staff time is higher in smaller developments than it is in larger developments, and it is likely that the County will be dealing with a greater number of smaller developments as a result of the settlement.

#### *II. Resistance to appearance of density*

Many of the barriers described in this chapter relate to density in one way or another, as the financing and development of affordable housing in these communities will likely be achieved through some degree of change in density; this section will look specifically at resistance to the

physical design aspects of density. The impact of density is primarily determined by how it is designed; yet the abstract concept of increased density is perceived as a threat in many suburban communities. According to Julie Campoli, density can be achieved through various combinations of three elements: the size of the house or the unit, the amount of the parcel covered by the building versus by open space, and the building type (Campoli 2007). The specific combination of these factors—in other words, the design of the place—determines the visual qualities of the neighborhood and community. Density is “not a very expressive term” in “describing the quality of a neighborhood,” as it “doesn’t reveal how the neighborhood appears or how it feels. A dense neighborhood could be crowded and unpalatable, or it could be lovely. How we perceive density has everything to do with how it is designed, not the actual ratio of units to acre” (Campoli 2007: 36). Nonetheless, people resist the concept of density in the suburbs.

The predominant housing type in the eligible Westchester municipalities is the single-family home: 45.6% of housing units in the county are in 1-unit detached buildings (*American FactFinder - Westchester County*). This is higher than the share of 1-unit detached home in New York State (41.8%), and lower than the share nationwide (61.7%) (*American FactFinder – New York and United States*). Broadly speaking, Westchester’s residential fabric is consistent with housing preferences across the country: “Surveys of Americans are cited to indicate that 70 to 80 percent do in fact express a strong preference for owning a single-family home. Other surveys show that most Americans, wherever they now live, prefer living in small towns, rural areas, and suburbs to living in larger central cities” (Feagin 1990: 214-215). That people actively choose to live in low-density increases their resistance to a change in that density. When opposing density for its physical design aspects, people are responding to two elements: the aesthetics of density and the meaning of density; the first has to do with maintenance of the visual character and identity of a community and the second with the maintenance of its prestige.

Many suburbs see density as incompatible with the aesthetics of their communities. There is concern that multifamily housing typologies and building materials are undesirable and visually inconsistent among the single-family fabric, with architecture that would in some way fundamentally damage or change the character of the community. There is also concern about how the massing of multifamily buildings would alter the suburban or semi-rural feel of the place. Explained John Saccardi of planning firm Saccardi & Schiff, “You know people tend to be afraid of change and if it’s a single family community and it’s a proposed town house development, whether it’s a luxury town house development or an affordable project, you know, you got to convince people” (Saccardi). They assume that these typologies and building materials would stick out amongst the lower density landscape. When people hear ‘affordable housing,’ they often imagine old brick tower-in-the-park public housing structures, which further exaggerates these concerns.

Following the concern about the impact of density on a community’s physical aesthetic character is the concern about its meaning—how changes to that aesthetic character would alter the reputation and stature of the community. Density is loaded with meaning around exclusivity and prestige; “...acceptable densities appear to have more to do with socially acceptable norms than with environmental or planning criteria” (Mallach 1984: 60). Residents fear that the image of their communities will be eroded if they are forced to take on higher densities.

It is important to understand, however, that density itself is not a meaningful descriptor, because the design of that density will determine its true impact (Campoli 2007). Westchester County has, historically, been quite successful in building multifamily affordable developments that are consistent with the community. Of the County’s quality of design in affordable housing, Saccardi said, “Oh, it’s gotten to be very good...[the County’s website shows] examples of town house projects and modest density projects that are affordable and look very good and really blend into the community nicely” (Saccardi). Density doesn’t have to be a barrier to implementation, as it can be designed to be compatible with the rest of the community; however, the necessary increases in density will remain a

barrier to implementation until the County can explain the design possibilities to the community members.

### III. *NIMBYism*

In the winter of 2010, the Westchester local news channel News 12 ran an informal, non-scientific poll on its website asking: “How long do you think it will take Westchester County to comply with the federal housing order?” (*Question of the Day*). A total of 289 votes were tallied:

- 9% of votes: 1-7 years (27 votes total)
- 40% of votes: More than 7 years (117 votes total)
- 50% of votes: Fight it instead (145 votes total)

That “Fight it instead” was even an option in the poll demonstrates the widespread assumptions about the existence one of the most significant barriers to implementation: public opposition. *Westchester Magazine* published a piece in its April 2010 edition entitled “Not in My Backyard! Affordable Housing—Yes or No?” that also gets at this issue. The magazine “polled nearly 50 county residents” at the train station in White Plains and outside of a Whole Foods in White Plains to find out “about their thoughts on the county’s controversial housing desegregation plans” (Schork 2010). Three of the 11 questions and answers published in the article are worth repeating here:

*“Are you in favor of having affordable housing built in your neighborhood as part of the country’s [sic] desegregation plan?”*

- Yes (47.9%)
- **No (52.1%)”**

*“I don’t want it because*

- **My house values would go down (40%)**
- If you can’t afford to live here, you shouldn’t (32%)
- It would change the look of Westchester (20%)
- I don’t think it would solve the problem of segregation (8%)”

*“If affordable housing was built in your neighborhood, you would:*

- **Tolerate it (52.1%)**
- Join the welcome committee (35.4%)
- Move out (12.5%)” (Schork 2010).

While neither the News 12 nor the *Westchester Magazine* polls employ a methodology that achieves a representative sample and neither uses a sample size nearly large enough to produce statistically significant results, these polls do provide relevant anecdotal evidence.

Negative public opinion (or NIMBYism)<sup>26</sup> is an obstacle in “in almost every [affordable housing] project” in Westchester or outside of it (Saccardi). Even when “municipalities...are interested in helping you to create the housing and recognize the need for housing...it doesn’t necessarily mean that residents are supportive” (McGrath). Residents can delay or stop affordable housing projects through pressure on elected officials, outcry in news publications, lawsuits against developers and other expressions of opposition. Warned Alan Mallach,<sup>27</sup> consultant and advisor to HUD and the U.S. Department of Justice (DOJ) during the settlement process, of the power of resident opposition:

“don’t underestimate the nature of organizational infrastructure in suburban communities...[E]very reasonably settled homeowner-oriented community has a powerful latent infrastructure...most easily mobilized against things than for things...at a level and at an effectiveness that makes all but a handful of urban community organizations look like slackers” (Mallach).

Even if the affordable housing can be built, continued public opposition can pose a threat to tenants that eventually move into the housing, who can become specific targets for the public anger. Not all public opinion is against affordable housing, and—as demonstrated in the Westchester Magazine poll—some people who are against the idea would tolerate the affordable housing if it were to be built; however, those in opposition do tend to be the most vocal in expressing their opinions. This section will describe and analyze the most common reasons cited in opposition to affordable housing development.

Relman, Dane & Colfax law partner Michael Allen said told me “there are basically four or five reasons that are always recited in terms of why you can’t get Affordable Housing built, and that most of them fall into the category of ‘urban myth’” (Allen). Through interviews with housing experts and with parties involved in the case and through anonymous public comments (left the Anti-Discrimination Center’s website, on the not-for-profit advocacy group Fair Housing For All’s website, and on *New York Times* and *Westchester Journal News* articles about the case), I collected and categorized 11 typical reasons given by residents in opposition to the case. As Allen said, many of these concerns are

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<sup>26</sup> NIMBY: Not in my backyard

<sup>27</sup> Mr. Mallach’s comments throughout this document are his personal opinions and not those of HUD or DOJ.



influenced by “urban myth” (Allen), most have a contributing element of misinformation, and some are fed by straight up racism and/or classism; however, some of them are legitimate and deserve attention. The identification and analysis below delineates where each type of comment fits on this scale.

### 1. Opposition to all types of development

The most basic reason that some people object to affordable housing development is that they oppose any type of development from happening in their community. Thomas McGrath, Senior Vice President at the Community Preservation Corporation and Chairman of the Board of the Blue Mountain Housing Development Corporation in Bedford, NY, explained: “Nobody wants development really in their area. You know what I mean. Nobody wants to add to traffic, nobody wants to add the schools, etc., etc., etc., and so the larger opposition is for just the development itself” (McGrath). Ann Seligsohn of Westchester Residential Opportunities, Inc., told me that “...people object to anything that’s not just the way it was” (Seligsohn). Scarsdale Village Manager Alfred Gatta echoed this, citing an example from a meeting to update the plan for Scarsdale’s downtown, which included the redevelopment of a few blocks: “Now even the fact that [the update] talks about [redevelopment of a few blocks] has got people upset, because the people do not want anything developed. They want to keep it the way it is...they’re fearful that if you allow something to change, there’ll be more changes” (Gatta). This resistance to development can easily be projected onto affordable housing proposals.

### 2. Concerns about property taxes

Another concern is about whether residents of affordable housing will pay their fair share of property taxes, and whether what they pay in taxes will cover the addition town services necessary to cover the addition of population. Two anonymous quotes from the Westchester Journal News online edition (LoHud.com) get at this concern:

“Now with the influx of [non] contributing people who will not pay property taxes the burden of home owners is about to increase even more. Now these towns will need more police/fire/ems workers. You think the freeloaders will pay? Of course not” (Anonymous comment on LoHud (Westchester Journal News) article, via *Prescription for Failure* 2010: 54).

“Is this just rental property or does it include mortgage-based housing as well? If it's the latter, I'm wondering how these people will be able to afford their taxes. Oh wait the rest of us will probably have to pay for that too” (Anonymous comment on LoHud (Westchester Journal News) article, via *Prescription for Failure* 2010: 56).

These comments demonstrate concern about affordable housing residents paying their fair share of tax burden, but their premises are misinformed in two ways.

First, affordable housing residents—both renters and owners—do pay property taxes (owners directly and renters through the cost of their rent). Real estate tax exemptions can be one way for government to give subsidy to affordable housing generally, but there are also examples of this type of exemption being given to market rate units<sup>28</sup> as an incentive for development of housing in general. In other words, property tax abatement isn't necessarily part of the Westchester subsidy package on an affordable project, and it is possible for property tax abatement to be granted to a market rate development. Westchester Board of Legislators Chairman Ken Jenkins explained:

“No, it's not someone is going to pay less tax money. They're going to pay the tax rate as assigned, whatever that is. And someone's like, 'Well, it's less than someone else.' That's because the property is worth less. And that's how assessment works...Whatever it is assigned, they're paying, 100 percent of” (Jenkins).

Jenkins thinks that it is legitimate to be concerned about the property tax question, “because people need to understand that someone is paying their fair share” (Jenkins).

Second, affordable housing residents can afford to pay for the property taxes. The taxes are built into the total cost of the unit when the developer is figuring out the level of subsidy needed to make the development viable and affordable.

### 3. Concerns about negative impacts on schools

A related concern is about the impact of affordable housing on the provision of town services, specifically schools. The question is about whether the suburban school districts can handle the

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<sup>28</sup> See New York City's 421-a Tax Incentive Program ([http://www.nyc.gov/html/dof/html/property/property\\_tax\\_reduc\\_421\\_a.shtml](http://www.nyc.gov/html/dof/html/property/property_tax_reduc_421_a.shtml))

additional students that will be added with the family affordable housing—and whether the additional students will impact the quality of education provided by these schools.

Jenkins said that the impact of this affordable housing settlement on the school systems wasn't a valid question because the number of additional students would be so small; in response to the concern "Well, our school district will be decimated," Jenkins replied: "out of 750 units, out of the 31 communities...you're getting 20 people a piece or something like that? Your school district is going to be decimated by the 20 people that come in? You're not trying to suggest that are you?" (Jenkins). Gatta agreed that the impact on the school systems will be "minor, because of the small numbers" of units involved in the case (Gatta). Where this small number of students may have a larger impact is in the districts and schools that mandate a maximum class size, where even one additional student might trigger the need for an entire additional classroom.

But both men said that, even if the impact were to be large, this should not be a reason to oppose affordable housing. Jenkins said that the "Impacts [of affordable housing] on School Districts is a ridiculous question" unless you are also concerned about large families with lots of children moving into market rate units, which he said that no one is checking. Gatta stated that,

"if there [are] large numbers [of affordable units], it would have an impact on schools. So what does that mean? That means the community has an obligation to educate every child and we'd have to do that... Now some people would see that as a burden and some people would see that as, 'You know, this is a great country and this is a great community. And let's provide people an opportunity'" (Gatta).

Gatta continued to say that he doesn't think that the quality of education would go down with the addition of the affordable units.

#### 4. Fears of decreases in property values

One of the most common reasons people oppose affordable housing is a fear of a reduction in their own property values. In the *Westchester Magazine* poll, in response to the prompt "I don't want [affordable housing] because," 40% answered "My house values would go down" (Schork 2010). This also was a common theme among the anonymous online comments responding to articles on the

case. One such commenter even threatened that his or her children would taunt the children living in affordable housing for their supposed impact on property values:

“I do hope you realize that when parents are angry, their children will learn from their anger and take it out on other people- most likely those kids coming into the school district who shouldn't be there and who are ruining the neighborhood by causing property values to decrease” (Anonymous comment sent to ADC via website, via *Prescription for Failure* 2010: 49-50).

These people fear losing all or part of the investment they made in their homes and their property.

Jim McCarthy, Chair of the Board of Directors of the National Fair Housing Alliance, commented: “you can never underestimate the extent to which money will cause human beings to act in odd ways”

(McCarthy). Interestingly, homeowners might also get angry if there was a positive impact on property values (i.e., if the affordable housing were to increase neighboring properties' values), because this would trigger higher annual property taxes.

There has been significant research on the question of how affordable housing impacts neighboring property values, and, according to the *Field Guide to Effects of Low-Income Housing on Property Values* from the National Association of Realtors, “Most studies indicate that affordable housing has no long term negative impact on surrounding home values” (*Field Guide*). In a review of existing research on the matter, George Galster finds that

“assisted housing of various types had positive or insignificant effects on residential property values nearby in higher value, less vulnerable neighborhoods, unless it exceeded thresholds of spatial concentration or facility scale; and evinced more modest prospects for positive property value impacts in lower value, more vulnerable neighborhoods, and strength of frequently negative impacts was directly related to the concentration of sites and scale of the facilities” (Galster 2002: 4).

