

**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”**

**February 2010**

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### About the Anti-Discrimination Center

ADC is a civil rights and public policy not-for-profit. We do advocacy, analysis, and public education on ways to improve civil rights enforcement, to promote the idea of "one community, no exclusion," and to help people realize that there are broader public policy choices available than they have been led to believe. Contact us by email. The address is [center@antibiaslaw.com](mailto:center@antibiaslaw.com).

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## I. Introduction

Every year, Westchester County receives millions of dollars in Community Development Block Grant (CDBG) and other federal housing funds. The only way that Westchester – or any other jurisdiction – is entitled to those funds is by certifying that it has and will “affirmatively further fair housing” (“AFFH”). In other words, Westchester over the years kept representing to the federal government that it had and would analyze, identify, and act to overcome impediments to fair housing choice.

The Anti-Discrimination Center (“ADC”) believed that Westchester was lying, and that the County had no intention of complying with its AFFH obligations. In particular, ADC believed that Westchester was determined to ignore impediments to fair housing choice that were related to race and to municipal resistance to affordable housing development. The aversion to dealing with issues of race was particularly egregious in view of the fact that Westchester remains staggeringly residentially segregated on the basis of race (*see* map on page 2).<sup>1</sup> The aversion to dealing with issues of municipal resistance was particularly egregious because, as Westchester’s own Housing Opportunity Commission has long reported,<sup>2</sup> municipal resistance is a central obstacle to the creation of affordable housing units.

In 2006, ADC sued Westchester under the federal False Claims Act.<sup>3</sup> The False Claims Act is unusual in that it permits private actors, including not-for-profit entities like ADC – to bring suit on behalf of the federal government against government contractors that have obtained

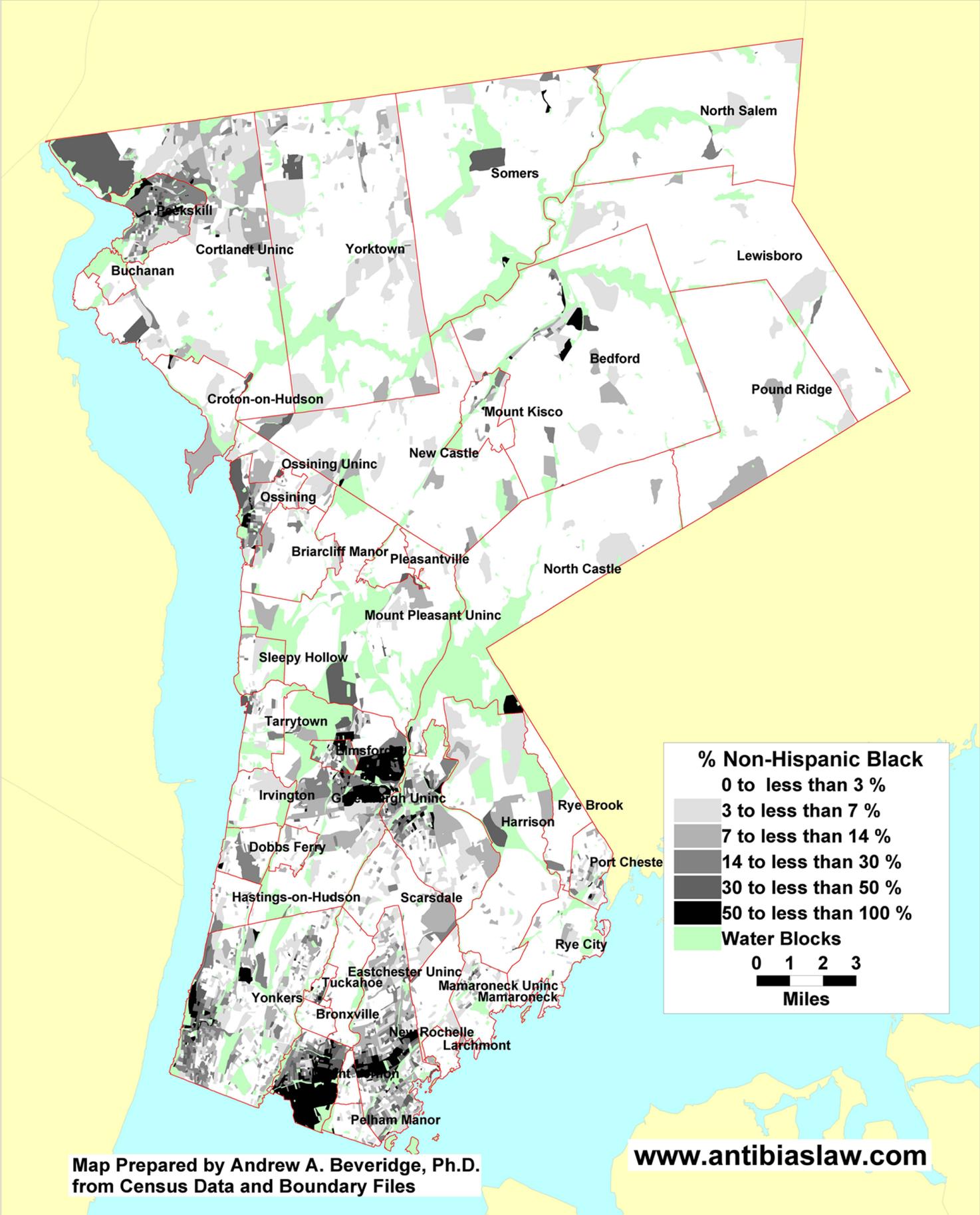
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<sup>1</sup> The map is also available at [antibiaslaw.com/WestchesterSegregation](http://antibiaslaw.com/WestchesterSegregation).

<sup>2</sup> *See, e.g.,* Westchester Housing Opportunity Commission, *2004 Affordable Housing Action Plan*.

<sup>3</sup> The complaint is available at [antibiaslaw.com/complaint](http://antibiaslaw.com/complaint).

# Concentration of Non-Hispanic Black Population by Census Block, 2000 Census.



Map Prepared by Andrew A. Beveridge, Ph.D.  
from Census Data and Boundary Files

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government funds fraudulently. In the course of intensive litigation, Westchester continued to insist, among other things, that the County was not segregated, that the County had no power to influence municipal zoning, and that a focus on “affordable housing” was an adequate substitute for a focus on “fair housing.”

Early in 2009, the Honorable Denise Cote, a highly respected Federal Court Judge, granted ADC’s motion for partial summary judgment against Westchester. She found that Westchester had “utterly failed” to meet its AFFH obligations throughout the period from 2000 to 2006 (the “False Claims period”), and that every single representation that Westchester had made during the False Claims period to the federal government that it had or would meet those obligations was “false or fraudulent.”<sup>4</sup>

Despite Westchester’s protestations that it was not residentially segregated, Judge Cote also noted that, “According to the 2000 census, over half of the municipalities in the Consortium had African-American populations of 3% or less.”<sup>5</sup>

Judge Cote was very clear about the impropriety of Westchester’s conflation of “affordable housing” with “fair housing.” She found both that the AFFH regulation “requires an analysis of impediments to fair housing choice, not to affordable housing,” and she found that the County had long known this to be true.<sup>6</sup> Indeed, she found:

[T]he County had its own internal documents from before the false claims period relating to its AFFH obligations and the preparation of AIs. One such document, which is an outline of the County’s Fair Housing Plan (“FHP”), sets forth the

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<sup>4</sup> *U.S. ex rel. Anti-Discrimination Center v. Westchester County (“ADC Summary Judgment Decision”)*, \_\_\_ F.Supp.2d \_\_\_, 2009 WL 455269 (S.D.N.Y.), at \*14, 17, and 22; also available at [antibiaslaw.com/sjdecision](http://antibiaslaw.com/sjdecision) (Slip Op.) at 35, 43, and 54.

<sup>5</sup> *Id.* at \*10; Slip Op. at 24.

<sup>6</sup> *Id.* at \*5-6, and 9, fn.5; Slip Op. at 13-15 and 21, fn. 5.

requirements that the County conduct an AI, set out actions to be taken, and maintain records. *The end of the outline contains the following reminder: "Remember: This [the FHP] is not a report on affordable housing, but FAIR HOUSING!!!"* (emphasis added).<sup>7</sup>

The Court's decision made just as clear the fact that Westchester had long collaborated with municipal resistance to affordable housing: "When the County considers where to acquire land for affordable housing, it seeks the concurrence of the municipality where the land is situated, and during the false claims period the County would not acquire any such land without the municipality's agreement."<sup>8</sup> The results of Westchester's "pretty please" approach were appalling: "The County set a goal in a 1993 Affordable Housing Allocation Plan to create 5000 affordable housing units; however, as of July 2005, at least 16 municipal units in the County had not created a single affordable housing unit."<sup>9</sup>

Westchester had improperly conveyed federal funds to municipalities despite the terms of "Cooperation Agreements" that it had entered into, by federal requirement, with each of the municipalities that participated in seeking federal funding (the "Consortium"). As Judge Cote found, "The agreements pertained to, *inter alia*, CDBG grants, and provided that the County is prohibited from expending community development block grant funds for activities in or in support of any local government that does not affirmatively further fair housing within its jurisdiction or that impedes the County's action to comply with its fair housing certifications."<sup>10</sup>

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<sup>7</sup> *Id.* at \*6; Slip Op. at 15.

<sup>8</sup> *Id.* at \*10; Slip Op. at 25.

<sup>9</sup> *Id.* at \*10; Slip Op. at 26.

<sup>10</sup> *Id.* at \*2-3; Slip Op. at 6.

Despite this, the Judge found, "the County has not withheld any funds or imposed any sanctions on any participating municipalities for failure to AFFH."<sup>11</sup>

After follow-on decisions whereby the Court rejected numerous additional positions that had been taken by Westchester, the County finally agreed to settle the case. In August 2009, a *binding Federal Court Order* was entered (the "Settlement Order").<sup>12</sup> In the Settlement Order, Westchester was required, among other things, to acknowledge that the development of affordable housing that achieved AFFH goals was an important County purpose; that the County had authority to overcome municipal resistance to such goals; that it was appropriate for the County to use such authority; that Westchester was, indeed, segregated; that all County housing policies had to act to eliminate segregation; that "affordable housing" and "fair housing" were not interchangeable terms; and that the goal of the Settlement Order was not simply causing some affordable housing to be developed, but rather causing affordable housing to be developed on the *census blocks* with the lowest percentages of African-Americans and Latinos.

In short, the heart of the Settlement Order is the frank requirement to deal with racial segregation and to overcome municipal barriers that stand in the way of developing affordable housing that would AFFH.

