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Affirmatively Furthering Fair Housing: The Search for Solutions That are Just Right

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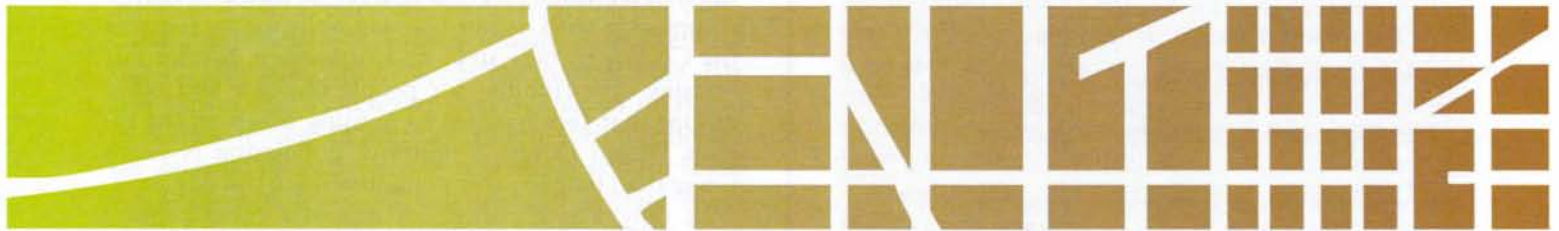
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ZONING AND PLANNING LAW REPORT



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Affirmatively Furthering Fair Housing: The Search for Solutions that are Just Right

John R. Nolon and Tiffany Zezula

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A federal False Claims Act action against Westchester County, New York launched a unique effort to explore whether zoning, subsidies, and advocacy could significantly increase the percentage of minorities living in largely white communities. A Voluntary Cooperation Agreement entered into by Marin County, California raises a similar question. This article describes the legal background of the lawsuit brought against Westchester County, the Settlement Agreement that arose from it, and the attempt by Westchester County to carry out its obligations to affirmatively further fair housing. It traces the evolution of exclusionary zoning law in New York State courts, contrasts it to statutory approaches in New Jersey and Connecticut, and reviews the tepid efforts of the New York State legislature to tackle the problem of articulating the affordable housing obligations of local governments. The authors detail the progress made in Westchester County and explain their own initiative to use training, education, and technical assistance to further the efforts by communities to provide

fair and affordable housing. The article also explains the significance of the implementation of the Settlement Agreement and that while Westchester County will probably meet most of the literal terms of the Settlement, the goal of achieving significant racial integration in largely white census tracts, and all the benefits of diversity that integration achieves, remains elusive. Finally, it considers what can be done at the state level to achieve integration goals, while still pursuing other state policies regarding smart growth, climate change mitigation, energy conservation, and housing equity in densely settled urban areas.

Introduction

After encountering significant NIMBY opposition to the expansion of the Lucasfilm facilities on his land, George Lucas abandoned his plans and proposed to sell his land to housing developers dedicated to creating much-needed affordable and workforce housing in Marin County, California.¹ However, recent media

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coverage of this sudden and dynamic confrontation does not cover the fair housing backstory; one that involves the Fair Housing Act, various federal grant-in-aid programs, and a Voluntary Cooperation Agreement (VCA) entered into between Marin County and the U.S. Department of Housing and Urban Development (HUD). The VCA, which resulted from an investigation launched by HUD in 2009 of Marin County's compliance with its fair housing obligations, requires the County to take steps to affirmatively further fair housing opportunities for people of color and other groups that face barriers to housing access in the region. Marin County's minority population is much lower than that of other communities in the Bay Area, with only a few pockets of minority concentration in Marin City and the San Rafael Canal district. The neighbors of Lucas's property are now contemplating a different change in the neighborhood than the one they initially opposed.²

Similarly in Westchester County, New York, the County, in 1975, organized a consortium of constituent cities, towns, and villages to apply to HUD for Community Development Block Grant (CDBG) funding. The consortium, which now consists of 31 communities, received these funds and has annually ever since. In 2009, the Anti-Discrimination Center of Metro New York (ADC) sued Westchester County under the False Claims Act³ alleging that it improperly certified its efforts to advance fair housing as a recipient of federal CDBG funding. Westchester County settled the lawsuit. The settlement required that the County develop an implementation plan to affirmatively further fair housing, including an obligation to build and affirmatively market 750 affordable housing units, primarily in census tracts with less than 3% African-American or 7% Hispanic residents.⁴ Many of the consortium communities have census tracts with very small percentages of African-American and Hispanic populations.