In other words, in “higher value, less vulnerable neighborhoods” such as the 31 eligible municipalities in Westchester County, low concentrations of affordable housing, such as that proposed by the housing settlement, have a positive or insignificant impact on the neighboring residential property values. The Center for Urban Land Economics Research looks at several Wisconsin Counties' experience with Low Income Housing Tax Credit affordable housing—which is also a common subsidy vehicle for building affordable housing in Westchester—and concludes that: “our results for Wisconsin are

generally consistent with results in other studies: we have not been able to find evidence that Section 42 [Low Income Housing Tax Credit] developments cause property values to deteriorate” (Green 2002: 4). Furthermore, the Center for Urban Land Economics Research concludes: “In our view, the key policy implication of our results is that Section 42 [Low Income Housing Tax Credit] developments are best placed in relatively affluent communities, where there is no evidence that that developments cause property values to deteriorate. This phenomenon is consistent with findings from past literature” (Green 2002: 4).

These studies indicate that there is little or no legitimate concern about negative impacts of low concentrations of affordable housing on property values in Westchester municipalities.

#### 5. Fears of increases in crime

People are afraid that affordable housing (which they often conflate with assumptions about public housing) will increase crime in Westchester:

“The video about Westchester County, NY made my blood boil. Talk about discrimination [*sic*]. It's not fair to force these hard working people who built a beautiful place to live to be required to be exposed to rape, murder, stealing, and car jacking, Where are these peoples rights?????? History has proved that public housing creates crime. After they build these 51.6 million [*sic*] dollar housing units the crime rate will be rapent [*sic*]” (Anonymous comment sent to Fair Housing for All, via *Prescription for Failure* 2010: 50).

Anthony Downs writes that, because many people in the suburbs “associate high crime and vandalism rates with low-income households, they are opposed to opening the suburbs to such households.

Many whites associate high crime rates with blacks; so they are doubly fearful of having low- and moderate-income black households as neighbors” (Downs 1973: 73). However, Downs says that “it is both statistically and morally wrong to conclude that all or even a majority of low- and moderate-income households—white or black—would create undesirable behavior patterns if they moved into a middle-income area” (Downs 1973: 74).

## 6. Racism and classism

Racism and classism are often tied into concerns to affordable housing development; and because the Westchester case is explicitly tied to desegregation, there is clearly a racial element to some of the opposition. Because of the ability to leave anonymous comments online, I have been able to find numerous instances of overt racism in opposition to the case; it is actually shocking to read the things that people will write when they don't have to attach their names to it.

The classist comments reflect a concern that people of low- and moderate-incomes will, by nature of their socioeconomic status, be a burden on the wealthier towns; furthermore, they note that the residents of these wealthier towns don't deserve to take on this burden, by nature of the fact that they have been able to become wealthy. This quote is representative of that sentiment:

"If people can afford to live in an upscale community because of either success or being born wealthy, I don't think it is fair that they are then by law saddled with people who will probably be more of a community problem than not" (Anonymous comment on LoHud (Westchester Journal News) article, via *Prescription for Failure* 2010: 57).

These comments are loaded with assumptions about people of different socioeconomic statuses, and they imply a difference in what people deserve in their lives based on their level of wealth.

The racist comments are far more explicit in their assumptions and stereotypes about persons of color; they defend segregation, demean non-white culture, and degrade the work ethic of minority groups. While these comments are clearly not a representative sample of Westchester residents' opinions about race, it does demonstrate that these sentiments are out there and underlie certain people's motivations in opposing affordable housing. I have pulled out several comments characteristic of the bunch:

"You folks are complete idiots, and must really love destroying productive white communities... Whites should, and can, segregate themselves AS MUCH AS THEY WANT TO DO SO" (Anonymous comment sent to ADC via website, via *Prescription for Failure* 2010: 49).

"No white family should be compelled to live amongst people who do not behave in a civilized manner. That is a fact. Forget politically correct notions. Voluntary segregation is a form of freedom" (Anonymous comment on New York Times article, via *Prescription for Failure* 2010: 53).

"Let's be honest for a second. Most Caucasians [*sic*], Asians, Hispanics and others simply don't want to live anywhere near blacks. This is not only because people don't want to live in the midst of poverty but also because black culture in the U.S. is, by and large, vulgar and repulsive to people who have an education and any decent level of taste" (Anonymous comment on New York Times article, via *Prescription for Failure* 2010: 51).

"This is INSANE. Minorities do not live in the more affluent white areas because they are not as wealthy, because and ONLY because they simply do not work as hard" (Anonymous comment on LoHud (Westchester Journal News) article, via *Prescription for Failure* 2010: 58).

These stereotypes are, at best, unproductive; at worst, they demonstrate a deep hatred and serious racial prejudice that act not only as a barrier to fair and affordable housing development but also as a barrier to any civil rights progress in Westchester or the country as a whole. Craig Gurian, Executive Director of the Anti-Discrimination Center, compared the situation in Westchester to the historic racism 'down South', saying of Westchester: "There's a big problem up South" (Gurian). Dennis Hanratty, Executive Director of Mount Vernon United Tenants, explained the larger implications of the racism within the county: "you feel... Westchester is a relatively progressive area; but I think [the fair housing case] has really thrown a light on how deep-seated racism is in our country" (Hanratty). Hanratty also talked about the failure of whites to admit a skin color privilege and the ignorance behind the argument that whites have been more successful than minorities because they simply have worked harder (Hanratty).

Another set of comments about race and ethnicity made an appeal to consider the types of diversity that do exist in Westchester municipalities beyond the white/black/Latino categorizations, for example, religious and ethnic diversity and immigrant diversity:

"I grew up in Westchester in one of those 'white' communities that everyone is decrying. And I have to tell you, it wasn't so white. It was pretty much all Asian, Catholic and Jewish. I literally [*sic*] did not know any White Anglo-Saxon Protestants until I moved away for university. And many many families were first-generation immigrants... We had plenty of Chinese, Japanese, Korean, Indian, Pakistani and immigrant kids in the school systems" (Anonymous comment on New York Times article, via *Prescription for Failure* 2010: 51).

Another commenter asked:

"[A]re you planning on importing Protestants into Scarsdale too?" (Anonymous comment sent to ADC via website, via *Prescription for Failure* 2010: 50).

While this type of diversity should not preclude these communities from promoting fair housing for African American and Latino populations, this point is well taken.

7. "If you can't afford to live here, you shouldn't"

32% of respondents in the *Westchester Magazine* poll said that they didn't want affordable housing in their neighborhoods because "If you can't afford to live here, you shouldn't" (Schork 2010).

This was a frequent comment among the anonymous quotes as well. This category of quotes came in two varieties. First, statements that people must work their way up and earn their way in to living in Westchester without government assistance—the American dream through hard work and not a hand up:

"Total social engineering. People work hard and fly right so that they can afford to live in communities that are safe, neat, orderly, quiet. Then the government forces them to accept people who have not earned their way in" (Anonymous comment on New York Times article, via *Prescription for Failure* 2010: 53).

"I would love to know what gives people the right to live in a neighborhood that they can't afford. Im white and I don't make nearly enough to live in these neighborhoods. I live where I can afford" (Comments on LoHud (Westchester Journal News) article, via *Prescription for Failure* 2010: 56).

"My family worked our way up through the American system by real means- not by free government give outs or programs where they handed us housing that we couldn't afford. I am fine with marketing Scarsdale to blacks and Hispanics who can afford it, but forcing us to pay our own tax dollars to allow people who can't afford our neighborhood to live there - whether white, black, Jewish or Hispanic is assinine [sic]" (Anonymous comment sent to ADC via website, via *Prescription for Failure* 2010: 50).

The second variety stated that racial segregation was rooted in income segregation, and that income segregation was legitimate because people shouldn't be able to live where they can't afford:

"It's not a matter of race, it's a matter of who can afford what. You live where you can afford to, end of story...You want to live in Westchester then you work to be able to afford that luxury. Otherwise, live somewhere else" (Comments on LoHud (Westchester Journal News) article, via *Prescription for Failure* 2010: 56).

"There is no segregation going on anymore. Some times you just can't afford something. Some times you have save and sacrafice [sic] and wait until you can afford something. There are families that don't take vacations, don't have the latest cell phone, subscribe to basic cable and don't eat out ever, save every penny that they can - all so they can save for a deposit on a home wherever they choose" (Comments on New York Times, via *Prescription for Failure* 2010: 54).



These comments stem from classic American Dream ideology about pulling oneself up the bootstraps, and they ignore (or are ignorant of) many of the racially-based social and economic injustices of 20<sup>th</sup> century that allowed certain racial and ethnic groups to get ahead while stymieing others despite hard work. There is also an implication in these comments that the minority groups that cannot afford to live in the wealthier Westchester communities are in that position because they do not work hard; so even if these comments aren't explicitly racist, they start from a racist premise.

8. Fears that outcomes of this case will mimic those from the 1980 Yonkers case

The Yonkers, NY desegregation lawsuit and court order from the 1980s still shape public perception of government-subsidized housing in Westchester. In Chapter 4, I discuss how the Yonkers case and the current fair housing case differ substantially in both the scope of the cases and the mechanisms of remedy. Despite the differences between these two cases, for many Westchester residents, the 2009 Fair Housing case immediately triggers memories of the divisive 1980s Yonkers desegregation battle.

I expected to find that my interviewees would frequently cite perceptions about the Yonkers case as a barrier to implementation for the current settlement; however, my interviewees consistently did not think that the Yonkers case would play a very big part in people's resistance to affordable housing mandated in the current fair housing case. Said Rose Noonan, whose organization Housing Action Council helped Yonkers come into compliance with desegregation court order, "I don't hear many people talking about [Yonkers]...I don't know, because all the turmoil around the Yonkers' case was so long ago. It's been relatively quiet on the Yonkers' front for the past 10 years" (Noonan). And Westchester County Board of Legislators Chairman Ken Jenkins, who was president of the local NAACP chapter during the desegregation order fight, said that, in the beginning "People were diving in front of bulldozers and saying, 'No, we can't have this,'" but by the end, there weren't any more issues than what "happened in any other normal community on an everyday basis" (Jenkins).

In other words, the fear about Yonkers in the beginning was much greater than the legacy left by the case in the end.

Where the concerns about Yonkers did appear was in the anonymous online comments, demonstrating, perhaps, that the public perception of Yonkers' legacy diverges from the narrative told by those who were professionally involved with the case. Some representative quotes:

"I remember when i moved to Yonkers in 1995 my East Yonkers Ave. neighborhood [sic] was clean and safe. Then the naacp came along with judge sand in their pocket. Within 10 years of the projects being built north, south, east and west of us, the area is a disgrace. When I moved, my block was almost entirely minority, as is much of the area. Every night I walked home from the train station to see these black and hispanic teenagers throwing bottles, fighting, cursing, acting all belligerent and ghetto. It is no longer a safe place to raise a family. This is what's in store for the rest of Westchester. Haven't we learned anything by this failure?" (Anonymous comment on LoHud (Westchester Journal News) article, via *Prescription for Failure* 2010: 57).

"WHAT A JOKE.....HERE WE GO AGAIN.....THE WHOLE COUNTY WILL GO DOWN HILL.....YONKERS ALL OVER AGAIN....." (Anonymous comment on LoHud (Westchester Journal News) article, via *Prescription for Failure* 2010: 56).

The *Yonkers* case acts as a barrier to implementation in that it is a concrete example of a vaguely relevant case for opposition to cite in their outcries. While the struggles present in Yonkers may not be relevant to the current case (see detailed explanation in Chapter 4), it is the most salient case for the opposition to point to in order to rally others in opposition to the fair housing case.

#### 9. Objection to government mandates

'Objection to government mandates' falls into a similar category as 'Opposition to all types of development,' where people who are generally opposed to government intervention in social matters apply this resistance to the fair housing case. Said one anonymous online commenter:

"What's next? Forced removal and replacement of families to ensure that every American neighborhood resembles an 'Indian' corn cob? I have no problem living in ethnically diverse neighborhoods, nor should anyone, but government should not FORCE people to do so. It smacks of Communist China, Brave New World, 1984 - type social engineering come to the good old USA. Sometimes France doesn't look half so bad anymore" (Anonymous comment on New York Times article, via *Prescription for Failure* 2010: 50).

#### 10. Discomfort with the specific labeling 'Affordable housing'

The specific labeling of affordable housing can impact whether it is publicly accepted. Affordable housing is an umbrella term for subsidized housing; it generally means that a unit can cost no more than 30% of a household's income, and it can be applied to different types of households at different levels of income. Affordable housing can be specifically for seniors (age-restricted), adults without children or families (the last two differentiated by how many bedrooms each unit has). Income levels are measured against the Area Median Income (AMI, set by the U.S. Department of Housing and Urban Development (HUD), specific to local areas).

According to HUD's definition, households with incomes less than 30% of AMI are considered extremely low income; households with incomes between 30 and 50% of AMI are considered very low income; households with incomes between 50 and 80% of AMI are considered low income; and households with incomes between 80 and 120% of AMI are considered moderate income. Affordable housing developers can use different forms of subsidy to meet the affordability needs of each income level group. The term 'workforce housing' has no official HUD definition, but is commonly used to describe units for moderate- and middle-income households

'Senior housing' and 'workforce housing' are descriptions better tolerated by the public.

Explained Jenkins:

"unfortunately affordable housing has developed a connotation that people don't want to say its 'Affordable Housing'...'Senior Housing'? Oh my God, Senior Housing, yes, motherhood, apple pie, let's bring it in. 'Workforce Housing'? Oh yes, for fire fighters, teachers, police officers, DPW workers, that kind of thing. Let's bring that in. 'Affordable Housing'? Oh my God, we can't have that, it's ridiculous. No, no, no. The neighborhood's going to change" (Jenkins).

This labeling issue presents a problem for Westchester County, given the type of units it is required to build to meet the settlement requirements.