On February 2, 2010, Westchester publicly released what it describes as an "Implementation Plan."<sup>13</sup> But, just like putting the label "Analysis of Impediments" on a document that failed to look at race or municipal resistance did not transform the document into

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<sup>11</sup> *Id.* at \*10; Slip Op. at 25.

<sup>12</sup> The Settlement Order is available at [antibiaslaw.com/settlementorder](http://antibiaslaw.com/settlementorder). A collection of documents relating to the case and the Settlement Order are available at [antibiaslaw.com/wfc](http://antibiaslaw.com/wfc).

<sup>13</sup> The "Implementation Plan" is available at [westchestergov.com/housingsettlement](http://westchestergov.com/housingsettlement).

a real Analysis of Impediments, so, too, putting the label “Implementation Plan” on a series of documents that reprise Westchester’s litigation arguments and attempt to avoid the obligations of the Settlement Order does not constitute a *real* Implementation Plan.

ADC believes that Westchester decided on an approach whereby its initial submissions would serve as a tool of negotiation. That is, Westchester would submit a set of documents that are entirely inadequate with the hope that the Monitor would agree to a “compromise” position. All parties well know, of course, it is the actual terms of the Settlement Order that control. As a preliminary review demonstrates, 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.

## II. Westchester Seeks to Undermine Both the Letter and Spirit of the Settlement Order

Westchester’s submission is designed to look like an Implementation Plan. Many provisions of the Settlement Order are referenced, and there are dozens of attachments included. But it does not take long to see that the submission entirely fails to provide a plan “setting forth with specificity the manner in which the County plans to implement the provisions of [the] Settlement Order,” as was required by Settlement Order, ¶ 18. Worse, the submission reveals a consistent and deliberate design to ignore the principles of the Settlement Order in favor of the discredited policies that Westchester pursued prior to the litigation and that the County was unsuccessful in defending during the litigation.

### **A. Westchester continues to purposefully conflate “affordable housing” with “fair housing”**

The terms “fair housing” and “affirmatively furthering fair housing” are intended to have some meaning. Indeed, the Court ultimately found that, contrary to Westchester’s attitude, “the AFFH certification was not a mere boilerplate formality, but rather was a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring the County to conduct an AI, take appropriate actions in response, and to document its analysis and actions.”<sup>14</sup> During the litigation, however, Westchester came up with what it thought was a clever idea. It took its affordable housing programs and actions and dressed them up with a new title: “fair and affordable housing.” Nothing substantive had changed – the actions and programs did not have any fair housing component. There was simply a relabeling.

Westchester’s rhetorical effort did not help it during the litigation, but the months since the entry of the Settlement Order have seen this sleight-of-hand tried anew. The phrase is now faithfully repeated as an incantation. The problem is a serious one. In terms of Westchester’s unit-specific obligations under the Settlement Order (the 750 housing units described not as a cap but as a *minimum* in Settlement Order, § 7), those obligations arise in a very specific context. Westchester was required to spend funds to assist in the “development of new affordable housing units *that AFFH...*” Settlement Order, § 5 (emphasis added). That is, the housing units, referred to in Settlement Order, ¶ 7 as “Affordable AFFH Units,” are not *random* or *interchangeable* affordable housing units; they are affordable housing units that must *affirmatively further fair housing*.

It was essential, therefore, for an Implementation Plan to give substance and definition to the AFFH element of the housing – specifically, identifying the housing as that which would

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<sup>14</sup> *ADC Summary Judgment Decision, supra*, 2009 WL 455269 at \*20; Slip Op. at 50-51.

reduce segregation and other barriers to fair housing choice. Instead, **Westchester has simply taken its definition of affordable housing and, as before, simply labeled that definition “fair and affordable housing.”** This is not a matter of guesswork. The County sets out three “Guiding Principles & Objectives” for its “fair and affordable housing” units.<sup>15</sup> **Not one has anything to do with fair housing or with AFFH at all.** The guidelines reference only design criteria and issues of timelines, cost, and efficiency.<sup>16</sup>

The consequences are profound. If AFFH plays no part in Westchester’s “guiding principles and objectives,” then all that follows will be empty of the required AFFH perspective. For example, Settlement Order, ¶ 25(a) requires Westchester to promote a “model ordinance” relating to zoning and development review “to advance fair housing.” A fuller discussion of the inadequacy of the “model ordinance,” and its incorporation of terms that violate both the Settlement Order and Fair Housing Act, follows later this report. But here it is important to highlight the fact that **Westchester’s definition of a “fair and affordable housing unit” is simply the definition of an affordable housing unit.**<sup>17</sup> Thus, for example, even though Westchester was forced to acknowledge as new County policy that “the location of affordable

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<sup>15</sup> Westchester’s submission consisted of a main document and a series of appendices. Numbered references preceded by “MS” shall refer to pages of the main document. The “Guiding principles & Objectives” appear at MS 14.

<sup>16</sup> *Id.* Sadly, Westchester’s desire to maintain the status quo is embedded even in these seemingly neutral criteria. For example, the qualification that the housing be compatible with “the character of the community in which it is located” – has over the decades been used as nothing more than a code phrase to signal that no development that disturbs an exclusionary status quo will be attempted). Likewise, what development is and is not “cost effective” depends significantly on how a property is zoned, and, as discussed extensively later in this report, Westchester clearly has no intention to use its authority to act as a catalyst to lower costs by challenging exclusionary zoning.

<sup>17</sup> See Appendix D-1 at p. 1.

housing is central to fulfilling the commitment to AFFH because it determines whether such housing will reduce or perpetuate residential segregation,” Settlement Order, ¶ 31(c), **the “model ordinance” provides no guidance whatever as to where in a municipality such housing should be encouraged and where it should be discouraged.**

Just as startlingly non-compliant is Westchester’s statement of priorities for site selection.<sup>18</sup> There is a list of nine priorities, and the conflicts between these priorities and the Settlement Order will be discussed extensively later in the report. For now, the point is that the few references to “fair and affordable housing” once again cannot be understood to have any fair housing content – the County is simply talking about “affordable housing,” despite the label. Had Westchester been trying to implement the Settlement Order, it would, of course, have had as a first priority the demographic composition of the census blocks in relevant municipalities that best served the Order’s AFFH purposes (*i.e.*, focusing on causing development on the census blocks with the lowest concentrations of African-Americans and Latinos). **Demographic composition, unfortunately, is not amongst any of the nine priorities listed.** Moreover, fair housing considerations fail to make an appearance in the rest of the “process and approach” that Westchester describes in a page-and-a-half of its submission.<sup>19</sup> By failing to incorporate AFFH criteria, Westchester could not be clearer in saying that it is stuck in the mode of thinking about affordability and maintenance of the status quo only.<sup>20</sup> That does not and cannot implement the Settlement Order.

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<sup>18</sup> MS 16.

<sup>19</sup> MS 16-17.

<sup>20</sup> Another good illustration of Westchester’s semantics is the “Flow chart of traditional fair and affordable housing development process,” Appendix H-2(i). The flow chart identifies more than 60 steps in the process. Not one has a *fair housing* component.

## **B. Westchester continues to ignore fundamental impediments to fair housing choice**

As Westchester notes, it has been given an extension of time to produce an analysis of impediments to fair housing choice. That extension, however, does not excuse Westchester's failure to identify or plan to overcome key impediments in the context of its submission. The dictionary defines "implement" as "put into effect," and defines "plan" as a "detailed proposal for doing or achieving something."<sup>21</sup> If one does not take account of the obstacles one can reasonably expect to encounter, there can be no detailed plan for putting the Settlement Order into effect. That is why, for example, the Settlement Order demands not simply benchmarks, but demands that Westchester "*specify steps and activities* that will be needed to meet those benchmarks." Settlement Order, ¶ 24 (emphasis added).<sup>22</sup>

Front and center in the litigation, in the ultimate Court decisions ruling against Westchester, and in the Settlement Order is the stark fact of residential racial segregation in Westchester. Yet **Westchester's submission fails entirely even to acknowledge the existence of segregation, let alone discuss its scope.**<sup>23</sup> There is no discussion of where the most

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<sup>21</sup> *The New Oxford American Dictionary*, pp. 853 and 1304, respectively (Oxford University Press, 2001).

<sup>22</sup> Westchester's unilateral decision to omit relevant benchmarks is discussed later in this report.

<sup>23</sup> The Settlement Order required Westchester to acknowledge the existence of residential segregation in the County, demanding that Westchester adopt policy to eliminate that segregation. Settlement Order, ¶ 31(c). Westchester has since sought to backtrack by changing the requirement from "elimination of de facto residential segregation," to the "elimination of *any* de facto residential segregation." *Cf.* Settlement Order, ¶ 31(c) *with* legislation adopted by the Westchester Board of Legislators (Appendix C-1 at p. 4). The stubborn resistance to confronting the reality of segregation is disturbing; as a practical matter the language change only emphasizes the fact that the obligation requires elimination of 100% of residential segregation.

segregated Census Blocks are located. What is the specific plan to counter that segregation? There is no discussion.

The other critical impediment to fair housing choice at the center of ADC's false claims case and its resolution is the municipal resistance to the development of segregation-reducing affordable housing. As noted previously, Westchester's own Housing Opportunity Commission has long recognized the existence of the problem. A letter from Westchester's Planning Department included in its current submission even makes passing reference to the fact that, "The major limiting factor in implementing County funds for fair and affordable housing development, used either alone or with other funding is the ability for the developer to gain building approvals from the city, town or village."<sup>24</sup>

**Yet the submission refuses to grapple with municipal resistance at all.** Where has that resistance been expressed? How has that resistance been manifested? How will the County meet its obligation pursuant to Settlement Order ¶ 7(j) to "use all available means" (including legal action) to overcome municipal resistance? A submission that fails to address these fundamental questions is no Implementation Plan at all.

### **C. Westchester continues to ignore the need to achieve residential desegregation**

Subparagraphs (a), (b), and (c) of paragraph 7 of the Settlement Order set forth *municipal-level* criteria for where it is permissible to develop Affordable AFFH Units pursuant to the unit-specific obligations of the Settlement Order. But the Settlement Order goes beyond this baseline. First, it is clear from the structure of the Settlement Order itself that the goal is to

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<sup>24</sup> Memorandum from Deborah DeLong to Susan Gerry, December 15, 2009, Appendix H-4 at p. 2.

create units in what are currently the least-integrated areas. That, for example, is why the number of units designated for municipalities with African-American populations of less than three percent and Latinos populations of less than seven percent is designated as a *minimum* (specifically a minimum of 630 units), whereas the number of units permitted in municipalities with somewhat higher percentages are designated as *maximums* (specifically, two groupings of no more than 60 units each).