Obligation of HUD Grant Recipients to Further Fair Housing

These stories from affluent counties on both coasts frame a challenge for attorneys and their municipal and development clients. Westchester and Marin Counties, like other recipients of HUD funding, have to "conduct an analysis to identify impediments to fair housing choice" and "take appropriate actions to overcome the effects of any impediments identified through the analysis."⁵ There are nearly 1,200 local recipients of CDGB funding nationally, and that funding makes financially

feasible thousands of public improvements and private developments. All recipients of CDBG funding, therefore, should be adhering to HUD's protocols and policies for fair housing.

Meanwhile, HUD is continuing to develop policies for conducting an Analysis of Impediments (AI) and for enforcing obligations to overcome these impediments on CDBG recipients based largely on the Westchester experience; it will eventually complete new rule-making that will be applicable nation-wide. For this reason, the Westchester County chapter is critical to understanding the story of affirmatively furthering fair housing for recipients of federal aid and for those whose projects depend on that financial support. Westchester County and its constituent communities have become the vanguard of a movement to strengthen the enforcement of fair housing obligations by HUD.

The False Claims Action and the Westchester County Settlement

The Anti-Discrimination Center of Metro New York (ADC) sued Westchester County under the False Claims Act⁶ for having failed to pursue in good faith a strategy for overcoming impediments to fair housing in consortium communities pursuant to certifications it submitted to HUD.⁷ Westchester County settled the suit and agreed to construct 750 affordable housing units over seven years and to encourage the adoption of inclusionary zoning by consortium communities.⁸ Under this agreement, the County would provide over \$50 million to subsidize these units and would affirmatively market them in communities of color throughout the region. The County created a set of principles for local governments to follow in adopting inclusionary zoning ordinances, which include the requirement that 10% of the units in future residential subdivisions be affordable under HUD guidelines, remain affordable for 50 years, and be affirmatively marketed. The principles also encourage, but do not require, localities to offer developers density bonuses in exchange for providing more than 10% affordable units. Should the consortium communities fail to either construct the units or adopt the inclusionary zoning ordinances, the County has agreed to withhold benefits from these communities and take other actions against them. The County is supervised by a federal monitor and by HUD, which intervened in the False Claims suit.

According to the last progress report delivered to the monitor, Westchester County is close to meeting

the Settlement Agreement's 2012 benchmarks for ensuring the development of 750 affordable housing units. It reported that 197 units have financing in place and that 109 have building permits. Currently 542, or 72% of the required 750 affirmatively furthering fair housing (AFFH) units are in the pipeline representing sites in 15 municipalities; 223 of these units are in census blocks that had 0% African American and 0% Hispanic population according to the 2000 Census.⁹ In addition, nine local governments have adopted local inclusionary zoning laws that follow the principles set by the County, and five communities have such laws under review.¹⁰

Despite this progress, the District Court, HUD, and the monitor insist that Westchester County has not complied with its other obligations under the Settlement, including failing to adopt legislation that prevents discrimination based on a tenant's source of income, failing to complete a proper AI, not having an adequate strategy for overcoming exclusionary zoning practices, and not identifying the types of zoning practices that would, if not remedied by a municipality, cause the County to pursue legal action against its constituent communities.¹¹

State Legislative Action

A week before the County approved the Settlement, the Governor of New York vetoed the Westchester County Workforce Housing Incentive Program bill, which passed both the Senate and the Assembly.¹² The bill is comparable to the Long Island Workforce Housing Act that was enacted in 2008.¹³ Both require local governments in the affected Counties to give 10% or greater zoning bonus densities to the developers of all new projects involving five or more residential units. Furthermore, both require that 10% of the units be affordable workforce housing. Under the Westchester County Workforce Housing bill, the required units must be affordable to households earning 80% or less of Westchester's Area Median Income. These state laws contain no direct reference to affirmatively furthering fair housing.

If the Governor had not vetoed this bill, municipalities in Westchester County would have been required to adopt a local law that specifies how each would implement this law and establish procedures for waiving or modifying standards that inhibit the utilization of the bonuses on specific sites. These local laws would have required affordable units to remain affordable for 30 years or more in certain instances. Obviously, the 31 communities in Westchester County

would have had different obligations under the Workforce Housing Incentive Program law than it does under the Settlement. Therefore, as of now, there is no state-wide legislation in New York that requires local governments to provide affordable housing.