The affordable housing in the Westchester fair housing settlement is targeted at three income groups: at least one-fifth of the rental units must be affordable for households at or below 50% of AMI (very low-income households); the rest of the rental units can be affordable to households at 50-65%

of AMI for the rental units (low-income households); and the homeownership units must be affordable to households at or below 80% of AMI (low-income households). At least one-half of all the units developed must be rentals. A quarter of the units can be age-restricted for the elderly (senior housing), and the balance has no age restriction. All of the units described here fall into the category of 'affordable housing,' and 25% of the units may fall into the subcategory of 'senior housing.' None would typically fall into the unofficial category of 'workforce housing' (commonly including moderate- and middle-income households); however, all of these units functionally qualify as workforce housing, as Westchester's Area Median Income (AMI) is much higher than most,<sup>29</sup> and households will be relying on income (rather than, for example, rental vouchers) to pay rent or make mortgage payments.

So while affordable housing is an accurate and legitimate way to describe the housing required by the settlement, describing it only as such may be a barrier to implementation because it will solicit more public opposition. Using the terminology for senior housing and workforce housing when appropriate could help the County address pushback around its 'Fair and Affordable Housing' requirements.

#### 11. Opposition that stems from misinformation about the case

The final category is public opposition that stems from misinformation about the case. The case and settlement are complex, and the details and nuances of both have not been sufficiently explained in the media. This lack of information, combined with misinformation that is spread intentionally or not, leads to opposition to the settlement as a whole based on elements that are not even part of the agreement. Explained Bedford Town Supervisor Lee Roberts, "when people don't know the facts or [don't] think it through...they think all manner of things and...misinformation is detrimental to the cause" (Roberts).

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<sup>29</sup> Westchester's 2009 AMI for a family of 4 is \$105,300, while the 2009 nationwide (including states and territories) mean Area Median Income for a family of 4 is \$57,742 ('Data for Section 8 Income Limits in MS EXCEL' 2009).

There is misunderstanding about how the lawsuit and the settlement came to be. Ann Seligsohn of Westchester Residential Opportunities, Inc. relayed stories about people thinking that former County Executive Andrew Spano had embezzled the affordable housing money instead of developing units: “they said, ‘Oh, we thought the reason...the housing wasn’t built, was that ....the old county executive, Andy Spano, put the money in his pocket.’ And I said, ‘No, the housing was built, it just wasn’t built in your community.’” (Seligsohn). There is also broad lack of knowledge about fair housing law, leading to questions about the legitimacy of the lawsuit in the first place.

There is a misunderstanding about what type of housing is required in the settlement and what the target income levels for the housing are. There is a lack of understanding about what ‘affordable housing’ is and is not; many people conflate it with the lingering stigma of public housing and public housing building typologies, and they assume that the housing is rental only:

“When will our government learn to stop wasting tax payer money for government public housing?...It's also unfair to locate these housing projects into white communities and subject them to crime that is attached to public housing. It seems to me that it would make much better sense to build single family homes located in sub-divisions where we all can live. The people will then have the feeling of ownership and would more than likely take good care of their home with less crime” (Anonymous comment sent to Fair Housing for All, via *Prescription for Failure* 2010: 50).

There is a misunderstanding about the eligibility requirements for the housing—many people think, because this has been framed as a desegregation case, that the housing is race-restricted to minorities or that there are racial quotas involved:

“These shallow racial quotas are anti white at the core and meant to divide people more than anything else” (Comments on LoHud (Westchester Journal News) article, via *Prescription for Failure* 2010: 56).

“Also I wonder if I qualify for these low income houses. My assumption [sic] would be no because im not a minority” (Comments on LoHud (Westchester Journal News) article, via *Prescription for Failure* 2010: 56).

There is a misunderstanding about the income levels of people eligible for the affordable housing. The anonymous online comments frequently complained that the affordable AFFH units would be going to households that do not work (despite the fact that, in reality, these units will be going to families earning between \$52,000 and \$84,000 per year for a family of four):

“Perfect, lets allow people who cannot afford nice houses because they have no desire to work or go to school, because they can sit on their butts, collect unemployment, welfare and Section 8...It sickens me to know that people can do absolutely nothing with their lives and be rewarded for it...” (Comments on LoHud (Westchester Journal News) article, via *Prescription for Failure* 2010: 57).

The opposition that comes from misinformation and misunderstandings about the case and settlement are particularly dangerous because they exaggerate and distort the details of the case and therefore incite more intense fear and opposition. These rumors could pose a large barrier to implementation if they are not better managed through education and advocacy.

With all of these points of NIMBYism, It is important to remember that the apparent level of resident opposition may not accurately reflect broad public opinion. As Scarsdale Village Manager Alfred Gatta explained “You’ll find most people in this village supportive, but silent. We only hear from the people who are vocal and non-supportive” (Gatta). He continued that those who are supportive do not come to meetings to express their support; at the same time, those who are not supportive will turn out to express their opposition (Gatta); so there is a disproportionate impact from the minority position because they are the ones whose opinions are heard and documented. The same is true for the anonymous online comments—those in opposition post more frequently and more passionately than those who are supportive; additionally, the anonymity allowed in such forums creates an opportunity for people to express extreme views that they would not dare say in public. Another risk is gauging public opinion through non-scientific polling methods, such as the News 12 online poll and the *Westchester Magazine* survey; while these surveys do not employ reliable sampling methods, the public still may interpret the results as representative.

Gatta also said that the NIMBYism issue can get exaggerated during political campaigns: the opposition position can be exploited for personal gain by those running for elected office, who use the fair housing case to claim that incumbents are not looking out for the best interests of the current residents (Gatta); this type of rhetoric can increase NIMBYism and legitimize the opposition in the

public's mind.

On the other hand, some of the NIMBYism issues may have legitimate roots, and should be taken seriously by the leadership as they are creating the implementation plan. ADC Executive Director Craig Gurian said that a frequent mistake made by “people who identify themselves variously as progressive or liberal or on the left” is to “deride legitimate concerns;” he explained:

“Is it true that somebody can be talking about school safety as a code word for race? Sure. Is it true that for somebody it comes to mind because they're engaging in racial or class-based stuff? Yes. But, it's also true that parents want their schools to be good and first of all they want them to be safe...Those concerns are real concerns...[P]arents think about...a whole series of issues. How a neighborhood is maintained? I know that can be said in a way that stems from racism, but it can also stem from pride in your neighborhood. So people have to...take those things seriously and be very vigilant that you proceed in a way where schools are good and that things are kept well. And I think we need to be very frank about that, because too frequently the only response is, 'well that's racist.' That doesn't help understanding, it doesn't help with things” (Gurian).

Westchester County Board of Legislators Chairman Ken Jenkins made a similar point, and said that the former County Executive did not do a good job of acknowledging legitimate concerns:

“Because the truth is, people had legitimate issues out there, which was the problem when the County Executive Spano painted anyone who disagreed with this ‘must be a Racist.’ It's like, ‘Oh, oh, wait a minute; no there were people who had real questions that deserved real answers and we need to take the time to address them’” (Jenkins).

Jenkins said that public education must be done about the housing settlement and implementation plan, to “[tone] it down so people can have real discussions” (Jenkins). The points of opposition need to be broken down—such as I have done in this section—so that people understand the actual issues at hand and can have an educated discussion about their concerns and hesitations.

#### *IV. Political expedience*

The narrative around the housing settlement has been highly political since the stipulation order was made public in August 2009. Candidates in district and countywide races campaigned around the issue in the November 2009 elections; it was one of the main issues that current County Executive Rob Astorino campaigned on in his race against then-County Executive Andrew Spano. The County's fair housing Implementation Plan was crafted within and will be carried out in this political

context, with interested parties on the local, county, state and federal levels in both the public and the private sectors all trying to strategically position themselves on the issue to efficiently and effectively achieve their own desired policy and political goals. Rather than implementing the requirements of the housing settlement with sincerity, these interested parties' needs for political expedience suggests a set of barriers to implementing the plan in good faith.

### Framing the settlement in economic terms

Throughout the settlement and implementation planning process, the Westchester County leadership has failed to take ownership of the core fair housing issues at stake in the case. Starting with former County Executive Andrew Spano, and continued with several county legislators and the new County Executive Rob Astorino, the decision to sign on to and carry through the settlement was framed as an act of fiscal responsibility rather than an acknowledgement of fair housing as a civil rights issue (described in detail in Chapter 4). The leadership has, for the most part, failed to embrace the underlying issues of the settlement, and this will have a trickle-down effect on how the municipalities and their residents consider the implementation of the settlement requirements. Jim McCarthy, Chair of the Board of Directors of the National Fair Housing Alliance, explained the relationship between the attitude of the leadership and the implementation of the settlement on the ground:

“...I think the biggest barrier to implementation right now is going to be the leadership in Westchester County. Because if the leadership in Westchester County continues to say or behave in a way that ‘well, we really didn’t do anything wrong, but you know we’re doing this because it could have cost us a whole lot more money’...if the leadership doesn’t have an attitudinal change, then I think that you can expect as additional affordable housing is planned, sited, and developed...you can expect a lot of community opposition, fear, stereotyping based upon those fears, and inflammatory, potentially discriminatory statements being made by and about people and developments that are just not true” (McCarthy).

In short, the perspective of the communities will reflect the narrative crafted at the leadership level about the settlement; a refusal by the leaders to take ownership of the core fair housing issues will cause implementation problems on the ground.

Jenkins, however, offered a different interpretation of how County Executive Astorino’s stance would translate: “because people know his position—that he was opposed to this—that when he says,



‘Well, you know, we got to do it,’ people are going to listen to it and see something different” (Jenkins). In other words, because Astorino was opposed to the settlement all along, it has a greater impact when he admits that it actually has to be implemented. While this may be true, it is not mutually exclusive of the need for the leadership to take ownership of the fair housing issue and engage with residents about the legal and moral reasons to accept the settlement and implement the plan.

### Dragging their feet

While Westchester County has been working towards an implementation plan for the settlement requirements, it is fair to say that they have not come out of the gates running. Although the settlement document and its requirements were not finalized until the summer of 2009, the County had indications starting in February 2009 that it would not win the case. The planning for implementation, however, did not start until after the Board of Legislators signed the settlement agreement in September 2009. The planning slowed down after the new County Executive was elected in November 2009, ostensibly to give the new leader’s administration the opportunity to craft the plan as they saw fit. When the initial implementation plan was submitted to the Court Monitor in late January 2010, the plan lacked specific information about how the settlement requirements would be achieved; the Monitor rejected the plan in mid-February 2010 and asked the County to resubmit. A second implementation plan was submitted on March 12, 2010; as of the County Executive’s State of the County address on April 22, 2010, the Monitor has yet to comment on the revised submission (Astorino 2010), but the U.S. Department of Housing and Urban Development (HUD) released a statement on March 16, 2010 signaling that the plan was inadequate and would require more work (U.S. Department of Housing and Urban Development 2010).

Despite knowing for over a year that some remedy would be required, and despite knowing for over 8 months what the specific requirements of the settlement were, as of April 2010, the County has not yet been able to craft a suitable plan for implementation. In its February 2010 report on the

shortcomings of the initial version of the implementation plan, the Anti-Discrimination Center (ADC) accused Westchester County of purposefully submitting an inadequate plan with the intention of using it as a starting point for negotiating down the settlement requirements (*Prescription for Failure*). While the implementation planning process is obviously complex and challenging, the County is doing itself a disservice in being slow to plan for actions that must be completed within a 7-year time period for which the clock is already running. The longer it takes for the County to come up with a satisfactory plan, the less time it will have to do the actual implementation work. This also raises the question as to whether the County is intentionally running out the clock, in the hopes that the settlement requirements are changed in the future (see section below: "Monitor's ability to change the settlement terms").

Gurian also criticized the County for planning for 750 units as if it were the maximum required by the settlement; rather, Gurian said:

"the 750 is supposed to be a minimum...So, if you were doing...any kind of planning whatsoever over a period of seven years...do you think that you would actually plan just to reach that minimum number? Or would you plan to have more than that minimum number, because you know invariably some of them are going to fall by the wayside, including some for entirely legitimate reasons?" (Gurian).

This criticism is difficult to evaluate in the absence of a complete County implementation plan, but his point is well taken.

#### Onus on Municipalities to implement County's settlement

One of the most frequent barriers mentioned in the interviews was about the disconnect between the entity that negotiated the settlement (the County) and the entities that will be responsible for its implementation (the municipalities). In other words, the County negotiated and signed the settlement, but the requirements of the settlement can only be achieved through action on the municipal level (in terms of identifying sites, changing zoning regulations, and giving approval to developers). Explained Alan Mallach, consultant and advisor to HUD and the U.S. Department of Justice during the settlement process:

“Here you have a negotiation that took place with an entity that is one stage removed from that responsibility. And I think that creates a lot of question marks, because...Westchester County...can’t simply say, ‘Okay, we’ll rezone those 40 acres in Lewisboro.’ Only the town of Lewisboro can do that. And they’re not a party to the Settlement. So that to me is the single, trickiest aspect to this whole thing” (Mallach).

Furthermore, the settlement is ultimately binding on the County. If the Municipalities refuse to cooperate, there are certain actions that the County can potentially take to force compliance (described below); but if Municipalities still fail to comply and the county as a whole cannot meet the settlement requirements, the financial penalties are levied on the County. Mallach said that this creates a “situation where somebody goes to the Town and says, ‘We’d like you to help implement this Westchester County Settlement.’ And the town could very easily say, ‘Why should I?’” (Mallach). The answer is that there are some points of leverage the County has over the municipalities, although the strength of the leverage is unclear and some pieces of it are contested.

#### Unclear strength of County leverage over Municipalities to get units built

The settlement agreement requires the County to use “all available means as appropriate” to promote Affirmatively Furthering Fair Housing (AFFH), including several mechanisms for getting the Municipalities to comply. While some Municipalities have already signaled their interest in having affordable AFFH units built within their bounds, many have shown either no interest or active disinterest in the units. The latter set of Municipalities does not want a mandate coming down from the federal level or the County on an issue their residents disapprove of; while the Town of Bedford has expressed interest in the affordable AFFH units, Bedford Town Supervisor Roberts explained the general attitude governing the other Municipalities’ behavior: “we have Home Rule in New York and we like to be captains of our own fate and we like to do things that meet with the approval of the residents of the town” (Roberts). Similarly, Jenkins said that “local...elected officials don’t like any other elected official...—or worse yet, a judge who may not be elected—telling him what to do” (Jenkins). Despite the existence of Home Rule (explained in detail in Chapter 2), there are several points of leverage that the County has over the Municipalities to get them to act.