Critically, however, the Settlement Order contains additional provisions relating to desegregation. These include the requirement that all of Westchester’s housing policies and programs have as a goal the elimination of de facto residential segregation, Settlement Order, ¶ 31(a) and the provision that the Implementation Plan specifically assess 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,*” Settlement Order, ¶ 22(f) (emphasis added).

Thus, the Settlement Order is not satisfied with having housing developed in “eligible” municipalities and census blocks – paragraph 22(f) takes that as a given. The point of the provision is to say that, within the overall universe consisting of “eligible” blocks, Westchester has to identify the means by which to maximize development on a particular type of block. **Westchester completely ignores its obligation to plan to achieve maximum desegregating effect with the development of the units in question.**

What the County does instead is engage in two transparent dodges. First, Westchester answers the question of what definitions are to be used in handling Census data, but fails to analyze the data and present information specifying the Census Blocks with the lowest

percentages of minority residents.<sup>25</sup> **Had Westchester been interested in compliance, it would, for example, have identified the fact that, within “first tier” eligible municipalities (African-American population of under three percent and Latino population of under seven percent) there are over 3,000 Census Blocks comprising over 130,000 acres and populated by more than 200,000 people where the population of each block is less than three percent African-American and less than seven percent Latino.** Indeed, within that total, over 40,000 acres are comprised of Census Blocks with an African-American population of less than *one* percent and a Latino population of less than three percent.<sup>26</sup>

Westchester’s second dodge is to pretend that the Settlement Order only demands that municipalities and blocks be *identified* for the purpose of determining whether percentages of minority residents exceed the percentages allowed under Settlement Order, ¶ 7. Indeed, the appendix specifically entitles its discussion “Determining *eligibility* of municipalities and blocks” (emphasis supplied).<sup>27</sup>

In fact, Settlement Order, ¶ 22(f) demands that Westchester set forth the *means* by which to maximize development on blocks with the lowest concentrations of African-Americans and Latinos. Thus, **a good faith submission could not have failed to identify salient barriers to the development of housing that maximizes desegregation** (*e.g.*, the blocks involved tend to have multi-acre zoning for even a single dwelling unit, tend only to permit single family homes,

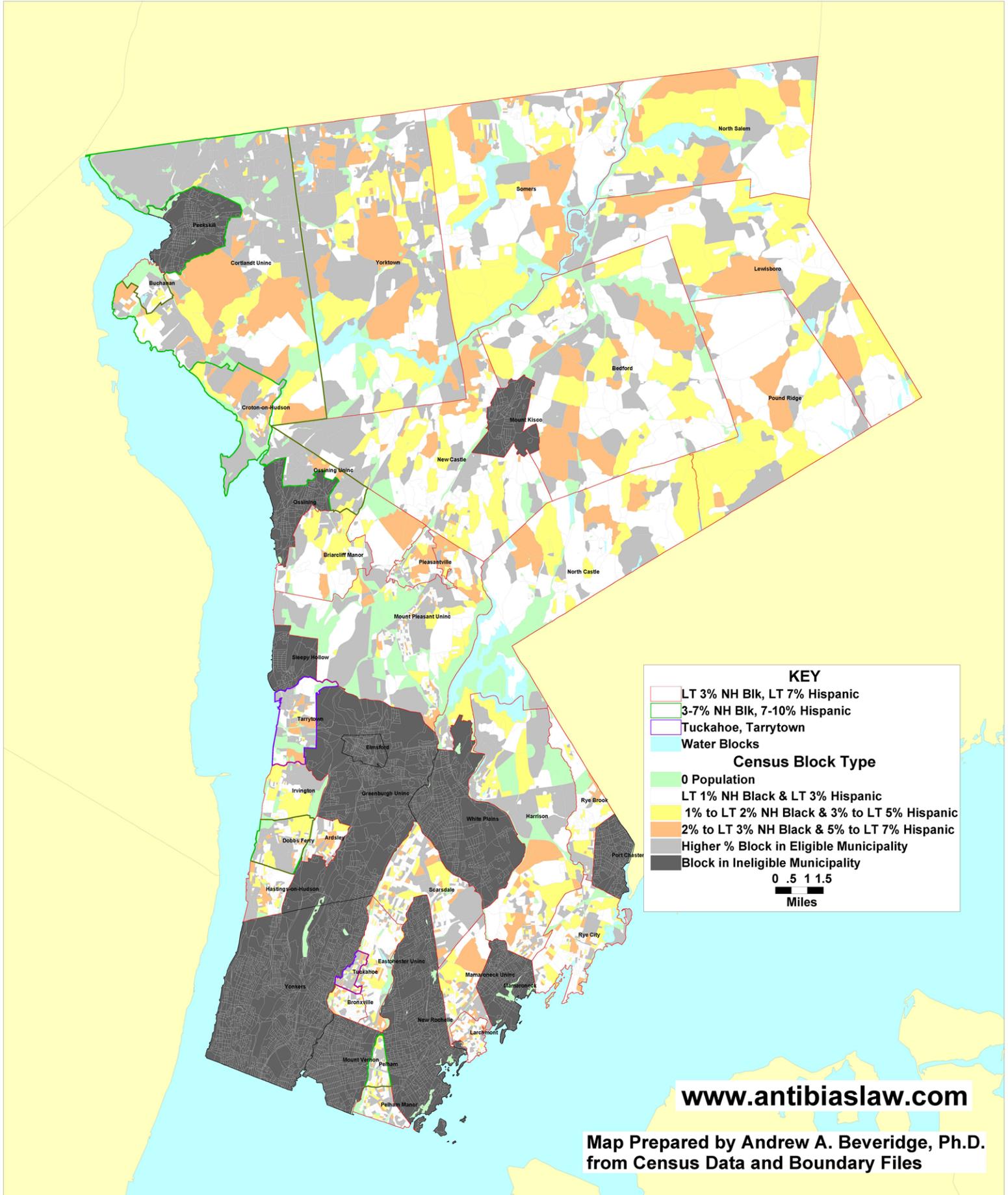
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<sup>25</sup> Appendix H-1.

<sup>26</sup> A map identifying both eligible municipalities and the demographic composition of Census Blocks appears on page 14 of this report, and is also available online at [antibiaslaw.com/classification](http://antibiaslaw.com/classification). The three types of “eligible” municipalities are indicated by the use of different colors (white fill indicates a Census Block with a population of under one percent African-American and under three percent Latino).

<sup>27</sup> Appendix H-1 at p. 4.

# Classification of Blocks in Settlement Based Upon Census Data and Boundary Files



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Map Prepared by Andrew A. Beveridge, Ph.D.  
from Census Data and Boundary Files

etc.), and could not have failed to identify the means by which to overcome those barriers (e.g., the County purchasing an interest in land of some representative exclusionary blocks, contracting with a developer to develop Affordable AFFH Units despite the barriers, and using all the tools available to the County to overcome such barriers as the municipality might interpose). Westchester did none of these things.

**In sum, Westchester’s claim in its submission to have addressed its Settlement Order, § 22(f) obligations is false.** There is no discussion whatsoever of *what* (as a definitional matter) Westchester considers to be the subset of eligible Census Blocks with the “lowest concentrations” of African-Americans and Latinos; of *where* those Census Blocks are located; or of *how* (i.e., by what means) Westchester intends (i.e., plans) to accomplish the goal of maximizing development on such blocks.

Tellingly, the date set forth on Appendix H-1 is August 12, 2009. In other words, Westchester is presenting work product completed two days after the entry of the Settlement Order. The County did not take the opportunity to do more on this question in the ensuing five months.<sup>28</sup> The only reasonable conclusion is that Westchester *has no intention* of maximizing development on such blocks, a conclusion consistent with multiple other indicia of non-compliance reflected both in what is contained in the submission and what is not.

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<sup>28</sup> The focus on “eligibility,” not lowest concentration Census Blocks or the means on which to maximize development on those blocks, is reflected as well in Appendix H-2. That Appendix, also prepared last July, only outlines “eligible” political units, and contains no priorities for development. Note that ADC has not reviewed Appendix H-2 for accuracy.

#### **D. Westchester continues to deny its authority over municipalities**

For years, Westchester claimed that it was powerless do anything in relation to municipal zoning and development policies. That was a lie, a lie that gave aid and comfort to exclusionary municipalities. At the heart of the Settlement Order, therefore, were provisions designed to make certain that Westchester would no longer disclaim its authority and would no longer refuse to act to overcome municipal resistance to AFFH-promoting affordable housing.

The Settlement Order began with the recognition of two facts:

First, that “the development of affordable housing in a way that affirmatively furthers fair housing is a matter of significant public interest”,<sup>29</sup> and

Second, that “the broad and equitable distribution of affordable housing promotes sustainable and integrated residential patterns, increases fair and equal access to economic, educational, and other opportunities, and advances the health and welfare of the residents of Westchester. . . and the municipalities therein.”<sup>30</sup>

In other words, developing affordable housing that was AFFH-promoting was clearly identified as – and acknowledged by the County to be – an important County purpose.

The County was then required to acknowledge two things about “municipal land use actions” pursuant to state law:

First, that such policies and actions “shall take into account the housing needs of the surrounding region”,<sup>31</sup> and

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<sup>29</sup> Settlement Order, p. 1, para. 1.

<sup>30</sup> Settlement Order, p. 1, para. 2.

<sup>31</sup> Settlement Order, p. 2, para. 1. The reference is to the *Berenson* doctrine, a state law doctrine that dates back to 1975. Under the *Berenson* doctrine, any party that owns or controls land may challenge a municipality’s restrictive zoning on the grounds that such zoning does not take

Second, that such policies and actions “may not impede the County in its performance of duties for the benefit of the health and welfare of the residents of the County,”<sup>32</sup> the development of affordable AFFH housing having just been described as something that advances the health and welfare of the residents of the County.

**The Settlement Order, finally, is unequivocal in stating that “it is appropriate” for the County to “take legal action to compel compliance” with state law doctrine if “municipalities hinder or impede the County in the performance of such duties” (i.e., duties such as the development of AFFH-promoting affordable housing).** The fact that legal action is contemplated is further underlined and directed by Settlement Order, ¶ 7(j). That provision states that where a municipality either hinders the development of Affordable AFFH Units or fails to take action needed to promote the development of Affordable AFFH Units, “the County *shall* use *all* available means as appropriate to address such action or inaction, including, but not limited to, pursuing legal action” (emphasis added).