Contrast this with New Jersey and Connecticut. In New Jersey, since 1985, the state legislature has enacted and amended state legislation establishing housing regions, allocating fair shares to municipalities within those regions for the construction of new affordable housing, and awarding builders zoning remedies where municipalities fail to amend their zoning to comply with their fair share.¹⁴ In Connecticut the state legislature adopted the Affordable Housing Land Use Appeals Act in 1990. It expressly reverses the presumption of validity, which sustains most municipal land use decisions, when a developer challenges the denial of an application to construct affordable housing. Under the Act, a municipality that denies such an affordable housing application carries the burden of proving that its action is justified by showing not only that the denial was necessary to protect substantial public interests in health and safety, but that these interests clearly outweigh the need for affordable housing. The Act, however, exempts communities in which at least 10% of the housing stock is affordable to low and moderate income families.¹⁵ Affordable housing under the Act is furthered by a program known as HOME Connecticut, which provides technical assistance and per unit funding to municipalities that agree to create high-density incentive housing zones that accommodate from six single-family to 20 multi-family units per acre.

The Limits of Judicial Intervention: *Berenson* and Its Progeny

The courts in New York have made it clear that beyond certain minimum judicial supervision of local zoning, requiring municipal governments to provide affordable housing is a matter for state legislative action. In the seminal 1975 Court of Appeals case, *Berenson v. New Castle*,¹⁶ the court noted that:

Zoning ... is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning.¹⁷

The *Berenson* decision also declared:

[T]he primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's land.... [I]n enacting a zoning ordinance, consideration must be given to regional [housing] needs and requirements.... There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met.¹⁸

This case and an associated line of cases establish the legal rules used by the courts in New York to decide whether municipal zoning unconstitutionally excludes affordable types of housing. These cases establish very general standards to determine whether a locality's zoning is exclusionary, while urging the state legislature, in turn, to provide for regional and state-wide planning regarding these matters.

The Court of Appeals established in *Berenson* a test for courts to apply when determining the reasonableness of local zoning ordinances. The test includes two factors: (1) "whether the town has provided a properly balanced and well-ordered plan for the community ... that is, are the present and future housing needs of all the town's residents met," and (2) whether the regional needs have been considered.¹⁹ After adopting these guidelines, the State's highest court remanded the case for trial to the Supreme Court in Westchester County, which decided the case in 1977.²⁰ The Supreme Court found that New Castle's ordinance violated both prongs of the test and the zoning ordinance was declared invalid to the extent that it failed to allow for multifamily development at densities of at least eight units per acre. New Castle was directed to issue a building permit for the project and was given six months to amend its ordinances to provide for the construction of 3,500 units of multifamily housing over a 10-year period.

The Town appealed the trial court's decision and, while the Appellate Division upheld the declaration of the invalidity of the ordinance, as well as the requirement that the plaintiff's land be rezoned,²¹ it reversed both the judicially-prescribed fair share goal and the requirement that the Town award a specific density for the plaintiff's development. The Appellate Division ordered New Castle to remedy the constitutional problems with its ordinance within six months. The immediate result was the development of upper-income condominiums on the plaintiff's land. No further appeal was taken.

In *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, five years after its *Berenson* decision, the Court of Appeals added a third factor to the *Berenson* test and restated several principles regarding the validity of zoning.²² The court held that if the ordinance was enacted with an exclusionary purpose it would fail constitutional examination. The *Kurzius* court reviewed and sustained the validity of five acre minimum lot zoning in the Village of Upper Brookville. It restated several principles used by the judiciary in reviewing zoning in New York:

- “zoning is a valid exercise of the police power if its restrictions are not arbitrary and they bear a substantial relation to the health, welfare and safety of the community;”²³
- zoning ordinances, as legislative acts enjoy a presumption of constitutionality, which may be rebutted if demonstrated beyond a reasonable doubt;²⁴
- the decision “as to how various properties shall be classified or reclassified rests with the local legislative body” and “its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary;”²⁵
- “the burden of establishing such arbitrariness is imposed upon him who asserts it;”²⁶ and
- if the purposes that zoning accomplishes are “fairly debatable, the legislative judgment must be allowed to control.”²⁷