The most basic mechanism for compliance is the existing Urban County Consortium Agreement that each member municipality has already signed as a prerequisite of entering the consortium and receiving federal Community Development Block Grant (CDBG) funds. The CDBG program requires the funding recipient—in Westchester’s case, the Urban County Consortium—to affirmatively further fair housing and to “ensure that entities to which it distributes funding also comply with the obligation”(Pratt 2008: 7). This agreement “binds both the County and the ‘cooperating jurisdiction’ ‘to take all required action to assure compliance with the [AFFH] certification’” (Pratt 2008: 7).

The second mechanism is the Model Zoning Ordinance specified in the Implementation Plan. The settlement mandated that the County produce a model inclusionary housing ordinance that contained: 1) a requirement that new developments include “a certain percentage of affordable units” with “criteria and standards for the affordable housing units and definitions of who is eligible” for the affordable units; 2) “standards for affirmative marketing” to reach “racially and ethnically diverse households;” 3) standards for “streamlining the approval process for the design, permitting, and development” of affordable AFFH units (i.e. expedited review for this projects); and 4) standards for ensuring long-term affordability of affordable AFFH units, including legal mechanisms. The model ordinance is meant to serve as a guide for each Municipality as it voluntarily creates its own inclusionary zoning policies; the County is meant to encourage Municipalities to voluntarily adopt this type of policy.

With these two mechanisms in place, the County ostensibly has leverage over the Municipalities. The settlement requires the County to make other County funding to the Municipalities conditional on their cooperation in Affirmatively Furthering Fair Housing, which means that the County can withhold various types of funds that the Municipalities may rely on in their budgets. If a municipality continues to fall short of the AFFH obligation they signed on to in the Urban County Consortium Agreement, the County could pull its CDBG funding, which municipalities use for

local community development needs. If a municipality does not cooperate with AFFH, the County can also withhold open space, parks, storm water and all other County grants (Gatta).

It is not clear, however, the extent to which withholding this money from the municipalities will be effective leverage for the county. The average annual CDBG award to a municipality in FY2009, FY2010 and FY2011 was \$73,638; the maximum allocation was \$525,000, and the mode was \$0 (Westchester Urban County Consortium 2010: 8-35). Traditionally, nationwide, local governments rely on these grants for their community development and open space needs. In Westchester, however, the Town of Mt. Pleasant has already set a precedent by refusing federal block grant funds because the money "wasn't worth it, if it meant surrendering jurisdiction over local zoning" (Astorino). If these methods prove ineffective, the settlement requires the County to take legal action against the municipalities.

The lawsuit threat is probably the most contested and controversial piece of the housing settlement. The settlement says that the County must use "all available means as appropriate," including legal action, to respond to the municipalities' active or inactive resistant behavior, and that the County "shall initiate such legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH" (*Stipulation and Order* 11). County employees have publicly questioned the legal basis of this requirement; for the first 6 months after the settlement, some were denying outright that the County had the power to sue the Municipalities over this (more detail on this in following subsection). Board of Legislators Chairman Jenkins described a County lawsuit against a Municipality as "the last course [of action] that you want to get to" (Jenkins). It is not surprising that the County does not want to be in a position to have to sue its municipalities: first, from a reelection standpoint, it is bad politics for the County to sue its municipalities, especially in the context of strong Home Rule; second, from a budgetary perspective, litigation against a municipality is a poor use of limited resources; and third, from the perspective of resisting change, the requirement to sue no longer leaves the County with the municipalities as a scapegoat.

### Exploitation of legal ambiguities

Another barrier to implementation is the apparently open question about whether there is legal precedent for the County to sue the municipalities for failure to comply with AFFH. I heard a wide variety of opinions on this point in my interviews. “Depending on who you ask, there are between zero and five sources of law” that the County can use to meet the affordable AFFH housing requirements of the settlement: the Fair Housing Act, the *Berenson* doctrine, the Westchester False Claims Settlement Agreement itself, the Urban County Consortium Agreement, and the *County of Monroe* doctrine (Schwieger). The first four have already been explained in detail in this thesis, and the last will be explained now.

The *County of Monroe* doctrine, originating in a 1988 case between the City of Rochester and the County of Monroe regarding the siting of an airport, says that there is a “balancing of public interest’ approach” when “resolving conflict between zoning ordinance of one political unit and statutory authority of another unit to perform designated public function” (*City of Rochester v. County of Monroe*). Gurian explained that the doctrine is about “what happens when there are two units of government in conflict...it doesn’t mean a County is above a Village so the County wins, but it also doesn’t mean” that because it’s the Village’s local zoning, the Village wins; rather, “there is a balancing test” that asks “what’s the nature of the public interest that...a County is trying to vindicate? What kind of harm would happen if the local regulation is overruled?” (Gurian). Gurian said that the *County of Monroe* case is “referenced in the [Westchester] Settlement Order, although not by name,” and that, in the Westchester Case, “you see it very quickly that when it’s the public interest in affordable housing and that public interest in affordable housing is tied to being able to overcome segregation—that’s all on the one hand. [And on the other hand,] What’s the harm in having two units per acre?” (Gurian).

Given these federal and New York State legal precedents, the core questions about the legal action are: “Does the [Westchester False Claims] Settlement Agreement convey standing on the County to sue local governments for exclusionary zoning? If so, would a community with multifamily

zoning be liable where the County can show that it is not meeting its obligations under the Settlement?” (Nolon 2009: 5). The different interested parties have come to different conclusions on these questions.

Rose Noonan, the technical assistance consultant to the Court Monitor, “was quoted in...a newspaper, ‘I’m not aware of anything that can force towns’” to change their local zoning (Gurian). Gurian disagrees with this; his answer has been consistent: that zoning is local to a large extent, but “not when it bumps up against these other legal doctrines,” specifically, the Fair Housing Act, the *Berenson* doctrine, and the *County of Monroe* doctrine (Gurian). He cites the settlement agreement: “The County *shall* initiate legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH,’ (emphasis added)” with ‘shall’ meaning ‘must’ in the legal context (*Prescription for Failure* 17).

The County’s stance has changed between the time of the settlement agreement and the release of the second version of the implementation plan. When the settlement was first signed, the County Executive’s Office mailed a brochure to county residents that implied that the County had no authority over the municipalities: “The federal government recognizes that there are forces beyond the control of the county, such as local zoning and home rule...” (County Executive’s Office 2009), which Gurian said is “factually untrue” both about the authority and the Federal government acknowledgement; the brochure was later withdrawn from the County’s website (Gurian). The County’s initial implementation plan from January 2010 stated: “The County of Westchester has no independent land use control or authority. Rather, pursuant to the New York State Constitution, the authority to impose zoning and land use controls resides in the local municipalities” (Westchester County. *Implementation Plan*. Jan 2010: 5). This statement was removed from the March 2010 version of the Implementation Plan, and the following was added: “In the event that a municipality does not take the actions needed to promote the development of affordable AFFH units under paragraph 7 of the Stipulation, or undertakes actions that hinder that objective, the County will use all available

means as appropriate to address such inaction, including, but not limited to, pursuing legal action” (Westchester County. *Implementation Plan*. Mar 2010: 9).

Pace University Law Professor John Nolon writes that it is not clear whether municipalities—under the current judicial standards—are vulnerable to legal action from the County under the fair housing Settlement Agreement. He writes that the exclusionary zoning cases following *Berenson*

“fall short of an effective judicial requirement to adopt inclusionary zoning at the local level. They require local zoning to include multifamily housing where local and regional needs are unmet; they caution localities against acting overtly to exclude, and they suggest that local zoning officials should periodically examine whether their ordinances have provisions that, in a court challenge, could be said to invite persons of modest income to live in the community.” (Nolon 2009: 5)

That is to say, the legal precedent set in *Berenson* prohibits exclusionary zoning, but the prohibition of exclusionary zoning is not a mandate for inclusionary zoning (the absence of exclusionary zoning does not require inclusionary zoning). His point is that municipalities that have zoning for multifamily housing—whether or not they actually have affordable housing developments—are meeting the requirements under *Berenson*; and it is unclear whether this means they are complying with the fair housing settlement agreement. In response to the questions about whether the Fair Housing Settlement Agreement conveys standing on the County to sue the municipalities and whether the presence of multifamily housing precludes municipalities from liability under the settlement, Nolon writes that these are still “novel questions” (Nolon 2009: 6). Scarsdale Village Manager Alfred Gatta gave an example:

“in Scarsdale we do have a Comprehensive Plan...we do not exclude so-called multifamily housing...And we have in our Comprehensive Plan...where those things can be built. Where we may face a problem—but it depends on how this unfolds—if...a developer finds a nice piece of land where the zoning does not permit multi-family housing...but...it’s ideal for multi-family housing, ideal for affordable housing, and they apply for a zoning change. And Scarsdale...I’m guessing, will deny [the zoning change] and then we’re off to the races. Lawsuit, etc., etc., and then they’ll go through the courts and we’ll see what happens. ...The developer would say, ‘You’re discriminating.’ We would say, ‘No, we’re not, because we do allow [multifamily housing] in two parts of the Village’” (Gatta).

The question of whether Scarsdale would be vulnerable in this situation to a lawsuit from the County through the fair housing settlement is unclear. They may risk losing their CDBG money and other



County grants for not cooperating with the settlement, but their vulnerability in a lawsuit using current legal doctrines is not certain.

The legal ambiguities around this point are a barrier to implementation because the threat of legal action is the biggest stick the County has for getting the municipalities to cooperate with the settlement. In the absence of this threat, or in the uncertainty around it, the County loses a major point of leverage in getting the municipalities to cooperate, and the County will need cooperation from the municipalities in order to implement the settlement requirements (as described above).

#### Monitor's ability to change the settlement terms

According to the terms of the settlement, the Court Monitor reserves the right to change, under certain circumstances, certain requirements that the County must meet. The settlement states that, if the Monitor finds that the County is making a good faith effort to comply with the requirements of the settlement, but that for reasons outside of the County's control (i.e., the real estate market) it is not able to meet the interim benchmarks, the Monitor can, with consent of the County and the federal government and approved by the Court, make modifications or refinements to certain elements of the stipulation order. These elements are limited to: 1) the specific allocation of the County's \$30 million capital investment; 2) the census blocks requirement (as long as the changes are consistent with the purpose of the AFFH settlement); 3) the municipalities eligible for the 630 units in consideration of new 2010 Census data, or the geographic distribution of units if they are found not to comply with the purpose of the AFFH settlement (note that no originally eligible municipality may be deemed ineligible by these changes); 4) the "terms, conditions and criteria" regarding the rental-ownership breakdown of the total units developed and the income eligibility targets and criteria for each tenure type; 5) the interim benchmarks and final deadlines for the development of units; 6) the total number of units required to be developed, if the deadline extensions already received "will not be sufficient to permit the possible satisfaction of the County's

obligations” due to factors beyond the County’s control; and 7) the County’s mechanisms for AFFH advocacy, education, outreach, affirmative marketing and intake (*Stipulation and Order*).

There have been no indications from the Monitor’s actions so far that he would use this power to let the County off the hook on their obligations. However, the existence of this option still poses a barrier to implementation, because it opens up the possibility for the County to give the appearance of a good faith effort (without actually doing the hard work) in the hopes that the Monitor will eventually decrease the settlement requirements. I don’t mean to imply that the County will take this approach to implementation, but it is worth noting that the incentive exists to behave in this way.

#### Lack of independent advocacy organizations on the ground

While Westchester has an active set of community-based and faith-based organizations doing work around fair and affordable housing, in all of my research and interviewees I could not identify any groups (besides the Anti-Discrimination Center, the plaintiff in the case) that were doing independent advocacy around the fair housing settlement or community organizing of potential future affordable housing tenants; I could not find any groups that were making noise about the settlement or the quality of the implementation plan. As Dennis Hanratty, Executive Director of Mount Vernon United Tenants, explained: “a lot of the groups that are providing...housing services in the county are these not-for-profit groups that have got County contracts, they’ve got State contracts, they’ve got local...municipal contracts, so they’re not going to rock the boat on a lot of these issues” (Hanratty). Gurian said that this type of not-for-profit landscape was not unique to Westchester: “That happens a lot, where people are tied into the status quo, and...the money comes from the County” (Gurian). He also said they ADC had been in contact with a number of Westchester groups privately, “but not one was prepared to do anything publicly” (Gurian).

The danger in this absence of independent advocacy and organizing is two-fold. First, there are no groups (beyond ADC and the Court Monitor) that are putting pressure on the County to do a good

job in implementing the settlement. ADC is actively playing the watchdog role, but the organization is seen as an outsider (there is no ADC office in Westchester) and it lacks objectivity in its critiques due to its position in the lawsuit; both of these issues serve to dilute the group's perceived legitimacy and therefore the impact of ADC's responses to the County's actions. Jim McCarthy, Chair of the Board of Directors of the National Fair Housing Alliance, said that the role of other not-for-profit community organizations could be

"to hold officials' seat to the fire and make sure that the implementation of this settlement is done properly...So there's lots of monitoring to do in making sure that there are people at the table whose only role there is not that they're getting a paycheck from the county or from a developer or someone else who's involved in the project but the role there is to make sure that the spirit of the settlement agreement is realized" (McCarthy).

The barrier to implementation in this sense is a barrier to the quality of the implementation; there needs to be some independent, community-based watchdog mechanism (beyond the Court Monitor and plaintiff in the case) to monitor the County's actions and challenge them to do a better job in implementation.

Second, planning without input from community groups and independent advocates is bound to fall short of meeting the actual needs of the future residents of the affordable housing. Said McCarthy, "I think it will be a big mistake if Westchester...goes off behind closed doors planning the affordable housing without talking to the potential people who will be living in that housing once it's built. You know, because inevitably, what...anybody thinks someone else wants is different from what the person actually wants" (McCarthy). Rather,

"the leadership of the county is going to have to reach out to their minority community leaders and involve them in planning and have them at the table so that message that the leadership from Westchester County wants to send about their planning and their organizing is received and repeated into the communities whether that's through social groups, churches...fraternal or sorority organizations. The tone has to be set and then that tone has to be replicated multiple times in one-on-one situations as well as small groups and then large congregational settings like a Sunday morning service. That you know this is what we're doing, this is why we're doing it, here's how we're going to do it, and we would like your input on how we go about doing it." (McCarthy)

Furthermore, the County needs these groups for successful implementation, especially around the affirmative marketing piece. If the County does not engage these groups early on, they will face challenges in reaching those ‘least likely to apply.’