The provision goes on to state an even broader, second requirement for Westchester to take legal action: “The County *shall* initiate legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH” (emphasis added). In other words, **the initiation of legal action is reemphasized as a required response to non-cooperation, and is done so in a manner that deals not only with unit-specific obligations but also with *any* action or**

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sufficient account of regional housing needs for multi-family housing. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672 (N.Y. 1975).

<sup>32</sup> Settlement Order, p. 2, para. 1. The reference is to the *County of Monroe* doctrine, a state law doctrine that dates back to 1988. Under *County of Monroe*, a County may challenge a municipality’s restrictive zoning on the grounds that the County’s public interests in proceeding with development outweigh the municipality’s interests in restricting such development. *Matter of County of Monroe (City of Rochester)*, 72 N.Y.2d 338, 533 N.Y.S.2d 702 (N.Y. 1988).

**inaction on the part of a municipality that stymies or fails to promote the overall purpose of the Stipulation Order to AFFH.<sup>33</sup>**

Even beyond the state law doctrines referenced in the Settlement Order, Westchester had another way to influence municipalities that refused to AFFH or that interfered with Westchester's efforts to do so. As one of the requirements for receiving federal housing funds, Westchester was required by HUD to enter into cooperation agreements with its municipal grant-receiving partners. As the Court found, the agreements provided that "the County is prohibited from expending community development block grant funds for activities in or in support of any local government that does not affirmatively further fair housing within its jurisdiction or that impedes the County's action to comply with its fair housing certifications."<sup>34</sup>

With all this attention in the Settlement Order and from the Court to Westchester's rights and responsibilities in relation to municipalities, and with the certainty that at least some

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<sup>33</sup> Some Westchester officials have tried to take refuge in what was actually a failed 11th hour effort to change the terms of the Settlement Order. Members of the County Legislature sought in September 2009 (prior to final legislative approval) to limit the universe of situations where the Settlement Order required the County to take legal action. This attempt was rejected, with the U.S. Attorney's Office for the Southern District of New York properly noting that the Settlement Order is a fully-integrated document that speaks for itself." Letter from James Cott to Stuart Gerson, September 21, 2009. The letter goes on to make the unexceptional point that it is Westchester that makes judgments in the first instance about its Settlement Order ¶ 7(j) litigation obligations (*i.e.*, what particular circumstances in respect to what particular municipalities merit the initiation of litigation). *Id.* The letter is just as clear that the County's decisions are subject to the assessment of the Monitor as to whether those decisions are compliant with the Settlement Order. *Id.* The letter does nothing to change either the mandatory nature of the requirement on the County to use all tools, including litigation tools, as appropriate, and does nothing to alter or amend the acknowledgment in a different part of the settlement (Settlement Order, p. 2, para. 1) that "it *is* appropriate" to take legal action against resistant municipalities (emphasis added). Finally, it is important to understand that only those acting in bad faith would use the phrase "as appropriate" to be a license for an *a priori* decision *never* to act *regardless* of circumstances. The phrase "as appropriate" properly recognizes that, in connection with dozens of municipalities, there will be some circumstances where legal action will be appropriate, and other circumstances where it will not.

<sup>34</sup> ADC, *supra*, at \* 2-3. Slip. Op. at 6.

municipalities will continue to resist AFFH-promoting affordable housing, one would think that an Implementation Plan would both discuss these rights and obligations extensively.<sup>35</sup> Part of that discussion would be roadmap of how Westchester was going to take steps to acquire interests in land and how, while it preferred cooperation from municipalities, the County needed to put municipalities on notice that Westchester would indeed use all available means, including legal action, to see that AFFH-promoting affordable housing was going to get built where it needed to get built – with or without municipal cooperation.

**Nothing.**

**No discussion; no planning.**

**Nothing.**

In truth, Westchester’s submission is in this respect actually worse than nothing. Westchester is back to claiming that it does not have any authority over municipalities, a claim in direct contravention of its Settlement Order representations and obligations. Under “Policy and Planning Tools,” Westchester states flatly that, “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.”<sup>36</sup> Likewise, a similar claim appears in an appendix: “pursuant to New York State Law, zoning is a matter of local authority for which the County currently has no jurisdiction.”<sup>37</sup>

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<sup>35</sup> Such a discussion would of necessity include the fact that Westchester, like any entity that had or that acquired an interest in land, had the authority to challenge exclusionary zoning and other local development barriers as having a disparate impact on the basis of race under the federal Fair Housing Act. *See, e.g., Huntington Branch, NAACP v. The Town of Huntington*, 844 F.2d 926 (2nd Cir. 1988).

<sup>36</sup> MS 6.

<sup>37</sup> Appendix H-4 at p. 4.

No one, or course, has ever stated that an entity other than the locality has *in the first instance* the power to zone and impose land use controls. But Westchester presents this as the whole story, when, in fact, this initial power is *limited* by the various state and federal doctrines previously discussed in this section.

Indeed, Westchester is even beating a retreat as to the fact acknowledged in the Settlement Order that AFFH-promoting affordable housing is a County purpose, and an important one at that. The Settlement Order requires Westchester to eliminate a municipality's right of "first refusal" with respect to Fair Housing or Affordable Housing land purchases by the County."<sup>38</sup> Legislation introduced this year to comply with the provision initially had a provision designed to clarify and confirm the fact that "furthering fair and affordable housing constitutes a county purpose."<sup>39</sup> Ultimately, however, the confirmation of County purpose was dropped. *See* Appendix C-2, with the Chair of the Committee stating at the February 1, 2010 meeting that, "We're sidestepping the "county purpose' question."<sup>40</sup>

Westchester's refusal to acknowledge its authority (or appropriate County purposes), let alone begin to plan to use its authority, fatally compromises the integrity of its entire submission.

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<sup>38</sup> Settlement Order, ¶ 25(c). Note that the provision is another instance where the Settlement Order is contemplating that Westchester will indeed be making such purchases.

<sup>39</sup> Memorandum accompanying draft legislation considered at January 25, 2010 meeting of the Housing and Planning Committee of the Westchester Board of Legislators.

<sup>40</sup> The memoranda accompanying the drafts contained an identical, and telling, error. Each quotes Settlement Order, ¶ 25 (c) as required the elimination of the right of first refusal in respect to "fair and affordable" housing land purchases by the County. *See, e.g.,* Appendix C-2 at p. 2. In fact, Settlement Order, § 25(c) does not reference "fair and affordable" housing land purchases, it references "Fair Housing" *or* "Affordable Housing" purchases. The Settlement Order has no problem recognizing two separate categories; Westchester is so committed to its concept-conflating strategy that it misquotes the Settlement Order to maintain its fiction.

**Local zoning is consistently taken as a given, something to be adapted to, rather than something to overcome.** As such, the submission avoids seeking to develop in the most segregated blocks (the blocks where exclusionary zoning tends to be most ubiquitously in place), and municipal resistance is encouraged (“the County is not prepared to take us on”). Finally, Westchester loses the leveraging effect that decisive County action would stimulate.<sup>41</sup> In sum, Westchester’s refusal to acknowledge its authority reflects the fact that its submission, as noted earlier, is a plan for maintaining the status quo, not for implementing the Settlement Order.

#### **E. Westchester continues to encourage the perpetuation of segregation**

The Settlement Order is devoted to remedying Westchester’s past abuses and insuring genuine implementation of AFFH policies. Accordingly, the last thing that Settlement Order would tolerate would be the licensing or encouraging of any conduct that perpetuated segregation. Westchester knew this when it was developing a model inclusionary housing ordinance [as required by Settlement Order, § 25(a)(1)], and knew this when it was developing a policy to limit public funds to those municipalities that committed to banning “local residency requirements and preferences and other selection preferences that do not AFFH [as required by Settlement Order, ¶ 25(d)(1)]. In fact, Westchester frankly acknowledges that the Settlement Order “provides largely unequivocal guidelines as to the content of both the model zoning ordinance and the discretionary spending policy.”<sup>42</sup>

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<sup>41</sup> Were private developers to see that Westchester overcoming zoning barriers, pent up interest from those developers in building context-sensitive affordable housing would be released.

<sup>42</sup> Letter of Deputy County Executive Kevin J. Plunkett to Westchester County Municipal Officials, January 29, 2010, p. 3 [Appendix D-1(ii) at p. 2].

Despite this, Westchester has gone ahead and presented a model zoning ordinance that provides for two types of preferences.<sup>43</sup> The preferences are incorporated as well into Westchester’s “Discretionary Spending Policy,”<sup>44</sup> and into the “Fair and Affordable Housing Affirmative Marketing Plan.”<sup>45</sup>

One preference is a specialized senior citizen preference. The Settlement Order itself specifically provides that a maximum of 25% of all units may ultimately be “senior units.” Settlement Order, ¶ 7(f).<sup>46</sup> But that is not what Westchester has done. Westchester wants each municipality to write into their zoning ordinances the ability to condition approval on a developer granting preference for *all* senior units to a current resident of the municipality (or to an immediate family member of a current resident of the municipality). **This is a particularly brazen attempt to violate the Settlement Order (and the Fair Housing Act).**

First, the ability to reserve units for seniors (without reference to residency) is an exception to the general Settlement Order rule of no preferences. The 25% maximum was a negotiated cap. To change a general senior preference into a residency preference in connection with senior units would violate principles of construction of agreements even absent additional Settlement Order language.

Second, there *is* additional Settlement Order language. As specified in Settlement Order, ¶ 25(d)(i), Westchester’s policy is supposed to condition the receipt of a variety of County funds

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<sup>43</sup> Appendix D-1(i) at p. 1.

<sup>44</sup> Appendix D-2 at p. 1.

<sup>45</sup> Appendix E-1 at p. 10.

<sup>46</sup> Note, however, that, pursuant to the same provision, no such units may be funded until at least 175 non-senior units have received building permits.

on a municipality's acting to "ban local residency requirements and preferences..." The preference proposed is a local residency preference directly in violation of this language.

Third, even if the foregoing language did not exist, the municipalities are supposed to ban "other selection preferences that do not AFFH." Settlement Order, ¶ 25(d)(i). A preference for seniors residing in a municipality over those who do not reside in the municipality simply does nothing to AFFH.

Fourth, there is the little matter of complying with the Fair Housing Act. Where a municipality is segregated, a preference for residents invariably perpetuates segregation to a greater extent than would an open selection process that did not have such preferences. The resulting disparate impact (based on race, for example) violates the Fair Housing Act.