Another eight years passed before the Court of Appeals returned to the *Berenson* doctrine in *Asian Americans for Equality v. Koch*.²⁸ In that case, the Asian Americans for Equality plaintiffs charged that the City of New York’s adoption of a special area-wide zoning district would effectively displace residents who require low-income housing by eliminating some existing housing and not providing adequate incentives to developers for more. The court rejected this “piecemeal” analysis of a community’s zoning ordinance, holding that it is how the entire community is zoned that matters under *Berenson*. After repeating prior court principles regarding the strong presumption of constitutionality that zoning enjoys and that the party attacking zoning bears the burden of overcoming that presumption beyond a reasonable doubt, the court held that *Berenson* did not mandate affirmative relief. Again quoting *Berenson*, it indicated that “our concern was not ‘whether the zones, in themselves, are balanced communities, but whether the town itself, as provided by its zoning ordinances, will be a balanced

and integrated community.”²⁹ Further the court noted, “in our prior decisions we have not compelled the [community] to facilitate the development of housing specifically affordable to lower-income households; a zoning plan is valid if the municipality provides an array of opportunities for housing facilities.”³⁰

This final holding by the Court of Appeals in *Asian Americans* cited *Suffolk Housing Services v. Town of Brookhaven*.³¹ There the plaintiff alleged that Brookhaven’s zoning ordinance was unconstitutional under *Berenson* because it did not allow for enough low-income housing. While the Second Department expressed an abhorrence of “unconstitutional zoning barriers that frustrate the deep human yearning of low income and minority groups for decent housing they can afford in decent surroundings,”³² it held that Suffolk Housing Services failed to “overcome the presumption of the constitutionality of the Brookhaven zoning ordinance”³³

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

- *Matter of Fox Meadow Estates v. Culley*, 233 App. Div. 250, 252 N.Y.S. 178, affd. without opn.(zoning ordinance that limited multifamily and businesses to areas adjacent to where such development had already occurred was held valid “since a locality may adopt plans suitable to its own peculiar location and needs, acting reasonably”);³⁴
- *Blitz v. Town of New Castle*, (holding that the number of housing units allowed or possible under a multifamily zoning ordinance, and not the number that will actually or probably be built, is determinative of whether such ordinance adequately considers regional needs and requirements);³⁵
- *Continental Bldg. Co., Inc. v. Town of North Salem*, (holding unconstitutional an ordinance which ignored regional needs for multifamily and affordable housing by reducing the number of multifamily housing units from 379 to 129 and limiting the percent of total area of the community zoned for multifamily housing to 1/3 of one percent);³⁶ and
- *Land Master Montgomery, LLC v. Town of Montgomery*, (holding that changes to a town’s zoning laws that eliminated the only specifically dedicated multi-family zoning districts in the town were enacted without proper regard to local and regional housing needs and had an impermissible exclusionary effect).³⁷

These cases fall short of an effective judicial requirement to adopt inclusionary zoning at the local level and stipulate nothing regarding affirmatively furthering fair housing. Instead, they require local zoning to include multifamily housing where local and regional needs are unmet, and they caution localities against acting overtly to exclude. The obvious limitation affecting the courts in this field is the lack of a statutory definition of the affordable housing responsibility of each community. What is the standard for its performance? What is its housing region? Who is it that is in need of housing within that region? What incomes do they have? How many of them are there? What is its proportionate share of that need? What other public interests are served by zoning that must be balanced with the provision of affordable housing? None of these questions have been answered by the state legislature.

The limited holdings of the New York courts regarding exclusionary zoning and the virtual absence of relevant state legislation raise interesting questions under the Westchester County False Claims Settlement Agreement. As a co-equal municipal government without zoning and land use powers of its own, what legal authority does the County have to force municipalities to adopt inclusionary zoning ordinances? Does the Settlement give the County standing to sue local governments for exclusionary zoning or simply for damages related to its obligations to the federal government under the CDBG Program, the Fair Housing Act, and the False Claims Act? Would a community with sufficient multifamily zoning to withstand an exclusionary zoning suit under *Berenson* be liable where the County can show that it is not meeting its obligations under the Settlement? If so, for what? Does the County have the power to claim that affordable housing projects under the Settlement are County projects and, as such, are exempt from local zoning?³⁸ In a state where the courts have crafted modest judicial remedies and where the legislature has delegated all relevant power to regulate private land to towns, villages, and cities, these are critical unresolved questions.

Though there remain many unanswered questions, it is clear that local governments exercise significant control over the provision of affordable housing, and that strong and well-informed local leaders are part of the infrastructure needed for an effective strategy to affirmatively further fair housing. The Settlement, the False Claims Act, the Fair Housing Act, and planning, zoning and decision-making skills are all topics that require an educated public and dedicated leadership to master.