V. *Commitment to the status quo*

Another barrier to implementation is the possibility for Westchester County to meet its requirements by adhering to the letter of the agreement without following the spirit of the agreement. That is to say, it is feasible—given the modest number of units required to be built<sup>30</sup> and the flexibility in how those units can be distributed amongst 31 different municipalities—that the County could meet the settlement requirements without implementing any real change on the ground. McCarthy thought that, if there isn’t a shift in how the County leadership thinks about the settlement—if there isn’t real ownership of the underlying fair housing issues—then the approach to implementation will be: “how do we do enough to meet the minimal requirements but still get around the law, as opposed to how to we comply with the law” (McCarthy).

This scenario seems eminently possible. If Westchester maintains the same rate of affordable housing development that it has in the past 20 years (approximately 230 units/year from 1990-1999 and 195 units/year from 2000-2005), but focuses on building this housing in the eligible communities, it will have no problem meeting the 750-unit requirement in 7 years. Explained Rose Noonan, Executive Director of the Housing Action Council and technical assistance consultant to the Court Monitor, “I think what we’re seeing is that, we think it’s going to be accomplished by the way that the County has been doing business as it has for the past 10 years, but with a focus more on the [eligible] communities” (Noonan). She continued: “I think it’s just going to happen by projects being identified either by municipalities or developers, and—because they know that the County has to make this

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<sup>30</sup> To put the number in perspective, 750 units distributed evenly across the 31 municipalities over 7 years would be only 3.5 units per municipality per year.

happen—most of the developers are going to be looking in those areas that are included within the Settlement” (Noonan).

While many of the 31 eligible communities are resistant to building affordable housing, there are a number that have already come forward to express interest in developing the affordable AFFH units in their municipalities—and this is where the County will start. Explained Attorney Michael Allen, “in the early part of the implementation...it’s going to be hard to get units built. And my guess is that the County will try to pick the low-hanging fruit,...[to] go to the places where there is the least resistance” (Allen). Ann Seligsohn of Westchester Residential Opportunities, Inc. said that the County could use the low-hanging fruit approach to gain momentum for development, using the cooperative communities to demonstrate to neighboring municipalities how it can be done (Seligsohn). Mallach explained that the “secret of success” is to use this type of “little bites approach,” where the County would “create this [750-unit] inventory incrementally with two units here, five units there, seven units there, one unit here and so forth and end up, at least in theory, with something that would be all but invisible and would achieve the Settlement” (Mallach).

Allen said that, after a few years of this type of development, “all of the obvious places and easiest places will have been exhausted, and the hard question will come in those communities that have been resisting since 1992 and will continue to resist” (Allen). Even if the County gets to the point of needing to figure out how to develop units in some of the resistant communities, this type of piecemeal strategy will still not require the most resistant communities to accept affordable AFFH units. There just aren’t enough affordable housing units required under the settlement to put the County in the position of confronting the most resistant municipalities.

In short, without a countywide allocation plan and using a piecemeal strategy instead, the County can move forward with the implementation of the settlement requirements without making any real changes to the status quo in the communities that are most resistant to affordable housing. The County will continue to rely on municipalities and developers to identify opportunities for

affordable housing, and they will not—at least at first—need to challenge municipalities that are resistant to affordable housing. The only major change that will be required is affirmative marketing, where the County will be required to be proactive in reaching out to those who are ‘least likely to apply’ (more on this to be discussed in the next section). But the planning and development process can remain largely unchanged, allowing for the maintenance of the status quo and limiting the impact that the settlement can have on lasting change in the county.

#### VI. *Limits of court-ordered requirements*

The Settlement Agreement itself has a number of provisions that may act as barriers to implementation of the underlying goals of the settlement. This section describes these barriers in detail.

#### Impact of local preference rules in Model Zoning Ordinance

In the interviews, I asked why some Westchester communities have historically been interested in and successful at developing affordable housing in their municipalities. The responses to this question were pretty similar across the board: that these municipalities had identified a local need for affordable housing and wanted to develop units to serve their own communities.

Westchester Department of Planning Deputy Commissioner Norma Drummond discussed how elected officials in Westchester become aware of the need for affordable housing:

“I think...the elected officials of most every community have experienced and have seen somebody personally who has needed...affordable housing, whether it’s their parents, whether it’s their...adult children who have been educated and now...based on their starting salaries with their jobs, they don’t have a place to live or afford. Whether it’s other relatives or whether its people that work for them—from the folks who clean the Village Halls to the bus drivers to the schools to the EMTs and the volunteer firefighters in many of these communities...And so I think many of the local officials recognize that ultimately there are people being impacted in every one of their communities” (Drummond).

Noonan said that support for affordable housing gets built when a community sees that “our seniors can’t afford there, our adult children can’t afford to stay there, our workers can’t afford to buy here or rent here” (Noonan). She gave an example of a group developing affordable housing in Croton:

“community members joined the community group to develop housing to address the problems that they found in their own community;” she told a similar anecdote about a group in Hastings-on-Hudson building units for firefighters (Noonan).

Along these lines, these communities often have local preferences built into their tenant selection process so that the affordable housing is serving the local need. These preferences can prioritize local residents, workers, or family members of current residents, among others. Town Supervisor Lee Roberts shared Bedford’s preferences: “Our ordinance gives preference...—you know, it’s the usual for most municipalities—we have municipal workers, teachers, police officers, that type of thing; then residents and then relatives of residents” (Roberts).

The housing settlement, however, requires municipalities to “ban local residency requirement and preferences and other selection preferences that do not AFFH” (*Stipulation and Order 24*). The County’s March 2010 Implementation Plan modifies that requirement to “ban certain housing selection preferences that do not AFFH” (*Westchester County. Implementation Plan. Mar 2010: 8*). The housing selection preferences that then remain in the County’s March 2010 Model Zoning Ordinance are: 1) households with at least one member that has worked or served as an emergency services volunteer in the municipality for at least one year immediately prior to applying for housing may be given preference for every third new fair and affordable housing unit and every third existing fair and affordable housing unit that becomes available for new occupancy; and 2) seniors living in the municipality or who have an immediate family member who lives in the municipality may be given preference for all fair and affordable senior housing units (*Westchester County. Implementation Plan. Mar 2010: 1*). Given that these selection preferences do not comply with the settlement requirements, it is unclear whether the Monitor will allow this to remain in the final implementation plan.<sup>31</sup>

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<sup>31</sup> As of the County Executive’s State of the County on April 22, 2010, the Monitor had not yet responded to the County’s revised implementation plan submission.

What will the impact of this required change of preferences be on the acceptance of affordable housing in the municipalities that have historically been friendly to affordable housing development? In the interest of the settlement and Affirmatively Furthering Fair Housing, most of the local preferences should be removed in order to create the opportunity to achieve residential diversity;<sup>32</sup> at the same time, however, these local preferences are often what drive the support for affordable housing in many communities in the first place.

John Saccardi, of the Westchester-based planning firm Saccardi & Schiff, noted that the settlement contradicting the existing preferences in many local affordable housing regulations would be a “big issue” (Saccardi). Jenkins also mentioned this, saying that this issue is a “legitimate concern” that people in Westchester have (Jenkins). While Roberts suggested, and McGrath echoed, that Bedford would welcome affordable housing even without local preferences, she said that it is a natural reaction for municipalities to want to serve their own people first (McGrath; Roberts).

It is hard to say without having done extensive focus group work what the community reactions to this change will be. But it is worth flagging as a potential barrier to implementing the settlement; if the eligible communities that have been accepting of affordable housing in the past (i.e., the ‘low-hanging fruit’) become less welcoming of it due to the removal of local preferences, then the task of implementing the settlement will be that much harder.

It is also possible that removing local preferences will not have any functional difference in who ends up living in the housing. The new affirmative marketing piece might change that (to be discussed in detail below), but based on anecdotal evidence from Westchester municipalities up to this point, it appears that those who apply for affordable housing tend to already have a connection to the community. Explained Roberts:

“I think there’s a misconception that people are coming from New Jersey to live here. They just aren’t in my experience. I mean maybe someone who has a connection, as I said, a relative, an

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<sup>32</sup> It is worth noting that tenant preferences for people who work within a municipality is not necessarily in conflict with AFFH if the municipality has a diverse workforce.



elderly parent, a sister or brother, but...it hasn't been my experience that millions of people from Hartford, Connecticut are going to move to Bedford and love living here" (Roberts).

Jenkins made a similar comment:

"We have plenty of examples in Westchester County right now where we marketed to the entire world and...we're able to show that municipalities that...[if] you market a house in a place in the northern part of Westchester County, the people that...usually apply are the people that work in the area—the public employees, the school teachers, the fire fighters, etc.—who can't afford to live in your town. They're the ones that apply. People don't say, 'Hey, I'm living down in Florida and I want to move up to New York, into your hamlet, into this housing opportunity'" (Jenkins).

Again, the new affirmative marketing may change this to some extent, but it's worth noting that the people generally want to move to places where there are opportunities, but also to places where they can access their social networks, employment and other connections.

#### Census blocks with lowest percentage of minorities a deterrent to minority applicants?

The settlement doesn't just require the housing to be built in the municipalities with the lowest percentage of minority residents; it requires the County to identify residential diversity at the census block level and develop the affordable housing in the census blocks with the lowest minority populations. More specifically, for the 630 affordable units that must be built in municipalities whose population is less than 3% 'single-race African-American only' and less than 7% Hispanic and for the 60 units that can be developed in municipalities whose population is less than 7% 'single-race African-American only' and less than 10% Hispanic, the units cannot be developed in census blocks whose population is more than 10% "single race African-American only" and has a total African American population of 20 or more, or whose population is more than 10% Hispanic and has a total Hispanic population of 20 or more (*Stipulation and Order*). The intention of this requirement, I assume, is to ensure that there isn't segregation within the municipality (i.e., where all of the subsidized housing would be built in areas within the municipality that already had relatively minority population compared to the rest of the community, such as was the case with public housing in Yonkers in the 1980s).

However, does both the requirement to build in municipalities that are more than 90% white and the further requirement to build in census blocks that are more than 80 to 90% white actually serve as a barrier to achieving desegregation? Does deliberately picking the places with the lowest percentage of minorities make it less likely that minorities will actually live in the units developed?<sup>33</sup> There are two potential problems with this set of requirements.

One, it makes the assumption that minority households want to live in communities and neighborhoods that have extremely low populations of other minorities. In Chapter 3, I make the argument that segregation is problematic partially because of the neighborhood-based opportunities that segregation often denies to minority households. One of the underlying assumptions of the housing settlement is necessarily that housing integration will provide net benefits to the minority households that move, including the neighborhood-based opportunities such as good schools and safety that are characteristic of Westchester's wealthier suburbs. This section isn't meant to deny that this is true or that minority households don't want access to these opportunities. As Gurian stated, "For good and bad, people are pretty much alike... People make decisions about what's good for them and their families all the time. Schools, job, commute, costs and that's what's going to happen here" (Gurian), and I agree with him. While this data is not Westchester-specific, demographer Nancy Denton cites nationwide studies in explaining that African-American attitudes towards integration are "mixed, but studies... show that blacks remain willing to live in neighborhoods that are between 90 percent and 10 percent white. However, their first preference would be for neighborhoods that are 50:50 white and black" (Denton 2006: 70). As a reminder, 84% of the affordable AFFH units in the Westchester settlement are supposed to be built in municipalities that are at least 90% white.<sup>34</sup>

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<sup>33</sup> Remember, while there is a requirement to affirmatively market the units to minorities, there is no way guarantee that the affordable AFFH units end up going to minority households.

<sup>34</sup> As a point of comparison, the Gautreaux program required that the predominantly African American program participants "move to areas that were more than 70 percent white, but few suburbs ranged from 70 to 90 percent white, so they actually moved to suburbs that were more than 90 percent white, with an average of 96 percent" (Rubinowitz 2000: 75).

It is important to consider that there are other things that factor into families' decisions about where to live, including the presence of social and cultural networks and a feeling of belonging. Sociologist Xavier Briggs de Souza asks, in reference to the Yonkers desegregation case, "in what contexts might poor residents be set back by the moves that provide few new concrete opportunities in exchange for heightened competition with hostile neighbors and weakened social support systems?" (Briggs in Belsky 2001: 22). While the levels of hostility in the current countywide desegregation case have not reached the levels seen in Yonkers in the 1980s, the point is well taken. The question remains, will minorities want to live in communities and neighborhoods that are more than 90% white? Will minority households apply to live in the units? If not, do the thresholds of municipal-level and census block-level diversity specified in the housing settlement work against its underlying goal of desegregation?

The second potential problem with the requirements to build the affordable AFFH units in the most heavily white areas in Westchester is that, by doing so, it increases the likelihood that low- and moderate-income white households will ultimately occupy the affordable units. Not only might these requirements decrease the appeal of the units to minority households (as described above), it might also have the related effect of making the housing more appealing to low- and moderate-income white households (who also need affordable housing). The more appealing the housing is to white households, the more likely it is that they will apply to live there. There is no race or ethnicity restriction for who can apply for the housing and for who can ultimately occupy the units. If more whites apply for the housing, there is a higher probability that they will be chosen in the lottery to live in the units. So, again, it is possible that these specific diversity thresholds could undermine the desegregation goals of the settlement.

Ambiguous standards for 'good faith' affirmative marketing to populations 'least likely to apply'

The affirmative marketing activities outlined in Westchester's Affirmative Fair Housing Marketing (AFHM) Plan<sup>35</sup> should be essential to the task of attracting a diverse population to apply for the new affordable AFFH units; however, as currently written, the plan has ambiguous standards that won't necessarily achieve the goals of the settlement. The AFHM plan that Westchester submitted as part of its March 2010 Implementation Plan covers a range of activities that developers, under the guidance and monitoring of the County, must complete to meet the affirmative marketing obligations attached to housing development funding assistance. According to Westchester's March 2010 Implementation Plan:

"AFHM typically consists of a good faith effort to attract to the project those who are identified as 'least likely to apply'. Through the AFHM Plan, the Developer indicates what special efforts they will make to attract racial or ethnic groups who might not normally seek housing in their project based on its location. Quantitative data and analysis are essential to planning and monitoring the AFHM program to determine its success" (Westchester County. *Appendix G-1: 4*).