The second preference that Westchester seeks to insert fares no better than the first. This is a preference (available for one in every three units) for households that have a member who is employed or who volunteers for the municipality in question or for a contiguous municipality.<sup>47</sup>

Here again, Westchester had the opportunity to seek to have such preferences placed in the Settlement Order; there is no warrant to allow their importation now.

Moreover, as with the resident senior preference, this preference runs afoul of Settlement Order, ¶ 25(d)(i). A ban on preferences that "do not AFFH" is more than a ban on preferences that perpetuate segregation. A preference must be banned unless it is shown that the use of that preference itself is AFFH-promoting more than the absence of the preference. This Westchester does not attempt to do in its submission, and this Westchester cannot do. The African-American and Latino populations of Westchester as a whole (not to mention the population of New York City) is in general much higher than the African-American and Latino workforces of the most

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<sup>47</sup> Appendix D-1(i) at p. 1.

highly-white municipalities where housing is supposed to be developed (a fact not discussed in Westchester’s submission). Thus, a rule of open selection is actually the course that maximizes the AFFH potential of the units being made available.

Finally, it is quite likely that in many cases (not necessarily all) that the application of the workforce preference will operate to create a disparate impact based on race in violation of the Fair Housing Act. Westchester gives no indication in its submission that it has considered this question, provides no data on it, and sets forth no plan to study it. Notably, Westchester, disdaining an interest in its own workers, did not bother to propose a preference of any type for County workers. The reason is clear: a preference for County workers regardless of their current residence does not satisfy the desire to exclude “outsiders,” particularly in view of the fact that the percentage of County workers who are African-American or Latino is higher than that of the workforces of most or all of the exclusionary communities.<sup>48</sup>

As Westchester admits, coming up with its scheme was a “challenging task” in view of the “largely unequivocal guidelines” set forth in the Settlement Order. Why then did Westchester take this course? The County itself admits that it was not simply engaged in the process of *implementing* the Settlement Order, but claims to have been trying *balancing* the commands of the Settlement Order with “the home rule rights and interest of the local municipalities.”<sup>49</sup> **Leaving aside the fact that Westchester’s “balancing” tilted heavily against the Settlement Order, federal court orders are not, in any event, supposed to be “balanced.” They are supposed to be obeyed.**

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<sup>48</sup> Note, however, that a County worker preference also does not AFFH in comparison to an open selection rule.

<sup>49</sup> Letter of Deputy County Executive Plunkett, *supra*, at p. 1 [Appendix D-1(ii) at p. 2].

## **F. Other problems with Westchester’s inclusionary zoning and funds-withholding proposal**

Westchester limits the reach of the Settlement Order requirement that new development contain a percentage of affordable units; completely ignores the fact that inclusionary zoning relates not only to a required minimum percentage of affordable units within a particular project, but relates as well to *where* such projects can be developed; and both limits and fails to set forth with specificity the circumstances under which the County will, as required, withhold funds from AFFH non-compliant municipalities.

Westchester did recognize that it had a Settlement Order obligation to “develop a model ordinance to advance fair housing in the local municipalities.”<sup>50</sup> That model ordinance was supposed to include a requirement that new development projects, without limitation, include a percentage of affordable units. Settlement Order, ¶ 25(a). In Westchester’s submission, however, the requirement is turned into a requirement only applicable to projects of 10 or more units. As such, a variety of potential smaller projects would contain no requirement.

One reason for Westchester’s addition of a restriction not mentioned in the Settlement Order is that Westchester has pegged the minimum percentage of affordable units in a development at a paltry 10% of the total. In other words, using Westchester’s model, even if developments smaller than 10 units had an obligation to include affordable units, the 10% rule would not yield a unit. Westchester could have easily crafted a proposal that tracked the 80/20 program (20% affordable), or have made specific provision for an absolute number of affordable units regardless of the small size of a development, or even been more bold and required a higher percentage. Westchester did none of these things.

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<sup>50</sup> MS 6.

**In combination with the County’s efforts to import improper preferences into the process, the “model” is a model of inadequacy.** Take, for example, a 40-unit development that operated with Westchester’s proposed preferences and minimum. Only four units would have to be affordable units. Of these four, one could be designated a senior unit, and that unit would go to the existing resident of an overwhelming white municipality. Of the other three units, one could go to a municipal worker of that same overwhelmingly white town, a person more likely to be white than an income-eligible person drawn from the broader New York metropolitan area generally. Even if one assumed minority participation in a lottery of as much of 50 percent,<sup>51</sup> we are now talking about the odds of a 40-unit development yielding one affordable housing unit that actually made demographic change on the ground.

Clearly, this is not the scope of headway contemplated by a Settlement Order that required Westchester to commit to the ending of de facto residential segregation throughout the County. Other tools are obviously required. **Anyone who has ever worked on inclusionary zoning issues recognizes that inclusionary zoning in a suburban context has at its core the expansion of areas in which multiple dwellings can be built.** Westchester could have built in this type of inclusionary zoning provision into its “model ordinance” (*e.g.*, a provision that permitted, for development that included a significant percentage of affordable units, higher density in what are now zoning districts that only permit one single family dwelling on an acre or more). The Settlement Order not only contemplated that the model ordinance would have additional provisions relating to inclusionary zoning (those specified were described as being “among others things” that the model ordinance would have), Settlement Order, § 25(a)(i), the

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<sup>51</sup> An unduly optimistic assumption given the problems in the Affirmative Marketing section of Westchester’s submission, discussed *infra* at pp. 33-36.

Settlement Order requires the County to condition the use of public funds on municipalities agreeing to actively implement the Settlement Order “through their land use regulations and other affirmative measures to assist development of affordable housing.” Settlement Order, ¶ 25(d)(iii). Thus, a model ordinance that dealt with promoting specific land use changes was an obvious and essential tool.

Westchester just did not use this tool. That is to say, even in the face of multiple indicia all pointing to the need to do so,<sup>52</sup> and even in the face of the Settlement Order requirement that Westchester adopt a policy recognizing that “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 [Settlement Order, ¶ 31(c)]...in the face of all of this, and in the face of the Settlement Order provisions previously discussed in this section, **Westchester refused to propose a tool that would widen the areas where Affordable AFFH Units could be built as-of-right.**

The Settlement Order requirement that Westchester condition funding for municipalities on those municipalities actively furthering implementation of the Settlement Order “through their land use regulations and other affirmative measures to assist the development of affordable housing,” Settlement Order, ¶ 25(d)(iii), has also not been properly satisfied by the submission.

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<sup>52</sup> *E.g. ADC Summary Judgment Decision, supra*, 2009 WL 455269 at \*10, Slip Op. at 25 (“The County admits that it did not undertake an analysis of whether the production of affordable housing between January 1, 1992 and April 1, 2006, had the effect of increasing or decreasing racial diversity in the neighborhood in which the housing was built”; Report of Professor Andrew A. Beveridge, June 16, 2008 (“Beveridge Report”), p. 12, *available online* at [antibiaslaw.com/beveridgereport](http://antibiaslaw.com/beveridgereport) (the placement of affordable housing in the County “serves to intensify and perpetuate the patterns of segregation in the County”); and Report of Professor Andrew A. Beveridge, August 13, 2008, p. 1, *available online* at [antibiaslaw.com/beveridgefollowup](http://antibiaslaw.com/beveridgefollowup) ((a follow-up analysis finding that “the location of County-funded affordable housing is disproportionately in census tracts with high concentrations of African Americans and Hispanics”).

The provision includes, but is not limited to Westchester funding involved beyond CDBG and Open Space funding.<sup>53</sup> Settlement Order, ¶ 25(d). Westchester’s submission tracks this language, but fails to specify, plan for, or otherwise disclose the specifics of other funding intended to be withheld from resistant municipalities. Moreover, by failing in its “model ordinance” to promote the expansion of where multiple dwellings may be zoned when they include an affordable housing component, Westchester either intends (or at the very least has conveyed to municipalities) that the term “inclusionary zoning” is intended to have only the limited meaning set forth in the “model ordinance” (*i.e.*, including a requirement for a minimum percentage of affordable units where developments of at least 10 units can already be built). This policy does not adequately capture the intended broad mean of inclusionary zoning and does not implement the Settlement Order.

### III. Additional major deficiencies in Westchester’s submission

There are so many ways that Westchester’s submission is inadequate that it is impossible for a preliminary report to identify all such inadequacies, and this report does not purport to do so. On the contrary, ADC urges HUD, the Monitor, and civil rights organizations to examine Westchester’s submission closely because more examples of defiance of the Settlement Order will undoubtedly be found. There are, however, several more areas of major concern that must be discussed now.

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<sup>53</sup> Appendix D-2; MS 6.

### **A. Accepting and embracing barriers to fair housing choice rather than fighting them**

Westchester's AFFH obligations did not end with the resolution of ADC's lawsuit. The County continues to receive CDBG and other federal housing grants, and, separate from and supplemental to its Settlement Order obligations, the County remains under an obligation to take the steps necessary to overcome barriers to fair housing choice.

Westchester's submission reflects the fact that the County is still operating from the premise that the existence of a barrier to fair housing choice is an excuse *not* to act. Westchester should have recognized that the existence of such a barrier is, by contrast, an urgent call for an action plan to promptly and forcefully overcome that barrier. Westchester's failure to recognize that need infects its entire submission; the failure is the opposite of what an Implementation Plan requires.

Westchester's "process and approach" to "ensure" required development is set forth in less than two full pages of its submission.<sup>54</sup> Part (a) of the "process and approach" section sets forth site identification priorities. One crucial aspect of the deficiency here has already been discussed: maximizing desegregation potential – the goal of the Settlement Order – does not form any part of the priority system. There are no AFFH priorities. But the priorities that are delineated paint an even bleaker picture. **Westchester's priorities actively avoid the kinds of impediment-overcoming actions that are necessary. The fundamental premise is: "Don't do anything that will upset the locals."**

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<sup>54</sup> MS 16-17.

Thus, vacant properties are considered based, *inter alia*, on “existing land use [and] zoning,”<sup>55</sup> a consideration that validates rather than challenges policies of exclusion. Improved properties likewise bow to existing land use and zoning.<sup>56</sup>

Westchester was specifically required to, “Assess the availability of vacant land suitable for development and adaptive reuse opportunities...” Settlement Order, ¶ 22(a). Westchester did submit a map of the County showing the existence of over 11,000 vacant parcels of 5,000 square feet or larger, including **close to 10,000 vacant parcels that are currently zoned for residential use.**<sup>57</sup> **The vacant residential parcels include 205 over 10 acres each.**<sup>58</sup> Nevertheless, Westchester resorted to its reflexive excuse to refuse to conduct this assessment seriously: because of what is described as a “vast array of impediments to development,” including zoning and land use restrictions,” Westchester characterized the “exercise” (a curious way to describe a Settlement Order obligation) as not “instructive.”<sup>59</sup>

To be clear: **Westchester is taking the position that not a single parcel of vacant land in the County is suitable for the development of housing.**<sup>60</sup> Westchester does not provide any details about any parcels or identify those parcels that have the most significant desegregation

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<sup>55</sup> *Id.* at para. (a)(iii).