Building the Human Infrastructure: Training and Education to Continue the Progress

The authors have been active in training local leaders regarding affordable housing for the past 15 years in Westchester County. Through the Land Use Law Center, they provide training to local land use leaders in all aspects of sustainable development, including fair and affordable housing. In early 2010, the Center, along with the Housing Action Council, a regional not-for-profit organization dedicated to expanding housing opportunities for low- and moderate-income households, brought together the chief elected officials of the consortium communities in Westchester to discuss the opportunities, challenges, and issues raised by the Settlement. Because local governments enjoy home rule authority regarding zoning and development in New York, and because the development approval process is highly sensitive to local public opinion, many of the chief elected officials believed that an intensive education process for local leaders was needed to further the creation of fair and affordable housing at the local level.

The Center, along with the chief elected officials, organized a four day training program to demonstrate to local leaders in consortium communities how they can promote fair and affordable housing through inclusionary zoning ordinances and other techniques. At the beginning of the program, participants were asked to identify the barriers to fair and affordable housing in their own communities. They identified several major impediments that, in their experience, needed to be overcome in order to affirmatively further fair housing. These included the difficulty of identifying suitable sites; the high cost of land and construction; the lack of adequate debt financing and subsidies; the need for rezoning of sites; the lengthy time it took to achieve project approval by local land use boards; high property taxes; community opposition to development of all types; the concern over the disappearance of open space; the lack of water, sewer, and transportation infrastructure; the fiscal impact on local school budgets; and the question of whether housing developed in some communities would even be desired by the intended occupants. To respond to these identified barriers, the trainers exposed the participants to a variety of strategies that could be adapted to the individual circumstance of each participant's community.

Site Identification: The trainers corroborated the view of the participants that most sites appropriate for af-

fordable housing were already developed. Therefore, alternative sites needed to be explored. The trainers created a list of unconventional sites and provided the leaders with disposable cameras to photograph possible locations in their community and return to the second day of training with examples. Among the suggestions that trainers offered were unused space on religious or other institutional properties, tax foreclosed properties, underutilized sites and buildings, infill sites in hamlets, marginal malls and downtowns, second story apartments over main street stores, accessory apartments, and others. On day two, the participants returned with photographs of 42 potential sites.

Infrastructure: The trainers also corroborated the participants' sense that water and sewer infrastructure were generally unavailable in much of the sparsely settled area in their communities, and that its construction was prohibitively expensive, using dollars-and-cents illustrations. Conversely, many of the sites identified by participants had the existence of water, sewer, and roads.

Regulations: The participants also accepted the challenge to further the adoption of the inclusionary zoning ordinance being advanced by the County, and were taught about several zoning techniques available for their consideration. These included floating zones, special use permits, and accessory units. They discussed, for example, how a special use permit could be created to allow multiple individual parcel owners to work with a developer and propose a scattered site, affordable housing program on their parcels. They learned that a special use permit could also be used for smaller affordable housing projects by reducing parking and setbacks requirements and increasing height allowances to create appropriately scaled housing. The same technique could be used to permit larger affordable housing projects, where the impacts on the surrounding areas could be mitigated by performance standards that a project would have to meet to win approval. They also learned that, when any of these new zoning techniques were proposed to encourage affordable housing, a generic environmental impact statement could be prepared that would identify the adverse environmental impacts and provide for their mitigation. As such, it is possible for developers of individual projects to eliminate the requirement of preparing a lengthy and costly environmental impact studies. This provides an incentive for developers to build under these new land use laws.

Community Opposition: The training program also discussed techniques to overcome community opposition typically encountered by affordable housing de-

velopment proposals. A key component of the training program is teaching the benefits of a collaborative community decision-making process and demonstrating that local land use boards make better decisions and have a greater positive impact on their community when they increase the frequency, diversity, and level of engagement of community residents. For instance, there are numerous opportunities in the land use approval process where the law allows the strict timeframes of the decision-making process to be waived to allow for collaboration and negotiation: opportunities for parties to effectively hear, develop, and accommodate each other's interests. Understanding how to design effective public participation meetings, including determining who convenes the stakeholders, identifying who the stakeholders are, determining who will facilitate the conversation, defining the purpose of each meeting, and teaching general meeting management skills are all tools for local leaders to use in communicating effectively regarding fair and affordable housing projects.

Education: Many of the participants thought that much of the negativity coming from community residents about fair and affordable housing resulted from people being uninformed about the Settlement, the County's Implementation Plan, affirmative marketing, and the Model Inclusionary Zoning Ordinance proposed by the County. Therefore, leaders were taught how to conduct educational sessions with their community residents and create advocacy groups to identify local impediments to fair and affordable housing, determine how to overcome them, and to support fair and affordable housing projects.