To achieve this, the AFHM plan should include target populations for those 'least likely to apply,' outreach programs for these target populations, and indicators used to measure success of the marketing.

Westchester's 'Direction of AFHM Marketing Activities' is based on the New York State Division of Housing and Community Renewal OFHEO Marketing Plan Guideline (Revised – March 2009). The implementation plan directs developers on how they should be identifying the racial/ethnic groups that are 'least likely to apply.' Developers must "Identify the project's Local Market Area [based on population density and physical distance from the project site]...to establish demographic information of immediate area [using racial/ethnic characteristics from Census data]...thereby providing the basis to establish the population which is least likely to apply" (Westchester County. *Appendix G-1: 8*). Through this analysis, developers must "Specify the racial/ethnic group(s) identified

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<sup>35</sup> Note: Westchester's Affirmative Fair Housing Marketing (AFHM) Plan covers the range of classes protected under the Fair Housing Act; my analysis, however, will focus on those parts that are specifically relevant to the race / ethnicity focus of the housing settlement.

in the Census data as least likely to apply (LLA) for the project's Local Market Area" (Westchester County. *Appendix G-1*: 8) and document "How the groups considered least likely to apply were identified" (Westchester County. *Appendix G-1*: 17). Developers must use Westchester County and its contiguous counties as the area in which they must make their 'good faith effort' to do marketing and outreach to the 'least likely to apply' populations.

The plan defines "good faith efforts" as "recorded activities and documented outreach to those individuals identified as least likely to apply," such as print and media advertising directed at this target population and marketing directed to "specific community, religious or other organizations frequented" by the target population (Westchester County. *Implementation Plan*. Mar 2010: 5). Brochures and other information should also be distributed through community contacts that hold "positions of influence within the general community and the particular target group" and have "direct and frequent contact" with those groups determined to be 'least likely to apply;' this may include minority organizations, such as the "League of United Latin American Citizens (LULAC), National Association for the Advancement of Colored People (NAACP), Urban League," and/or "women's organizations, civil rights groups, editors of majority owned and minority-owned newspapers..." (Westchester County. *Appendix G-1*: 11-12). Developers should make sure that marketing and outreach efforts are "appropriate for attracting the target groups," with consideration of non-English language needs, messaging about the target groups being welcome in the project area, and diversity of persons being used in pictorial advertising; however, "the advertising should not imply that the project area is restricted to persons of a particular race, color, creed, sex or national origin" (Westchester County. *Appendix G-1*: 15-16).

Developers are required to record all marketing and outreach efforts made towards the populations 'least likely to apply' and assess their effectiveness. Developers must keep records 'based on census data, application and surveys about community residents, applicants for housing units, residents of the project, and records about tenant selection or rejection;' they must also record

“Racial and Ethnic data on all persons applying for housing units and participants” (Westchester County. *Appendix G-1*: 15). The implementation plan gives guidance on performance indicators for measuring the effectiveness of marketing and outreach:

“Indicators such as the anticipated racial/ethnic composition of the tenant population or applicant pool are not to be used as indicators of effectiveness of an AFHM Plan under any circumstances. The Developer is encouraged to use indicators based on actual efforts, including the number of referrals by community contacts listed in the Plan; the number of visits to the site or walk-ins due to outreach or advertising; or the representation of persons identified as least likely to apply as part of the potential buyer or renter group in comparison to the percentage of that group within the housing market area” (Westchester County. *Appendix G-1*: 13-14).

Developers are required to “Include a discussion of corrective measures to be taken if least likely to apply populations are poorly represented” (Westchester County. *Appendix G-1*: 14). Finally, Westchester County will conduct audits of these records and performance indicators to make sure that “efforts were made concerning marketing to all groups...including targeting efforts to least likely to apply populations...” (Westchester County. *Appendix G-1* 15).

Because of the specific nature of the Westchester Fair Housing Case, the requirements laid out in this Affirmative Fair Housing Marketing Plan may not be sufficient to implement the underlying goals of the settlement agreement. The standards for the key elements of the plan, as written, are ambiguous, therefore creating the risk that developers could appear to be adhering the requirements without actually working to achieve the settlement’s intended outcomes. The Anti-Discrimination Center summarized this point well in describing its concerns about the affirmative marketing plan contained in Westchester County’s initial implementation plan submission:

“in a world where everyone was trying to do the right thing, more affirmative marketing plans would actually work. But there is a long history of affirmative marketing being mere window dressing...This concern is magnified by the fact that there will be a continuing and intense urge in many quarters to cheat...” (*Prescription for Failure* 2010: 36).

It is possible that, in practice, the oversight process from the County would hold developers to higher standards, but the written requirements are too weak by themselves to guarantee compliance with the spirit of affirmative marketing.

First, ‘least likely to apply,’ a term of art in the affirmative fair housing marketing world that is

often open to interpretation, is even less specific in Westchester’s AFHM plan than can be found in other jurisdiction’s guides.<sup>36</sup> The only guidance given is to look at the racial and ethnic makeup of the surrounding area based on Census data, but it does not give any more detail beyond that on how the current diversity in the market area is related to who is likely to apply for the affordable housing. It doesn’t even suggest looking at the income information about the racial and ethnic populations to see who even might be likely to be eligible for affordable housing. Without more specific guidelines on how to define the target population, the developers have a tremendous amount of leeway in defining who they are supposed to be affirmatively marketing to and, therefore, how their efforts will be later be evaluated against the County’s performance indicators. There is potentially the incentive here—in the written standards—for developers to chose a target population that is not actually the least likely to apply in order to improve their ultimate evaluation against the performance indicators. Again, I don’t mean to imply that a developer would do this, but it is important to note that it is possible under the way the standards are currently written.

Second, what are the standards for a ‘good faith effort’ to attract the target population? There are activities and performance reporting requirements, but there are not explicit goals or thresholds required for either. Does this create a mechanism that allows developers to make it look like they are reaching out to these communities without necessarily reaching the intended goal of affordable housing occupancy by minorities? These requirements don’t necessarily answer the question: how good is good enough? Does a good faith marketing effort without results count? The ambiguity of these written rules could serve as a barrier to implementing the diversity goals of the settlement by creating a flexible system that developers can manipulate.

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<sup>36</sup> See Ohio Department of Development, Community Development Division’s Affirmative Fair Housing Marketing Guide: <http://www.odod.state.oh.us/cdd/ohcp/AFHMGUIDE.pdf>

## Challenges of the court-ordered desegregation mechanism in general

Westchester County's Implementation Plan was born out of a very specific policy mechanism for achieving residential desegregation: the court order. The judicial mandate of residential desegregation operates distinctly from civil rights remedies enacted through legislation or executive branch policy directives of how to achieve racial and ethnic integration. The implementation planning process, therefore, lacked opportunities for stakeholder participation and negotiation that one would expect in other policy contexts. I asked Anti-Discrimination Center Executive Director Craig Gurian about the role of various stakeholders in the implementation planning process, and his response gets at how policy driven by court order differs from other policy contexts:

"I understand what you mean when you use the term 'stakeholders' and that that's used in social science circles a lot...I think that the term is misleading in an important way. If you imagine stakeholders coming together, you are imagining a process whereby there's negotiation, give and take...The interest of the stakeholders needs to be accommodated. That's an interesting hypothesis, but that is not the federal court order that exists" (Gurian).

Rather, Gurian said, Westchester had a "99.9% chance of losing what was left of the case," and so it agreed to do things in the settlement rather than go to trial. And so the stakeholders in the case are not other interest groups in Westchester but "the people of the United States who have a Fair Housing Act" (Gurian). He continued:

"And so you may think that I'm being persnickety about it, but it is really a fundamental issue, and it will inform whether or not implementation is successful...if anybody is serious about implementation—HUD, The Monitor, Westchester County, anybody else—that the starting point is there are legal obligations, and those legal obligations that are enforceable by the court that retains jurisdiction are not a starting point or a series of suggestions for a group sing-a-long. That's what was negotiated as between and among the Anti-Discrimination Center, the [federal] government and Westchester County" (Gurian).

In other words, the stakeholder negotiation in the case already happened—that's what the settlement agreement was born out of. And the court order does not provide for the opportunity for community participation on the matter; it does not ask for buy-in from other interested parties the way other policy mechanisms would want to do when crafting an implementation plan. That the implementation planning process does not require or even allow participation from other stakeholders may pose a barrier to implementation, as those stakeholders retain the ability to make



the conditions on the ground difficult for implementation; whether it is through inaction or counterproductive behavior, other stakeholders have the ability to delay or derail implementation even if (and perhaps especially because) they were not involved in the planning process.

The Westchester case follows a series of related housing desegregation court cases that have produced mixed results, and lessons from these cases can give us clues to what it likely to happen in the implementation of the Westchester plan. From a comparative study of three such cases—*Mt. Laurel*, *Gautreaux*, and *Yonkers*—Law Professor Peter Schuck draws several broad conclusions about the effectiveness and potential impact of judicial approaches to housing desegregation. His conclusions are not optimistic:

“First, the market’s pervasive influence over housing choices powerfully constrains, and often distorts, efforts by government generally and courts in particular to shape those choices. Second, a ubiquitous classism rejects the idea that people should have a right to live in a neighborhood they cannot afford. Third, politically mobilized communities strongly oppose the kinds of diversity the courts have mandated. Fourth, courts possess only the crudest, most limited tools for constructing a new vision of diversity amid these obstacles” (Schuck 2002: 366).

He concludes from these three cases that the courts’ efforts have been “Promethean...as [they] have entailed laborious persistence, mythic hubris, and tragic failure” (Schuck 2002: 308). Schuck does not have any commentary specific to the Westchester case (Schuck 2010), and the Westchester case is distinct from the three he studied in important ways, so it’s hard to say how transferable these conclusions are onto a prediction for the success of the court-order in the Westchester case. However, it is worth noting that court-ordered desegregation cases have historically struggled to achieve their intended goals, and that the judicial mechanisms that created the settlement may end up being a barrier to its own implementation.

#### *VII. Unintended consequences*

Public Policy 101 teaches that every public policy decision is subject to the problem of unintended consequences, the unforeseen or overlooked byproducts or outcomes of a policy, program and/or process. The Westchester fair housing settlement is no different; in trying to achieve

the fair housing desegregation goals as a remedy for civil rights injustices, the settlement may promote unsustainable development, divert attention from non-eligible municipalities that have the greatest affordable housing needs, and instead give affordable housing residents the opportunity to live in isolated communities that are unfriendly to their presence there.

The housing settlement wants to expand housing opportunities in the heavily white, low-density Westchester suburbs located in the north and northeast of the county; the first unintended consequence is that this housing would often require greenfields development and additional infrastructure, while putting the new affordable housing residents in a position to rely on cars for transportation rather than public transit or walking. This is inconsistent with the planning trends around sustainability, including smart growth, transit-oriented development, infill development and densification. Rose Noonan, Executive Director of the Housing Action Council and technical assistance consultant to the court monitor, explained: “in this world where we’re trying to be green, why now are we focusing on developing in those communities where there is not much transportation?” (Noonan). There is a tradeoff here between desegregation and sustainability, and this begs the question: should redress for past racial discrimination drive development policy if it means perpetuating unsustainable suburban residential patterns, especially when there are other opportunities in the county to promote fair housing more sustainably? On the other hand, if this were true, would it mean that communities located off public transportation are relieved of their obligation to affirmatively further fair housing? What type of perverse incentives would this type of policy decision create?

A second unintended consequence of the settlement agreement is its impact on the communities in Westchester that are not eligible for the affordable AFFH units (i.e., the communities where building affordable units won’t count towards the County’s settlement obligations). How does the settlement change the County’s development priorities, and what does this shift in focus mean for the affordable housing needs of the non-eligible communities? The non-eligible consortium

communities are: Elmsford, Greenburgh, Mamaroneck Village, Mount Kisco, Ossining Village, Peekskill, and Sleepy Hollow. Between 1990 and 2005, these 7 non-eligible communities built a total of 625 units of affordable housing, while the 31 non-eligible communities built a total of 908 affordable units; that equals approximately 90 units per municipality in the non-eligible communities, and approximately 30 units per municipality in the eligible communities (*Affordable Housing Allocation Plan 2000-2015*). Additionally, the entitlement municipalities that have separate relationships with HUD but still receive County funds for affordable housing (Mount Vernon, New Rochelle, White Plains and Yonkers) built a total of 1746 units, or approximately 440 units per municipality.

If my previous hypothesis is correct—that the communities that built affordable housing in the past were those that saw a local need for it—it is clear that the non-eligible consortium communities and the entitlement communities have previously acknowledged and demonstrated a greater local need for affordable housing units than the eligible communities. Confirmed John Saccardi, a principal at the Westchester-based planning firm Saccardi & Schiff, “the people that live in those communities really want the affordable housing” (Saccardi). If limited County resources (both funding and staff) are focused on implementing the settlement requirements (with the incentive to do so to avoid financial penalties attached to noncompliance with the settlement), how will the affordable housing needs of the non-eligible communities be addressed? Noonan explained, “Most community groups, most municipal officials feel there continues to be a need for affordable housing in those [non-eligible] communities and will this Settlement redirect funds so that they’re not able to access some of the public [funding]...whether it’s federal, state or local” (Noonan). Developers have expressed concerns about this issue as well (Brenner 2010). The unintended consequence of the settlement in this case is a diversion of attention and resources from other communities that have historically acknowledged a local need for affordable housing.

A third unintended consequence of moving low- and moderate-income households (minority or not) into these more affluent communities is separating them from networks that they relied on in

their old communities. In other words, the flipside of deconcentration of affordable housing into communities that offer ‘better opportunities’ is the potential isolation of these households—both physically and socially—from their former support systems, communities, and cultural institutions. Ann Seligsohn of Westchester Residential Opportunities, Inc. talked about how this issue was particularly acute in the northern Westchester communities: “when you think about putting people in Pound Ridge, Lewisboro...there’s no transportation. There’s no daycare...People really will lose their support services. If it’s a two parent family, you really need two cars” up north (Seligsohn). There is also the argument that integration of minority populations into white communities also acts to dilute the political power of those minority groups—that dispersing minorities isolates them among whites that might not share their political values or interests, therefore forfeiting the opportunity for minorities’ voices to be represented by elected officials.