<sup>56</sup> *Id.* at para. (a)(iv).

<sup>57</sup> Appendix H-6. Note that the parcels exist throughout the County, so that the subset of parcels appropriate for development in the areas with the lowest concentrations of African-Americans and Latinos is somewhat smaller.

<sup>58</sup> *Id.*

<sup>59</sup> MS at 16, para. (b).

<sup>60</sup> *Id.*

potential. It is simply impossible to square this posture with a credible belief that Westchester is operating in good faith.

There is yet more evidence of brazen non-compliance when one examines what Westchester had to say about its “[a]ssessment of existing housing and other development opportunities which could be adapted to fair and affordable housing.”<sup>61</sup> **Westchester says nothing – the section is blank.**

When Westchester comes to its “Post Site-Identification Property Evaluation Process/Criteria,”<sup>62</sup> the County again validates rather than challenges impediments. As a preliminary matter, we note that desegregation potential is not among the 10 listed criteria.<sup>63</sup> Moreover, “local zoning/density/set back requirements” and “local municipal master planning” are listed considerations, without any indication of how or when those considerations need to be overridden.<sup>64</sup>

Finally, Westchester’s discussion of financial considerations reflects its refusal to recognize that the cost of development is greatly influenced by what the zoning rules are. Cost is not immutable – particular zoning generates particular costs; upzoning (*i.e.*, permitting greater density) lowers the cost per unit, often significantly. To ignore this basic fact of development life is to ignore a critical means by which Affordable AFFH Units could more easily be developed. In a real Implementation Plan, Westchester would have (at least through illustration)

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<sup>61</sup> MS at 17, para. (c).

<sup>62</sup> *Id.*, para. (d).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*, para. (d)(ii) and (iii). The section also lists “land use (history/legal concerns),” a particularly opaque characterization that ought to be explored. *Id.*, para. (d)(viii).

identified development with high desegregation potential that could be achieved if the County either secured municipal cooperation or else proceeded, using its authority, in the absence of such cooperation. Instead, **Westchester treats current zoning (and hence current costs) as a given,<sup>65</sup> constricting substantially the number of potential sites that will be perceived as “realistic.”**

This section is one of a number where Westchester references “municipal and community input”<sup>66</sup> and “municipal concerns.”<sup>67</sup> As another example, every parcel, whether County-owned or recommended to the County,” will be “vetted” for issues including “municipal cooperation.”<sup>68</sup> ADC recognizes that municipal input is desirable, but also recognizes that **the goals of the Settlement Order cannot be achieved if municipalities that come to the table in good faith are treated identically to those who do not.** Westchester’s submission does not even begin to suggest that it recognizes this point, and unmistakably conveys the message that Westchester has no intention to overcome, let alone have a plan to overcome, municipal resistance.

Westchester’s “process and approach” could have been written before or during ADC’s litigation. It represents an effort to preserve the status quo, not to turn the page.

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<sup>65</sup> *Id.*, para. (e).

<sup>66</sup> *Id.*, para (d)(ix).

<sup>67</sup> *Id.*, para. (e).

<sup>68</sup> Appendix H-3(vi).

## **B. The Affirmative Marketing described in the submission is non-compliant**

Lots of people in Westchester County do not like the fact that, pursuant to the Settlement Order, affordable housing in Westchester County has to be affirmatively marketed to people living outside of Westchester, especially people in places like New York City (where the number of African-Americans far exceeds the total population of Westchester, as is the case with the number of Latinos in New York City).<sup>69</sup> To combat that resistance, and to comply with the Settlement Order, **any real Implementation Plan would be especially careful to make sure that affirmative marketing *effectively reached* income-eligible households in New York City, and helped create the conditions whereby individuals in such households felt that they would be welcome *anywhere* in Westchester County.** Westchester's does not do this; moreover, Westchester's submission fails even to recite accurately what its Settlement Order obligations are in connection with affirmative marketing.

The obligations of Settlement Order, ¶ 33 are *not* unit-specific. On the contrary, they are part of what is described as Westchester's "additional obligations to AFFH." Settlement Order, ¶ 33. Several mandatory obligations are set forth; one of those obligations is that *Westchester* shall affirmatively market affordable housing within the County and in geographic areas with large non-white populations outside, but contiguous or in close proximity to, the County, and include in all agreements between the County and a developer requirements that the developer meet these same affirmative marketing requirements and hire consultant(s) to carry out outreach activities where appropriate.

*Id.* Thus, separate and apart from what Westchester has developers do, it – the County – must affirmatively market affordable housing outside Westchester in areas like New York City.

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<sup>69</sup> If one has any doubt about the present-day existence in Westchester of hostility to "outsiders" that is race- and or class-based, then one should examine a sample of the comments made about the Settlement Order just in the two weeks after it was announced. ADC sent such a sample to the Monitor in August 2009, and that sample is annexed to this Report as Appendix A.

Westchester’s submission contains no plan for Westchester to do this. The “Fair and Affordable Housing Affirmative Marketing Plan” says what it is: “a guide to assist Developers who are applicants for Westchester County housing funds...”<sup>70</sup> Westchester itself is not undertaking affirmative marketing of affordable housing outside the County.<sup>71</sup>

Reinforcing the problem are additional elements that will also undercut the desegregation potential of the marketing, even where the underlying concept is sound. For example, the use of a web-based centralized intake and housing outreach mechanism<sup>72</sup> does have excellent AFFH potential. But asking participants to identify geographic areas of interest<sup>73</sup> *without having educated “outsiders” to the features and amenities of different areas* will invariably mean that “insiders” are more likely to request a geographic area, particularly an exclusionary one. This is a problem that an Implementation Plan is supposed to address.

If the Settlement Order had intended to limit affirmative marketing outside of Westchester to areas contiguous to Westchester, it would have said so. In fact, the Settlement Order includes geographic areas with large non-white populations that are “in close proximity” to Westchester in the affirmative marketing obligations. That means first and foremost New York City. Yet, somehow, the publications listed in the commercial media section of the Affirmative Marketing Plan do not include any New York City publications, and the requirement to identify general circulation publications conspicuously omits New York City as a whole,

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<sup>70</sup> Appendix E-1 at p. 1.

<sup>71</sup> See MS 9; Appendix E-2 “Centralized Intake & Housing Outreach Plan”; Appendix F(ii) (“Fair Housing Outreach & Education Plan”)

<sup>72</sup> Settlement Order, ¶ 33(f); Appendix E-2.

<sup>73</sup> Appendix E-2 at p. 1, para. (a)(5).

referencing instead only areas contiguous to Westchester (the four areas named are the Bronx, Connecticut, Rockland County, and Putnam County).<sup>74</sup>

This omission would be of less concern if it were not indicative of a **general disregard of obligations as they relate to marketing to residents of New York City**. Westchester could easily have planned for intergovernmental cooperation, including, for example, asking New York City to include a link to Westchester's informational website on New York City's widely used housing information site.<sup>75</sup> It did not do so.

Westchester also neglects to grapple with a critical problem in connection with any consumer product, including residential neighborhoods: how to overcome inhibitions that members of some demographic groups might feel about the product. The way producers of consumer products try to overcome these inhibitions (*i.e.*, causes for underutilization of the product) is *to ask*. Once the inhibitions are understood, both substantive and marketing changes can be made to encourage greater use. It is not an unreasonable hypothesis to suppose that, for a variety of reasons, some African-Americans and Latinos might entertain some qualms about living in (or may not have sufficient information about) one the 12 Westchester municipalities where the African-American population and Latino population is less than one percent each, or in one of the 10 Westchester municipalities where the African-American and Latino population is under two percent each.<sup>76</sup> **Westchester's submission does not address the question of how to identify the existence of inhibitions, let alone the methods to overcome such inhibitions that are confirmed to exist.**

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<sup>74</sup> Appendix E-1 at p. 6, para. (a).

<sup>75</sup> See [www.nyc.gov/html/housinginfo/html/home/home.shtml](http://www.nyc.gov/html/housinginfo/html/home/home.shtml).

<sup>76</sup> These figures are from the 2000 Census.

Finally, it is not enough that developers make notice of available housing opportunities online; developers should also be required to make the applications themselves available online (the anomalous method of having people read online that they have to send in a postcard to a developer to get an application (as many people have told ADC over time) is not reliable method. Westchester’s “homeowner/tenant selection procedures” only require a developer to identify how applications will be made available, but do not specify online availability.<sup>77</sup>

**We need to be blunt: 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, and, as specified above, there are particular concerns about Westchester’s lack of planning in respect to out-of-County income-eligible households.** This concern is magnified by the fact that there will be a continuing and intense urge in many quarters to cheat (*i.e.*, undermine affirmative marketing using a variety of devices designed to put existing residents of a segregated town in a privileged position in relation to the application process). The Monitor must demand an actual plan “setting forth with specificity” (Settlement Order, ¶ 18) how broad-based affirmative marketing, including that for prospective out-of-County applicants, will be more than a fig leaf.

### **C. Westchester’s obligations beyond the unit-specific**

The obligation to affirmatively market is one example of Westchester’s Settlement Order obligation that goes beyond the “750 units” that have been the most discussed feature of that document. There are many others. Among those that are especially important to be integrated into implementation planning is the one discussed in this section.

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<sup>77</sup> Appendix E-1 at p. 10, para. (6).