Bringing it all Together: By the fourth day of the training program, the participants had considered a number of strategies for overcoming the particular barriers faced in their communities and were ready to develop a plan. The final challenge was to find a way to talk about the 42 sites identified, the land use tools and techniques to utilize, and how to engage the public effectively. To do this, the trainers grouped the sites into four categories: Infill in Mixed-use Centers, Commercial Corridors, Residential Neighborhoods, and Rural Residential. They then organized participants into the applicable group to consider how to create a strategy most relevant to their communities.

Each group was asked to design housing in one of the categories of sites identified. The groups were facilitated by architects experienced in the design workshop process. Each group had a base map and an aerial photograph of their category of site. Trainers asked them to review a compilation of about 20 examples

of well-designed affordable housing developments, to consider some essential statistics about the density and design, and to sketch a site plan at the same scale as their base maps to demonstrate how different housing types and densities might actually fit on their site. Trainers, including experts on zoning, engineering, and finance, floated among the tables to give advice and remind the participants to think about practical implementation during the site design process.

Each group presented its conclusions to the full group and the trainers provided feedback. The trainers then suggested planning and zoning tools, engineering solutions, design approaches, and financial pro-formas for each of the sites designed.

This description of preparing local leaders to identify and remove the formidable barriers to affirmatively furthering fair housing illustrates how complex and challenging the process is. Local governments, particularly the smaller ones involved in the Westchester County Settlement, have limited staff capacity, rely on volunteers of the type trained in this program, are fiscally challenged, and have many high priority land use challenges to consider. Lawyers and other professionals can use some of the techniques described above to prepare and educate the local leadership infrastructure to further the development of fair housing.

The Elusive Goldilocks Solution: Discovering What is Just Right³⁹

Justice requires the removal of barriers to housing that are based on color and ethnicity to increase the benefits of diversity to those excluded, as well as the community as a whole. In Marin County, Judy Arnold, a member of the County Board of Supervisors, had this to say about the localities in the County that have yet to cooperate in affirmatively furthering fair housing: "We know they're concerned about local control, we know they're concerned about unfunded mandates, but this is fulfilling Title VIII...and that's what supersedes everything else in planning."⁴⁰

Much of the land in the communities implicated in the Westchester County Housing Settlement is not served by water, sewer, or transit infrastructure. The high costs of subsidizing housing developed in many of these neighborhoods is due, in part, to the extraordinary expenses involved either in providing on-site community water and sewer systems or in connecting to remote sources of water and sewage disposal plants.⁴¹ Ironically, neighborhoods in the areas where community infrastructure is most lacking are often the

most segregated and, as such, are most appropriate to provide benefits advanced by diversity.

In a letter regarding regional economic growth in the Westchester County area, the African American Men of Westchester stated the obvious dilemma involved in requiring such communities to provide sufficient fair and affordable housing to achieve meaningful integration. The organization wrote:

[We are] strong supporter[s] of access to "fair and affordable" housing for all people, and commend the state and county for committing funds to facilitate its development throughout Westchester. However, we must also continue to invest in the cities, and urbanized areas of the county that have traditionally provided affordable housing options for young households, the elderly, and the less affluent that help to make Westchester diverse. Sound land use policies, such as "sustainability", "transit oriented development", etc. all highlight the benefits of guiding revitalization efforts and new growth into existing centers....[W]e need to continue to capitalize on the existing infrastructure in our centers to create new jobs and businesses."⁴²

This article points out that New York State has yet to adopt legislation that requires or encourages Westchester County or other suburban communities to plan for and create affordable housing that is to be affirmatively marketed. A bill that passed both houses, but was vetoed by the Governor, was silent on the issue of fair housing and would have imposed different obligations on localities than the Westchester Housing Settlement and the County's Housing Implementation Plan.⁴³ In the meantime, the State has adopted the Smart Growth Public Infrastructure Act, which states that:

It is the purpose of this article to augment the state's environmental policy by declaring a fiscally prudent state policy of maximizing the social, economic and environmental benefits from public infrastructure development through minimizing unnecessary costs of sprawl development including environmental degradation, disinvestment in urban and suburban communities and loss of open space induced by sprawl facilitated by the funding or development of new or expanded transportation, sewer and waste water treatment, water, education, housing and other publicly supported infrastructure inconsistent with smart growth public infrastructure criteria.⁴⁴

The State is also implementing Climate Smart Communities, an unprecedented partnership between New York State and local communities. Its goal is to reduce greenhouse gas emissions and save taxpayer dollars through climate smart actions that also promote community goals of health and safety, affordability, economic vitality, and quality of life.⁴⁵ Additionally, in each region of the state, sustainability plans are being drafted that will become part of the existing regional economic development strategy.⁴⁶ The land use and transportation elements of these sustainability plans emphasize strategies for reducing vehicle miles travelled and for promoting compact, mixed-use development in areas served by infrastructure. This militates against an aggressive program to provide enough new affirmatively marketed affordable housing in relatively remote suburban communities to significantly increase the percentage of minority households in the most highly segregated census tracts.