The fourth unintended consequence—that residents of the new affordable AFFH units will be unwelcome in the new communities if the developments continue to be contested—is not a forgone conclusion to this story. This one is contingent upon how well the County is able to frame the conversation, educate the public, and advocate for the housing. Explained Jim McCarthy, Chair of the Board of Directors of the National Fair Housing Alliance:

“If the perception in the community is that ‘well we were forced to built it by the courts and it’s been nothing but trouble ever since they built it,’ you can bet that people who live there no matter who they are, what color they are or where they come from, are going to experience some level of jaundiced eye turns to them simply because they live in that property. And that would be an enormous mistake and an unfortunate thing to allow to occur” (McCarthy).

On the other hand, he said, if the community is better educated about the physical developments, the programmatic elements, and the tenant selection process, “then I think the success for the project, the development itself, bodes much better. And I think that the success that the residents will enjoy in the communities as residents is likely to be higher and people are going to be much satisfied in general” (McCarthy). In short, the unintended consequence of using a court order to desegregate communities is the animosity that may be faced by the tenants that eventually move into the housing.

This chapter has laid out some of the barriers that Westchester County will face in implementing the fair housing settlement. The next chapter will look at overcoming those barriers to implementation and make recommendations.

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## **Chapter 6: Recommendations for overcoming barriers to implementation**

This chapter presents recommendations to various stakeholders in Westchester County for overcoming barriers to implementation of the fair housing settlement. Before going into my recommendations, I want to acknowledge how challenging this case is and how the situation lacks simple solutions to facilitate the difficult work ahead of the County. The previous chapter described a number of barriers that the County and other stakeholders will face in implementing the fair housing settlement, and surely there are additional ones out there. Rather than address each barrier point-by-point, I'm going to make broader recommendations to address the question: In the face of all of these barriers, how does the County get the affordable "Affirmatively Furthering Fair Housing" (AFFH) units built according to both the letter and the spirit of the settlement? Here is an overview of the recommendations, broken down into three categories:<sup>37</sup>

### **I. Politics Recommendations:**

- 1) Change the narrative
- 2) Establish a participatory process

### **II. Policy Recommendations:**

- 3) Align fair housing development with other planning objectives
- 4) Create a binding countywide allocation plan

### **III. Design Recommendations:**

- 5) Develop in and around municipality centers
- 6) Integrate with existing fabric and character

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<sup>37</sup> A note about the target audience for these recommendations: My intention is for this thesis to be useful to a wide range of interested parties, from elected officials to municipal workers to not-for-profits to residents and on the local, county, state and national levels. Therefore, I am writing these recommendations in hopes that the insight is accessible across the breadth of this target audience. This means that some of my recommendations will appear too basic to experts in the field, and other recommendations will appear too wonky to the layman. I hope to be able to strike the appropriate balance between the two in order to make this document interesting and informative to a diverse group of readers.

## *I. Politics Recommendations*

### **1. Change the narrative**

As one strategy for overcoming barriers to implementation, the leadership in Westchester (broadly defined) must change the public narrative around the False Claims case. In other words, they must redefine how the public and they themselves understand the story of the lawsuit and the settlement. Marshall Ganz explains that “Narrative allows us to communicate the values that motivate the choices that we make” (Ganz 2008: 15). The narrative around the Westchester False Claims case needs to be adjusted to reflect the fair housing values implicit in the settlement order; it is only with this change that implementation plan can be crafted and carried out in the letter and the spirit of the settlement. There are three steps to changing the narrative: 1) the leadership needs to take ownership of the underlying fair housing issues in the case; 2) they need to reframe the public conversation about the case; and 3) they need an explicit values-based approach moving forward.

Leadership: Ganz also talks about the “art of leadership storytelling”—the process that leaders use to communicate values and get people to act (Ganz 2009). John Forester adds that “Stories...work by organizing attention, practically and politically, not only to the facts at hand, but to why the facts at hand matter” (Forester 1999: 29). The leadership in Westchester needs to change the story that is being told about the False Claims case. It is not productive for these leaders to be talking about the settlement decision in only economic terms. Nor is it productive for the leadership to publicly question the mechanisms and requirements established by the settlement. The leadership needs to be honest about its past approaches to analysis and development, acknowledge the difference between affordable housing and fair housing, embrace the fair housing values at the core of this case and take ownership of the obligation to Affirmatively Further Fair Housing. This is the first step in changing the narrative of the case.

Reframing: The second step is to reframe the broader public conversation about the case from a story about a county that was the target of an inappropriate lawsuit that burdened it with

settlement obligations, to a story about a county that previously did not meet its legally enforceable obligations but that now has the opportunity—with dedicated funding to leverage in a down real estate market—to expand housing choice across the county and benefit from the economic spillover effects of the development. The case needs to be reframed from an analog to the 1980s Yonkers case and its fallout, to a new era of contextual affordable housing development for working households and the elderly. In the most basic terms, the case needs to be reframed to a story that Westchester residents can connect with, a story that builds on shared values and shared outcomes.

This reframing can be accomplished by changing the way planners (and other leaders) talk about it publicly:

“...planners should consider the importance of issue framing when dealing with controversial issues. Under certain circumstances, using the right words may expand the policy options available, allow including goals that otherwise would not receive public support...or simply help to shape local policy discussions. Any of these results may change the outlook for affordable housing...from impossible to possible” (Goetz 2008: 228).

This is a basic public policy approach to gaining public support for a policy issue. The way the issue is framed is key in the public’s understanding of the nature of the problem, the possible solutions, and the outcomes of the implementation. Anecdotally, I have found that the current reputation of the fair housing settlement is uninformed at best and unfavorable at worst; this works against the implementation of the plan and does not help achieve the settlement requirements. This is not an intractable problem; “a deliberative planning process can redefine the entire scope of a problem, resulting in a fundamental rethinking of appropriate solutions” (Goetz 2008: 223). The leadership will benefit from reframing the issue so that there can be a more honest, educated and intelligent public discussion about the roots of the settlement and the implementation options.

Approach: The third step in changing the narrative is establishing the values underlying how the leadership (again, broadly defined) intends to move forward with implementing the settlement requirements. Tim Iglesias of the Non-Profit Housing Association of Northern California uses an

approach to developing affordable housing that includes three objectives, many of which were echoed by those I interviewed for this thesis:

- “(1) Respect for the legitimate concerns of the local community;
  - “(2) Respect for the rights of current and prospective residents; and
  - “(3) Advancing the prospects of future affordable housing proposals in the community”
- (Iglesias in Allen 2002: 1).

Westchester can learn from this approach to developing fair and affordable housing, using these goals to inform the underlying values of the implementation plan. Furthermore, explicitly stating these values could transform the public narrative about the case and the implementation, facilitating the goals of the settlement.

## **2. Establish a participatory process**

A second strategy for overcoming barriers to implementation is to instate a participatory planning process that involves a range of interested parties. A note about my understanding of the implementation planning process up to this point: From the 2009 and 2010 “Master List of Housing Meetings” included as appendices in both the January and the March versions of the implementation plan, it is clear that the County has had some level of involvement from other stakeholder groups. The record shows that, between the end of August 2009 and mid-March 2010, at least one (but in most cases, just one) meeting and/or presentation was held individually with entities within the following types of groups: lawyers, developers (non-profit and for-profit), municipal officials, labor, housing advocacy groups, local community activists, social service providers, finance entities, and clergy. Each meeting seems to have been targeted at a specific stakeholder (with few meetings including representation from multiple stakeholder groups), and it is unclear from the information I have exactly what type of participation these meetings represent. Note that there is only one instance of a meeting with “local community activists”—and this one was in the format of a County presentation.

What has been clear to me throughout my interview process, however, was that the County Executive Office’s implementation planning process was conducted behind closed doors and that it

was explicitly top-down; those who I spoke with in the interviews who had been involved in the process in some capacity were not able to share anything about the process, and it was frequently stressed that this was a County Executive's Office-centric planning exercise, the details of which would not be released before the official implementation plan was issued. If the difficulty that I was having researching the planning process is any indication of how accessible the planning process was to anyone not already intimately involved with the County on housing issues, then I would conclude that the process was not very accessible or participatory. Granted, I don't have specific information on how receptive the County Executive's Office was to taking meetings with groups outside of the embedded affordable housing development and advocacy infrastructure that exists in Westchester; however, based on the list of people with whom the County did meet, it's probably safe to say that either none of these groups requested a meeting or none of them were granted one.

My recommendation is for the County to use a participatory process in planning for implementation. I challenge the notion that stakeholder participation is in conflict with the settlement order that exists and that seeking buy-in from participants weakens the agreement. The settlement order as written provides for a great deal of flexibility in terms of the details of the implementation plan (i.e., how and where the 750 affordable "Affirmatively Furthering Fair Housing" (AFFH) units are built), and therefore there seems to be a great need for stakeholder involvement to come up with the details of the implementation plan.

A top-down planning process misses the opportunity to draw from stakeholder expertise, and it risks alienating the organizations and players whose assistance on the ground will be necessary for successful implementation moving forward. From my own professional experience in local government, I am acutely aware of the impulse of government to seek out token community participation for the appearance of inclusion with the actual intention to proceed as the government thinks is best. From a practical perspective, this may be the most efficient way to get something done,

but from a values perspective—and from a quality of outcomes perspective—this is not the right way to proceed, and Westchester County should not fall into this common trap.

Lawrence Susskind and Jeffrey Cruikshank suggest a number of criteria against which to evaluate the fairness of used in the process of negotiating a settlement, which I think are also relevant to evaluating the inclusiveness of Westchester’s implementation planning process:

- “Was the process open to public scrutiny?”
- “Were all groups who wanted to participate given an adequate chance to do so?”
- “Were all parties given access to the technical information they needed?”
- “Was everyone given an opportunity to express his or her views?”
- “Were the people involved accountable to the constituencies they ostensibly represented?”
- “Was there a means whereby a due process complaint could be heard at the conclusion...?” (Susskind 1987: 21)

Measured against these criteria, it is clear that Westchester County’s implementation planning process can be more inclusive, and I argue that a more inclusive process will create a better plan and a more successful implementation.

Therefore, moving forward, Westchester County needs to open up the implementation planning process. It cannot remain a municipality- and developer-driven process, where opportunities for affordable housing development are identified on a one-off basis to try to meet the settlement requirements through a piecemeal strategy. I will talk later about the need for a countywide allocation plan,<sup>38</sup> but a precondition for creating that countywide allocation plan is a participatory planning process that engages a range of stakeholders—elected officials, municipal workers, community-based organizations, faith-based organizations, community leaders (organizers, activists), other community members, people who represent the interests of the future residents, among others—in a productive conversation about how to implement the settlement requirements. There is no question that this makes for a more challenging planning process (and a longer one),<sup>39</sup> but an

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<sup>38</sup> See recommendation #4.

<sup>39</sup> Note: It is important to have safeguards in place so that opposition groups cannot derail the process by delaying a participatory process indefinitely.



investment of time and effort upfront will ultimately lead to a better vision for the plan and will facilitate a more successful implementation.

The planning and implementation processes would also benefit from the addition of an independent watchdog group to keep any eye on the County's work and hold them accountable for doing a good job. In Chapter 5, I mentioned that the Anti-Discrimination Center (ADC) is currently playing this watchdog role, releasing comments and reports critiquing how the County is proceeding with implementation. However, ADC—the plaintiff in the case—is not an independent group, and the organization—which is based in New York City—is seen as an outsider to Westchester; both factors diminish the impact of its critiques. The process needs a housing advocacy and/or community organizing group that does not receive funding (i.e. funding from the County) that would restrict it from playing a legitimate independent watchdog role over the implementation of the fair housing settlement. An academic department or research center in a local university could fill a similar role.

*II. Policy Recommendations:*

**3. Align fair housing development with other planning principles**

The implementation of the fair housing settlement should be driven by good planning principles, especially those related to sustainable development. This may seem obvious from a planning perspective, but it is not so obvious from a civil rights perspective; because the fair housing issue spans both spheres, it is important that the civil rights implications of the settlement do not overshadow planning considerations in the final implementation plan. Simply put, the civil rights objectives of the fair housing settlement should be achieved in consideration of planning trends around sustainability, including transit-oriented development, infill development and densification; the implementation plan should not perpetuate undesirable suburban development patterns.

The flexibility of the settlement agreement (in terms of determining the details of implementation) allows for but does not guarantee the achievement of good planning in the

development of the new affordable AFFH units. Therefore, the County should explicitly align the fair housing settlement implementation plan with its other planning initiatives. The implementation plan should reference goals from Westchester 2025's "Policies to Guide County Planning," such as:

- 1) *Channel development to centers* ("where infrastructure can support growth, where public transportation can be provided efficiently and where redevelopment can enhance economic vitality");
- 2) *Enhance transportation corridors* ("to make these areas into efficient and attractive multi-use places");
- 3) *Assure interconnected open space*;
- 4) *Nurture economic climate* ("with use of municipal, county, state and federal resources to improve infrastructure, housing and programs that attract and support business enterprise");
- 5) *Preserve natural resources*;
- 6) *Support development and preservation of permanent affordable housing*;<sup>40</sup>
- 7) *Support transportation alternatives* ("that improve the mobility choices...and improve air quality by enhancing the efficiency and effectiveness of public transportation and reducing solo-driving");
- 10) *Maintain utility infrastructure*;
- 12) *Engage in regional initiatives* ("aimed at sound land use, transportation, economic development, housing and environmental policies");
- 13) *Define and protect community character* ("through focus on location, setting, aesthetic design and scale of development");<sup>41</sup> and
- 14) *Promote sustainable technology* (i.e., "reliable, sustainable energy and conservation practices while fostering green technology in all areas of land use and building") (Westchester County 2010: 7-10).

To be clear, the alignment of these two sets of goals does not sacrifice or dilute the civil rights goals of the settlement; rather, the implementation plan can and should be crafted with both sets of goals in mind.