Westchester’s housing policies and programs all must incorporate as goals “the elimination of discrimination, including the present effects of past discrimination, and the elimination of de facto residential segregation.” Settlement Order, ¶ 31(a). Westchester’s submission goes as far as saying that a policy consistent with this language has been adopted, but no farther. The problem is obvious. The creation of 750 Affordable AFFH Units is not a process that exists in a vacuum; rather, it is a process that is supposed to exist in an environment where all efforts are being made on all fronts to eliminate de facto residential segregation. Westchester’s submission does not discuss what it plans to do, if anything, specifically to implement this overarching policy. **Just like an Analysis of Impediments is supposed to represent a substantive obligation and not be mere boilerplate, so, too, is a policy to eliminate residential segregation.**

One very conspicuous omission from Westchester’s submission is the state of, and plans for, the goals of the Housing Opportunity Commission. During the litigation, ADC assessed where municipalities were in terms of the affordable housing units they were supposed to see developed within their borders by 2015. It turns out that the municipalities that are “eligible” for development under the terms of the Settlement Order collectively have an unmet obligation of *more than 6,000 units*. In other words, the minimum number of Affordable AFFH Units required by the Settlement Order is less than one-eighth the number that Westchester had believed these municipalities should have developed (but have not). Westchester’s treatment of the development of 750 units as a difficult challenge is clear evidence that it has no intention to see that the more than 6,000 units gets built. And walking away from the larger number of units is directly contrary to the obligation to try to end housing segregation using all of the County’s housing policies and programs. An Implementation Plan simply must talk to these issues.

#### IV. Westchester's submission is intentionally evasive and non-specific

As demonstrated in this Report, the non-compliant essence of Westchester's submission is easy to discern (as is the County's non-compliant intentions). It is clear, in other words, what Westchester is *not* going to do (most notably, either grapple with municipal resistance or maximize desegregation as contemplated by the Settlement Order). This non-compliance is made even more clear by approaching Westchester's submission from another direction: that is, **“How much more does Westchester's submission tell us about the *specifics* of what the County *is* actually going to do than we knew prior to the submission?”** The answer, **unfortunately, is “not much.”**

Westchester blithely *declines* to provide benchmarks as required by the Settlement Order with the argument that the Settlement Order itself “provides very specific and ambitious benchmarks for the development of the required housing units...”<sup>78</sup> This posture is disingenuous in the extreme.

It is not for nothing that the Settlement Order requires that the Implementation Plan “set forth *with specificity* the *manner* in which the County plans to implement its Affordable AFFH Unit obligations. Settlement Order, ¶ 18 (emphasis added). The very next paragraph of the Settlement Order requires “proposed timetables and benchmarks for the first six-month and one-year periods and for each year thereafter.” Settlement Order, ¶ 19. This requirement cannot fairly be read as simply a requirement for when specific numbers of units have financing in place or have building permits, the subject of Settlement Order, ¶ 23. The various aspects of the steps Westchester must take to achieve compliance *themselves* need benchmarks established, with appropriate time frames linked thereto. Likewise, the Settlement Order requires that Westchester

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<sup>78</sup> MS 19.

“specify steps and activities that will be needed” to meet the unit creation benchmarks. Settlement Order, ¶ 24. Indeed, the Settlement Order contemplates that those steps and activities will be specific enough and sufficiently time-specific to be able to be designated by the Monitor as additional benchmarks enforceable like any other term of the Settlement Order. *Id.* Westchester has just opted not to provide such specificity about steps and activities.<sup>79</sup>

Westchester’s decision to take this approach is particularly troubling given its assertion that there are “anticipated challenges” in meeting the “basic compliance deadlines” (*i.e.*, those Settlement Order, ¶ 23 benchmarks including having a minimum of 100 units with financing in place by 2011 and having a minimum of 750 units with building permits in place by 2016). **If there are anticipated challenges, it is especially important to plan to overcome those challenges.** For example, it is always the case that a significant percentage of developments initially planned do not reach fruition. Given that basic fact, the only way to plan to wind up with at least 750 completed units is to plan to have many more than 750 enter the pipeline. As another example, the chances that there will be significant municipal resistance to the Settlement Order are 100% (as already demonstrated in comments from municipal officials over the last several months). The only way to plan to succeed is to incorporate means by which to overcome such resistance. Westchester’s submission has not a hint of a trace of a plan to deal with either of these examples; does not identify the other “anticipated challenges,” and does not plan to overcome those unspecified anticipated challenges.

Westchester is likewise vague and non-compliant when it comes to the issue of a revolving fund. The Settlement Order requires Westchester to “[e]xplore and implement

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<sup>79</sup> Westchester does not even distinguish between its site selection priorities for existing units that need to be converted to affordability (a maximum of 25% of the total units) and new construction, let alone specify time-specific benchmarks for conducting site selection.

mechanisms by which the monies made available pursuant [to the Settlement Order], and proceeds from the expenditure of those funds, can be placed in a revolving fund dedicated to the development of Affordable AFFH Units. To the extent there are obstacles to doing so, the County shall identify the obstacles in writing to the Monitor and any steps that can be taken to overcome the obstacles.” Settlement Order, ¶ 22(e).

Westchester’s submission contains a Planning Department letter relating to the use of Revolving Funds,<sup>80</sup> but the submission does not comply with the Settlement Order requirements. The letter asserts an “understanding” that “there is a NYS Constitutional prohibition on the gift of loan or public funds to private entities,”<sup>81</sup> but does not either explain why this provision would bar a Revolving Fund, does not identify “any steps that can be taken” to overcome that perceived obstacle, and does not discuss ways to structure a revolving fund that would not run afoul of the perceived obstacle.

Westchester’s submission might leave the impression that the County is, in fact, committed to the use of a revolving fund for some portion of the Settlement Order monies. In fact, an examination of submission shows that **Westchester is not committing to set aside a single dollar in a *dedicated* Revolving Fund, but rather is reserving to itself a future decision as to whether *any* funds will be used for revolving purposes.**<sup>82</sup> Having all funds comingled in a single account is not the same as creating a revolving fund, and making a vague statement that funds will be used “as appropriate” on a “project-by-project” basis is not the same as engaging in implementation planning.

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<sup>80</sup> Appendix H-4.

<sup>81</sup> *Id.* at p. 1.

<sup>82</sup> MS 15.

Westchester’s strategy of playing its cards close to the vest is not *always* wrong. For example, Westchester notes some legitimate concerns that “site specific inquiries and preliminary transactional terms” potentially impairing “the viability of potential projects.”<sup>83</sup> **But Westchester does not narrowly tailor a concern about release of information – it tells us nothing about what it expects from municipalities or about what commitments (if any) it has gotten from municipalities.** Westchester’s submission tells us nothing about the Census Blocks on which development would maximize the desegregation goals of the Settlement Order. Westchester’s submission tells us that it met with developers, as required by Settlement Order, ¶ 22(b), in order to “determine their interest in furthering developments that will AFFH”), but incorporates nothing about what it learned into the plan. There are further examples too numerous to list here. Suffice it to say: “If you have a question about the specifics of implementation, Westchester’s submission most probably does not answer it.”

Westchester’s submission was supposed to be a complete and comprehensive roadmap for implementation (subject, of course, to revision as more is learned over time). Instead, **the County has just pushed things down the road, effectively taking an additional extension of time without getting permission to do so.** That attitude does not augur well for Settlement Order success.<sup>84</sup>

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<sup>83</sup> MS 18.

<sup>84</sup> We note as well another disturbing and consistent pattern: Wherever the Settlement Order (as with a model inclusionary zoning ordinance) is framed as having to “include” certain elements (phrasing which contemplates that there will be other elements as well), Westchester does not provide any additional elements.

## V. Additional Observations

The obligations imposed on Westchester by the Settlement Order do not *replace* but rather *supplement* Westchester's ongoing AFFH obligations under federal law and regulation. As Westchester has been continuing to received CDBG and other federal housing funding, it has been continuing to certify that it has and will AFFH, including that it has and will take the steps necessary to overcome barriers to fair housing choice. As Westchester's submission has confirmed, it is still refusing – just as it refused during the false claims period – to take actions appropriate to the circumstances to confront and overcome the key barriers to fair housing choice in the County (not taking action against even a single municipality, no matter how AFFH-resistant). Furthermore, the “Discretionary Funding” Policy, which is defined to include CDBG funds, contemplates continuing to provide CDBG funds over the course of the coming year to municipalities that fail to AFFH.<sup>85</sup> HUD, therefore, is obliged to explore how to respond to the fact that, as of the date of its submission last week, Westchester was: (a) not meeting its underlying AFFH obligations; and (b) continuing to submit false certifications that it was meeting those obligations.<sup>86</sup>

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<sup>85</sup> See MS 7, setting forth a January 2011 effective date for the start of the funding limitations. In so doing, Westchester implicitly acknowledges that municipalities have *not* been held to account over the course of the past year.

<sup>86</sup> The Court held that requests for payment of CDBG and other federal housing funds constitute implied certifications that the jurisdiction submitting payment has in fact met its AFFH analysis and action obligations. *ADC Summary Judgment Decision, supra*, 2009 WL 455269 at \*17-18, Slip Op. at 43-45.

## VI. Lessons Learned to Date; Pitfalls Ahead

Two weeks after Judge Cote signed the Settlement Order in August, ADC sent the Monitor a letter.<sup>87</sup> In that letter, ADC warned that, “Appeasement only emboldens resistance.”<sup>88</sup> Unfortunately, that advice was not heeded, and Westchester was given the impression over the last several months, intentionally or unintentionally, that *structural* change would not really be required, that the Settlement Order would be looked at “flexibly,” and that Westchester could progress towards unit-specific targets by focusing on “low-hanging fruit” (*i.e.*, the kinds of projects that minimize municipal or other opposition). Not surprisingly, Westchester has understood these signals to mean, “Let’s see what we can get away with.”

Westchester is banking on an old strategy: adopt an extreme position, and hope that you can negotiate a middle ground. In this case, the extreme position is a woefully non-compliant submission that bears a striking resemblance to Westchester’s pre- Settlement Order positions. The risk, of course, is that the Monitor will take the bait...and negotiate. The terms of the Settlement Order, however, are non-negotiable. Negotiating away either portions of the letter or spirit of the Settlement Order would be improper and impermissible.

Thankfully, the Settlement Order, however, is very clear that **the Implementation Plan shall ultimately contain precisely what the Monitor wants it to contain.** The Monitor has authority not only to reject the submission in the first instance (Settlement Order, ¶ 20), but, should a revised submission continue to be “insufficient to accomplish the objectives and terms set forth in [the Settlement Order],” the Monitor “*shall* specify revisions or additional items that

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<sup>87</sup> The letter (“ADC-Monitor Letter”), exclusive of attachments, is attached as Appendix B to this Report.

<sup>88</sup> ADC-Monitor Letter, *supra*, at p. 1.

the County *shall* incorporate into its implementation plan.” Settlement Order, ¶ 20(d) (emphasis added). As such, a final Implementation Plan will be the Monitor’s Implementation Plan. The Court, of course, retains jurisdiction to enforce Westchester’s compliance with its obligations. Settlement Order, ¶ 58.