These concluding considerations underline the daunting nature of developing a strategy that is both just and right under these conditions. At least three conclusions, however, seem obvious if the benefits of diverse neighborhoods are to be realized. First, to the extent that the market and governmental policies further residential growth, wherever it occurs, a percentage of it should be fair and affordable. Second, engaging local leaders in the conversation and using them to find solutions to barriers regarding fair and affordable housing can be effective in making progress. Third, a patient and helpful attitude should be assumed with respect to the efforts of both Westchester and Marin Counties to overcome the impediments to affirmatively furthering fair housing. They should be aggressively supported as models for tackling an incredibly challenging problem that has not yet been solved effectively anywhere in the nation.

NOTES

1. Norimitsu Onishi, *Lucas and Rich Neighbors Agree to Disagree: Part II*, N.Y. TIMES, May 22, 2012, at A13.
2. Section III E (4) of the VCA requires Marin County to report to HUD "on actions taken to promote, overcome barriers to, and cause the development of affordable rental and homeownership housing into non-racially/ethnically-impacted areas of the county." http://www.publicadvocates.org/sites/default/files/library/voluntary_compliance_agreement_with_full_attachments.pdf (last visited on May 25, 2012).
3. *U.S. ex rel. Antidiscrimination Center of Metro New York, Inc. v. Westchester Cnty.*, No. 06 Civ. 2860 (S.D.N.Y. May 2012); 31 U.S.C. § 3729 (2009).
4. Stipulation and Order of Settlement and Dismissal at 6, No. 06 Civ. 2860 (DLC) (2009) [hereinafter *Settlement*].
5. U.S. Department of Housing and Urban Development, Fair Housing Planning Guide 1, 1-2 (1996); *See also infra* note 6.
6. *U.S. ex rel. Antidiscrimination Center of Metro New York, Inc. v. Westchester Cnty.*, No. 06 Civ. 2860 (S.D.N.Y. May 2012); 31 U.S.C. § 3729 (2009).
7. Under the Fair Housing Act, 42 U.S.C. §§ 3608(d) and (e)(5), HUD and other federal agencies must administer programs and activities relating to housing and urban development "in a manner affirmatively to further" fair housing practices. *See also* 42 U.S.C. § 5304(b)(2).
8. *Settlement*, *supra* note 3, at 6, <http://www.westchestergov.com/pdfs/Housingsettlementtext.pdf>
9. Westchester County Fair and Affordable Housing Quarterly Report, for the period January 1, 2012 through March 31, 2012, <http://www.westchesterhousingmonitor.org/county-reports>
10. The Town of Ossining, Town of New Castle, Village of Scarsdale, Village of Rye Brook, Town of Yorktown, Village of Tarrytown, Town of Bedford, Village of Irvington, and the Village of Ardsley have adopted the Model Ordinance in some form. The Village of Hastings-on-Hudson, the Town of North Salem, the Town of North Castle, the Village of Pelham, and the Town of Pleasantville have it under consideration.
11. *Settlement*, *supra* note 3, <http://www.westchestergov.com/pdfs/Housingsettlementtext.pdf>; note 11: letter from James E. Johnson, Partner Debevoise & Plimpton LLP, to Hon. Robert P. Astorino, County Exec., Westchester County (May 14, 2012) (on file with author); email from Glenda L. Fussa, Deputy Regional Counsel for New York/New Jersey, to Kevin J. Plunkett, Deputy County Exec., Westchester County (Apr. 20, 2012) (on file with author).
12. Westchester County Workforce Housing Incentive Program, Bill S4946, A3173, available at <http://open.nysenate.gov/openleg/api/html/bill/S4946>.
13. N.Y. CLS GEN MUN, Art. 16-A, § 699 (2009).
14. N.J. STAT. ANN. §§ 52:27D-301 et seq. (2007).
15. CONN. GEN. STAT. §§ 8-30g (2002).
16. *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975).
17. *Id.* at 111.
18. *Id.* at 109-110.
19. *Id.* at 110.
20. Unpublished opinion, *Westchester County Sup.Ct.* (Dec. 30, 1977) (discussed in *Berenson v. Town of New Castle*, 415 N.Y.S.2d 669, 670 (App. Div. 1979)).
21. *Berenson v. Town of New Castle*, 415 N.Y.S.2d 669 (App. Div. 1979).