#### **4. Create a binding countywide allocation plan**

In order for the spirit of the settlement agreement to be accomplished, the implementation plan must include a binding countywide allocation plan for the 750 affordable AFFH units, aligned with the settlement's timeline. As I discuss in Chapter 5, in the absence of required allocations for each municipality, the most resistant municipalities will not need to develop any affordable AFFH

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<sup>40</sup> This policy was added in January 2010 to bring the these planning policy guides in compliance with the fair housing settlement

<sup>41</sup> Community character should be preserved as long as it is not being used as an exclusionary physical technique and as long as "community character" is not a euphemism for the social, racial and ethnic characteristics of the people in the municipality.

units; that scenario provides municipalities an incentive to be as resistant to the units as possible, and it works against the spirit of the settlement agreement. A binding allocation plan would also enhance the County's leverage over the municipalities by establishing specific development requirements against which inaction and/or resistance can be measured; while it seems to be an open question about whether the County can legal sue municipalities for failure to comply, a lawsuit remains a threat and a point of leverage until a test case proves otherwise.

It is outside of the scope of this thesis to suggest how the allocation for each municipality should be calculated. However, my suggestion is that the methodology for determination be established through a participatory planning process (as described in Recommendation #2). There are certain parameters for distribution already set up by the agreement, and there are other examples to learn from for additional criteria; for example, the Westchester County Housing Opportunity Commission includes following measures per municipality in the formula it uses to determine its *Affordable Housing Allocation Plan 2000-2015*: 1) Adjusted Land Area, 2) Adjusted Aggregate Household Income, 3) Job Growth 1990 to 2000, 4) Overcrowded Units, and 5) Miles of B-Line Bus Service (*Affordable Housing Allocation Plan 2000-2015*: 6). It is important to note that an allocation plan created through a participatory process could be more effective than the ones created by the Westchester County Housing Opportunity Commission—even if it utilized some of the same criteria—because the participatory process would create buy-in from the municipalities from the beginning (whereas the commission's allocation plans were non-binding suggestions placed upon the municipalities by this outside entity). Furthermore, a participatory process could help to capture information about some of the qualitative characteristics of the municipalities that cannot be accounted for through these other quantitative measures.

My final suggestion for the allocation plan is that it should not include a cap-and-trade mechanism that allows a municipality to pay another municipality to build the first municipality's allocated share of affordable AFFH units. This type of system would not further fair housing, as it would

allow wealthy municipalities to avoid building affordable AFFH units and therefore perpetuate exclusivity.

*III. Design Recommendations:*

As discussed in Chapter 5, the development of affordable AFFH units will likely require some increase in density to make the financing and development work; however, communities are often resistant to the appearance of density based on their assumptions about how density is necessarily physically expressed. This recommendations section will look at design strategies that minimize the appearance of density, reframing the conversation about density and therefore decreasing resistance to the development of affordable AFFH units.

## **5. Develop in and around municipality centers**

The first design recommendation is about the strategic placement of the affordable AFFH units: the development should occur in or around downtowns or other centers of the municipalities. These areas are suitable for higher density development because they typically already have higher densities than the other residential fabric, and they are especially suitable for affordable housing development because to have access to amenities such as transportation (both commuter rail and bus) and commercial uses (retail and/or offices). I will present two strategies for creating affordable AFFH units in the centers: 1) Creation of special zoning (overlay) districts for affordable housing, and 2) Adaptive reuse.

### Special zoning (overlay) districts

Special zoning (overlay) districts could allow municipalities to work towards their required settlement allocations<sup>42</sup> while maintaining local control over the siting and urban design of the developments. Through local planning processes, municipalities could designate certain areas—

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<sup>42</sup> See Recommendation #4

for example, centers or other choice locations—as overlay districts for affordable housing development; within each area, municipalities could also set urban design standards for development to be consistent with the character of the surrounding area. Within the overlay districts, development bonuses would be offered only in exchange for the provision of both amenities: affordable housing and compliant design. The density bonuses prescribed by the municipalities would allow denser development than is currently permitted (making development on the site more financially feasible and therefore more attractive to developers), but the designated design standards would provide this density in a contextual way. This tool differs from an Inclusionary Zoning ordinance (a model for which has been specified by the County in compliance with the settlement) in that the overlay is applied to specific locations within the municipality and it can incorporate other design requirements by location to make the development more contextual. This means that the overlay density and design requirements could vary in each application within a municipality, based on the specific area to which it applies; for example, an overlay district in a commercial or formerly industrial zone could have very different details than one in a residential neighborhood.

The municipality benefits from using special zoning districts by having a finer-grain control over the siting and design regulations, while still providing opportunity to meet the settlement allocation requirements. Furthermore, the municipality can create the opportunity for denser affordable housing development without changing the underlying zoning, potentially making the process more politically palatable. Ultimately, the special zoning district creates an incentive for municipalities to be proactive in their planning for the affordable AFFH units to

avoid a County lawsuit;<sup>43</sup> in the absence of the overlay district tool, that threat still exists, but the municipalities lack a mechanism that allows them to take such specific control of the process and implement the affordable AFFH units in a way that is consistent with local planning efforts. This tool has the potential to change the narrative of the settlement<sup>44</sup> by empowering the municipalities to incorporate the affordable AFFH units into their plans through a local process consistent with other planning goals, rather than leaving the development as a top-down County mandate that municipalities fear they don't have control over the implementation of.

Variations on this tool have been used in Westchester and Long Island, as well as other jurisdictions across the country. The Village of Irvington (in Westchester) utilized a one-time special zoning district for the redevelopment of the Burnham building into affordable housing and a library: "In order to assist with the [Burnham] affordable housing development, the Village Trustees [of Irvington] decided to make the property a part of a special zoning district that encourages the development of affordable housing" (Listokin 2005: 200). Irvington Village Administrator Lawrence Schopfer explained that an industrial zoning district was modified to incorporate affordable housing through a specialized amendment to code for this particular piece of property (Schopfer).

The Town of East Hampton in Suffolk County on Long Island has a similar mechanism called the 'Affordable Housing Overlay District:'

"Since 1984, an eight unit per acre Affordable Housing Overlay District (AHO) has allowed non-profit groups, governmental and quasi-governmental agencies to build higher density affordable housing than that which would otherwise have been possible under the underlying zoning. Affordable Housing Overlay districts have been incorporated on the zoning map in accordance with the following location and site characteristics criteria:

- Public water is available to the site.
- The site is reasonably convenient to public transportation.
- The site is not within a flood hazard or erosion area.
- The size and shape of the site is reasonably suited to the proposed development.
- Development of the site is reasonably compatible with the surrounding use"

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<sup>43</sup> Note: An underlying assumption of this tool is that the County can take legal action against municipalities that do not cooperate with the settlement requirements. While some stakeholders in Westchester contest that the County has legal authority to do this, it is still a threat until proved otherwise in a test case.

<sup>44</sup> See Recommendation #1

(Town of East Hampton 2005: 60).

Since 1984, East Hampton has produced 209 units of affordable housing across five separate complexes using the overlay district mechanism; as of April 2010, a complex for 26 townhouses and a complex for 40 senior units are being planned (Ruhle).

While there are many benefits to the special zoning district tool, there are also some precautions that need to be taken. In order for the overlay district to truly be a tool towards affordability and equity, the County would have to set guidelines for size of density bonuses, the siting of the districts and the permitted design regulations; otherwise, the overlay districts might end up being loopholes where municipalities could appear to be proactive about planning for affordable housing while setting rules that actually prevented economically-feasible affordable housing (or that relegated them to only the worst possible parcels). The County could develop a model ordinance (similar to how it developed a model inclusionary zoning ordinance) that could be adopted by municipalities. There are also limitations to the tool: it does not address the water and sewer issues that limit density in much of northern Westchester (although it could still be applied to the areas in northern Westchester that do have public water and sewers). Additionally, fair housing advocates might argue that this mechanism doesn't promote fair housing because it limits affordable housing development to certain locations only. I acknowledge both of these limitations, but I contend that the overlay district still has potential to be one of the various tools used in Westchester County to develop the affordable AFFH units.

### Adaptive reuse

A second strategy for focusing the development of affordable AFFH units in and around the center of municipalities is adaptive reuse, where non-residential buildings are converted for residential use. This is a strategy that the County already uses to develop affordable housing, but I want to mention it here to underscore its importance. This is a particularly good tool to use in the

depressed real estate market of 2010, which is experiencing high commercial vacancy rates. It can also be consistent with the centering strategy, as much of the non-residential property is located in these central, mixed-use locations. It is also a good tool to use in municipalities that claim that they are already completely built out and do not have vacant land for new development; this reframes the conversation about affordable AFFH unit development to include vacant nonresidential buildings, changing the number of municipalities can claim they are already ‘built-out.’

An example of how this is already being used in Westchester, the Village of Ossining completed an adaptive reuse project in 2009. The former Ossining National Bank building, which had “been empty for decades” was turned into affordable condominiums—called Ossining T.B. Flats—that brought 12 units of affordable housing to Ossining’s historic downtown business district (Westchester.com). This project brings affordable housing to the village, and it also serves as an economic revitalization tool for the downtown by removing vacancy.

**Figure 6.1: Old Ossining National Bank**



(Source: Ossining T.B. Flats)

**Figure 6.2: Renovated T.B. Flats Building, 12/2009**



(Source: Faranda)

## **6. Integrate with existing fabric and character**

The second design recommendation is to integrate new affordable AFFH units with the existing fabric. Affordable housing built at higher densities does not have to be visually inconsistent with the existing residential fabric; rather, good design can be employed to integrate the new housing with the existing typologies in the various districts in each community. “Emphasis on good



design is paramount, because good design is what actually makes density livable" (*Introduction to Density: Lecture# 1-Part 2*). This section will suggest several strategies for designing affordable AFFH units so that it is visually consistent with the existing fabric. Specifically, I will look at 1) Contextual infill for a range of existing densities; 2) Multiple units built with single-family appearance; and 3) Acquisition.<sup>45</sup>

### Contextual infill for a range of existing densities

Affordable housing is not limited to any one building typology; this point may be obvious, but I think it is worth noting, especially because broad public perceptions of 'affordable housing design' often refers only to the brick towers style of public housing (which is not relevant to the way affordable housing is built today). That affordable housing can be developed in different building types means that infill development can be contextual across a spectrum of existing fabrics. Downtown or town-center infill developments can utilize denser multifamily housing typologies (i.e., row houses, townhouses, walkup apartment buildings, elevator apartment buildings). Compact single-family or two-family units can be used for infill in lower-density residential areas or when only small parcels are available. Appropriate architectural styles and building materials can also be chosen to fit into the surround neighborhoods. All of these typologies can protect and accentuate community character if correctly contextually designed.

### Multiple units built with single-family appearance

Multiple units developed together in a building that has a single-family appearance can be utilized in the suburban and semi-rural areas of Westchester County municipalities, especially where large single-family homes exist. There is precedent for putting multiple units together to look like

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<sup>45</sup> Note: I want to point out that I am not including accessory dwellings units in my suggested strategies. While accessory dwelling units have the potential to add contextual, affordable units in many Westchester municipalities, they would be difficult to affirmatively market (due to separate private ownership of each individual unit) and therefore would not promote the fair housing goals of the settlement.

rambling farmhouses or large single-family homes, dating back to the 1940s (Vale 2000). In the areas of Westchester where larger, expensive single family homes are common, it would be easy to design low- and moderate-income multi-family buildings to look like single family homes, as the massing and floor-area-ratio of the new buildings wouldn't be so different from that which currently exists. "By most objective indices of physical intensity...each expensive unit may well be equivalent to three or four low- or moderate-income housing units" (Mallach 1984: 61).

**Figure 6.3: Drawing of multifamily homes rendered to look like a pair of neocolonial detached single-family houses, Massachusetts State Housing Board, 1948**



(Source: Vale 2000: 250)

There are various examples of this method used across the country. Battle Road Farm in Lincoln, MA uses classic New England farmhouse and turn-of-the-century carriage house design to camouflage 4 to 6 units into each building (Battle Road Farm). Both Crescendo at River Oaks in San Jose, CA and the Great House in Fairfax, VA incorporate multiple affordable units into a large, mansion-like building (6 units in the former, 2 to 4 in the latter). All of these buildings are models for Westchester, as they reflect the style of single-family houses already included in the residential fabric.

**Figure 6.4: Battle Road Farm, Lincoln, MA: 4 – 6 units per building**



*(Source: Introduction to Density: Lecture #2-Part 4)*

**Figure 6.5: Crescendo Oaks, San Jose, CA: 6 townhouses per building**



*(Source: Introduction to Density: Lecture #1-Part 3)*

**Figure 6.6: Great House, Fairfax, VA: 2 or 4 units per building**



*(Source: Introduction to Density: Lecture #2-Part 4)*

### Acquisition of existing residential units

In municipalities where new development is not possible, another way to integrate the affordable AFFH units into the fabric is through the acquisition by the County of existing residential units to be converted to affordable housing. The settlement agreement allows for up to 25% of the 750 units to be developed through the acquisition and conversion of existing units. This is a good strategy to use in those municipalities most resistant to any form of new development, as it only utilizes existing structures. It is also an opportunity to deal with foreclosed properties or other for-sale residential units that have been on the market for a long time.

#### *IV. Topics for further research*

My goal for this thesis is to contribute research, analysis and recommendations that facilitate a more educated and intelligent discussion about the implementation of the Westchester False Claims settlement agreement. This thesis has also raised questions that were outside the scope of my work but deserve attention in future research. For example:

- What type of participatory process will be most effective in incorporating multiple stakeholders into Westchester's implementation planning process?
- What criteria should be used to determine the countywide allocation plan?
- Is the Affirmatively Furthering Fair Housing obligation (when enforced) an effective mechanism for achieving the goals of anti-discrimination and desegregation?

Finally, once implementation is complete (post-2016), a detailed evaluation should be done to determine how successful the plan was at accomplishing the goals of the settlement. Where were the units ultimately built? Who is occupying the units? Did the new affordable housing units achieve the settlement goals of greater racial and ethnic residential diversity in Westchester municipalities? What has the impact been (if any) on the communities in which the units were built? Because this case has

the potential to significantly impact fair housing across the country, the outcomes should be rigorously evaluated so that there is documentation and analysis to inform work in other jurisdictions.

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