22. *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, 414 N.E.2d 680 (N.Y.1980), *cert. denied*, 450 U.S. 1042 (1981).
23. *Id.* at 343.
24. *Id.* at 344.
25. *Id.*
26. *Id.*
27. *Id.* (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).
28. 72 N.Y.2d 121 (1988).
29. *Berenson*, *id.* at p. 109.
30. *Asian Americans*, *id.* at 121.
31. *Suffolk Hous. Servs. v. Town of Brookhaven*, 511 N.E.2d 67 (N.Y. 1987).
32. *Id.* at 71.
33. *Id.* at 69.
34. 261 N.Y. 506, 185 N.E. 714 (1931)
35. 94 A.D.2d 92, 463 N.Y.S.2d 832 (2d Dep't 1983)
36. 211 A.D.2d 88, 625 N.Y.S.2d 700 (3d Dep't 1995)
37. 821 N.Y.S.2d 432 (Sup 2006)
38. In *Westhab v. Village of Elmsford*, 574 N.Y.S.2d 888 (1991), the county's contractor for the purpose of building housing for the homeless was deemed exempt from the village's zoning. Providing aid, care and support of the needy are deemed public concerns under the New York Constitution, Article XVII. The County Department of Social Services is considered the delegate of the State of New York for taking care of the homeless and the County Commissioner of Social Services is responsible for the administration of public assistance and care within the jurisdiction of the County. There is no comparable authority in the Constitution or state law that extends the County's obligations to the provision of housing for low, moderate, or middle-income housing.
39. Harvard professor Maria Tatar, in *The Annotated Classic Fairy Tales* 251 (W.W. Norton 2002) notes that *Goldilocks and the Three Bears* is typically framed today as a "discovery of what is 'just right'".
40. Marin County Housing Action Initiative, <http://www.publicadvocates.org/marin-county-housing-action-initiative> (last visited May 25, 2012).
41. Land Use Leadership Alliance Training Binder (Fall 2010), Rosemarie Noonan (Housing Action Council) used a hypothetical 40 unit rental development in which she estimates a per unit subsidy cost of \$233,271.
42. Lawrence C. Salley, Chairman, Housing Development Corporation, Letter to members of the Mid-Hudson Regional Economic Development Council, African American Men of Westchester, Inc., October 19, 2011.
43. See Settlement, *supra* note 3.
44. New York Environmental Conservation Law § 6-0105 (2010).

45. New York State Department of Environmental Conservation, *Climate Smart Communities: Local Action to Combat Climate Change* (2012), <http://www.dec.ny.gov/energy/50845.html>
46. New York State Energy Research and Development Authority, RFP 2391- Cleaner, Greener Communities Regional Sustainability Planning Program (2012), <http://www.nyserda.ny.gov/Funding-Opportunities/Current-Funding-Opportunities/RFP-2391-Cleaner-Greener-Communities-Regional-Sustainability-Planning-Program.aspx>.

Supreme Court of Idaho holds that variance, not conditional use permit, was required to obtain waiver of building height restriction imposed by zoning ordinance.

Burns Holdings, LLC, owned land in Teton County, near the City of Driggs, on which it wanted to construct a concrete batch plant. The Driggs zoning ordinance, to which the proposed plant was subject, provided that no building could be constructed that was more than 45 feet high, unless approved by a conditional use permit (CUP). Burns Holdings filed an application with the City for a CUP to exceed the height limitation, as it wanted its plant to include a building 75 feet high.

The City approved the CUP and the matter was sent to the county for its approval. The county board of commissioners denied the CUP. Burns Holdings sought judicial review, and the district court remanded the case so that the board could prepare written findings and a reasoned statement of its decision, as required by state law.

After the board had issued written findings of fact and conclusions of law, Burns Holdings again sought judicial review. The district court held that the county's findings of fact and conclusions of law were inadequate, and again remanded the matter to the county. The county on remand denied the application for a CUP on the grounds that Idaho's Local Land Use Planning Act (LLUPA) required a variance, not a CUP, to obtain a waiver of a zoning ordinance provision limiting the height of buildings. On judicial review, the district court rejected the contention that a variance was required to waive the height limitation, but it upheld the denial of the CUP on other grounds.

On appeal, the Idaho Supreme Court affirmed on the grounds that Burns Holdings was required to seek a variance, not a CUP, to obtain a waiver of the height limitation in the zoning ordinance. The court noted that LLUPA defines a variance as a "modification of