## VII. Conclusion

The documents that Westchester has submitted to the Monitor constitute neither planning nor implementation. The documents ignore or contradict several fundamental principles and requirements of the Settlement Order, and are clearly designed to maintain the status quo to the maximum extent possible. If the Monitor is to fulfill his job of insuring that the letter and spirit of the Settlement Order be complied with, he must reject this *faux* “Implementation Plan” out-of-hand.

**Appendix A:**

**Sample of biased comments made in wake of announcement of Settlement Order**

## Sample Comments – Various Sources

### Comments sent in to ADC via website

1. [Subject: your misguided unwanted push to ruin every clean safe community in the country] there is a reason people remain segregated today. not your much vaunted zoning regulations, but the fact that white people and black people do not like each other. in any school. you will see automatic segregation at lunch where minority students sit together and caucasian students sit together and if there are indians from india, or polocks from poland, they sit together. i do not want to be forced to have shopping carts littering the parking lot of my condominium unit because 1 block away from me, people have been permitted to move to an area they cannot afford and do nothing but make a mess for the rest of us to clean up. this is the same claptrap that caused the "civil rights revolution" which was not about helping poor downtrodden blacks, but about giving jewish attorneys and jewish groups "POWER". for every action, there is an equal and opposite reaction about which no one can do anything. you may continue to push for your absurd egalitarian society in which only your tribe would be the ones on top, but believe me, everyone is not fooled by any of it.

2. You folks are complete idiots, and must really love destroying productive white communities. I find your actions TOTALLY disgusting and unconstitutional. Please take your fake "president", Obama, and fly off to the third world and live in the crap and poverty that you so obviously desire. Whites should, and can, segregate themselves AS MUCH AS THEY WANT TO DO SO. No social engineering is going to change that. In short, GET STUFFED!!

3. [Subject: YOU HATE WHITE COMMUNITIES] SCREW YOU and what you stand for! Quit attacking white communities!

4. I do not understand why this has to be. Do people in this country not have the right to live with and among whom they please? Doing this is going to bring third world problems to a first world area and lower the standard of the ENTIRE area and surrounding areas. This is not even taking in to account that none of the communities want such a thing to happen. Equality: No. Tyranny: Yes.

5. I saw that you had filed suit forcing Westchester into affordable housing. I would just like to inform you that in Scarsdale, while there may not be blacks & hispanics, the majority of people are not your white protestants- instead, they are Jews, Catholics & Asians who have worked very hard for what they have. Growing up, I did not know anyone who was independently wealthy. My great grandparents immigrated from Russia while being persecuted and came to the US as factory workers. 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. Why not pay for me to live in White Plains for free instead? Also, are you planning on importing Protestants into Scarsdale too? Finally, 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.

6. [Subject: worthless bastards should mind their own affairs] I could be wrong, but my first opinion of you worthless pieces of shit, is that you are nothing more than cocksucking motherfuckers, and that the judge in the Westchester case is a turd.

#### Comments to Fair Housing for All

7. When will our government learn to stop wasting tax payer money for government public housing? This is not fair housing for all. It's unfair to stuff black people into an atmosphere that breeds unwanted babies, abortions, rape, crime, drugs, and property destruction due to people not having a feeling of ownership. 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.

8. The video about Westchester County, NY made my blood boil. Talk about discrimination. 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 dollar housing units the crime rate will be rapent.

9. Well that is all well and good, discrimination should not be allowed. Now I just wonder when this Craig Gurian character is going to go after the BET, The United Negro College Fund, The Black Miss America pagent and the NAACP itself, who by it's very name is racist, promoting only one race of people. When are you going to start cleaning them up? Or is that only white people can be racist?

#### Comments on New York Times article

10. If people want to self-segregate, why not let them? Westchester is being forced by the government to bring in minorities and with them crime and lowered property values. Time to become a Libertarian.

11. 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.

12. This is ridiculous. There are these wonderful, beautiful, safe neighborhoods, places where people have worked hard their whole lives to live in so that their families are safe and they can enjoy themselves. Bring in public housing, bring in crime. Its a fact. Why should these people have to deal with criminals and welfare recipients coming into their neighborhoods, just because

its not "colorful" enough? Public housing, even if its well built and nice looking is a threat to any neighborhood. After a few years, the housing will look trashy and beat up due to the fact that the people who live there have no pride, no sense of respect of property, they look for handouts and the easy way out, they are just plain lazy. Just look at any low income neighborhood in the country, any public housing communities. The fact that the government wants to try to "desegregate" any community is ridiculous. I have seen it firsthand where I live. The city decided to "clean up" downtown (had to clean it up b/c of the people living there) and the public housing communities were moved more into suburban communities surrounding the city. The crime rate went up, the value of the houses went down, the area became more crowded, more noisy, trash littered the streets and scummy people sat on their front porches of their government housing doing absolutely nothing during the day, on weekdays, it did nothing for the area except make it undesirable. Government help only furthers the already lazy masses to become even sorer than they already are ,its their excuse to have a gazillion kids, not work and be complete leeches on society. Why should I have to pay for that with my taxes? Leave good communities alone, let this country have some beauty left, some safety and some community. Moving these people into other areas just exacerbates the issue in that it creates a bad area in an otherwise nice community. There is a reason for so called "white flight"- just look at the areas were minorities live, they bring these stereotypes upon themselves. There is no excuse anymore, everyone has equal opportunities, minorities even more so in that everything seems to be in their favor lately, so stop sitting around doing nothing and educate yourself, get a job, stop having a gazillion kids you cannot pay for or spend time with. Its not about racism, its about facts, stop denying them and do something to make yourselves a worthy part of society, then no one will mind living around you no matter your gender, color or background.

13. 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 did not know any White Anglo-Saxon Protestants until I moved away for university. And many many families were first-generation immigrants. But they all shared the value that their childrens' education was the most important variable so they were willing to pay more for (often lesser) homes in excellent school systems. We had plenty of Chinese, Japanese, Korean, Indian, Pakistani and immigrant kids in the school systems. We had very few Hispanic and black kids but the ones we had were wealthier than the preponderance of the so-called white people. Now I live in Denver where we have a plethora of Mexican hispanics in my kids' school system. Zero Asians, zero Indians or Pakistanis. I had been to Sikh, Muslim and Buddhist households by age 10. My kids? They've eaten a lot of tortillas and been exposed to Spanish. How exactly is this more 'desegregated' than Scarsdale?

14. Let's be honest for a second. Most Causasians, 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. For the government to force these people down the throats of others who don't want them there does absolutely no one any good. If I were a policymaker, my goal would not be to take blacks and relocate them to wealthy white neighborhoods where they are not wanted but to provide various kinds of outreach and economic aid to blacks where they ALREADY live so that these communities are transformed and, in the long term, people will not mind living near blacks.

15. The Courts and now the Executive branches of government believe that white people should not be allowed to choose to live together because there is a legal presumption that whites are racists. For everyone else its okay, however if you can't keep tabs on those people or keep them apart they'll plot to take over again and we don't want that. I'm sure our newest Justice will approve.

16. It's so funny--- it never occurs to anyone, ever, that whites (some whites) for whatever reason might just like to live in "their own" neighborhood. NY has Chinatown, Little Italy, once had Germantown, Harlem, various ethnicities in groups. The fact is, sometimes (for many different reasons) people just like being around people with highly similar traits. In fact, it's not xenophobia, but lots of older people get this way. And they should have rights, too. Whites (non-Jews, non-Hispanics) are largely the only ones for whom no one extends this basic courtesy. I never thought I'd say such a thing, but I am very tired of this. Who knows the whys? Some have been victims of violent crime, for instance, and while yes, one shouldn't dwell on race of perpetrator, what if they were... Asian, Hispanic, Black, etc. Why is it better to have some old lady go to a shrink to un-do her feelings around a crime against her---than just let her move where she'd feel ok. Same for other groups. Plenty of non-whites choose to live around non-whites. It makes me sad to see other groups never extend the same courtesy to whites. Many diverse neighborhoods used to be a draw for the city (Chinatown, Little Italy, the arts scene of Soho, Harlem) ---but the guise of "diversity" destroys that. Those old "neighborhoods" are vanishing, also. Sad. Everything is about money now, no more neighborhoods. Whites in such communities are often more than their money, too. They have a culture (although it's so degraded that most people do not recognize it as such). The Protestants have truly fled the city--- at about 6% now. The ethnicity of the Founding Fathers leaves, not b/c of color, I don't think, but b/c of culture. They value freedoms and freedom of association, and cannot get that in a city like NY. So they just left. Nobody even noticed.

17. This seems very unnatural. I think we, as a society, really need to evolve beyond the need to categorize people and trying to manufacture a perfect, politically correct society. You can't tinker with how communities evolve: it has the potential to change everything, with too many unknowns. These communities have spent a couple hundred years organically evolving. As with anything, when we go tinkering with the natural evolution of things...things can and will go awry. For example, how will this impact Westchester's astronomical property values/taxes - and, ultimately, their excellent school system? This school system is paid for because families move there for it. They work hard to achieve the American dream, then they move into a nice house in a neighborhood they like and pay a lot of hard-earned money to educate their children. Why are they now the bad guy for wanting this? Now, when the property values decline and taxes go down - as they will - who is going to pay for the schools? Now the community that these folks have worked so hard to build for so long is going to go down the tubes and people will yet again flock somewhere else that hasn't been meddled with. This isn't about color or race. It's about the American dream. People want to achieve it, and when they do, the American way should be to let them have their homes, their schools...what they worked so hard for. It shouldn't be to be offended by it...to try to change it. You cannot manufacture the way a community evolves. Bronxville used to be known as being unfriendly to the Jewish community. Now we know lots of

Jews who live there. How wonderful this natural evolution happened organically. It's a process that has dignity and honor. How insulting it would have been to if someone had said: "let's build housing for the Jews!" This proposed scenario should be equally as insulting to anyone, of any economic or racial background. Yes, we should always take care of each other - regardless of race or religion. But to force communities to change who they are to accomplish this seems to go against what the American dream was built on.

18. Ridiculous. Not only is it offensive to principles of property rights and free association, it is terribly destructive of racial harmony. Forcing people to live together is a recipe for hostility and resentment - not for civility. All of this ideological theorizing and social experimentation is disastrous. Human nature vomits it out quite grotesquely in the real world. People, all people, like to congregate with people who are "like themselves" - however they define it. This won't work. It never has. Stop doing it and leave people be.

19. 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.

20. As a native Southerner, I just chuckle over settlements like this. After decades of having every manner of arbitrary racial remediation slammed down our throats, I see the millionaires of Westchester don't seem to like it much, either. Frankly, until blacks stop trying to "get even" and we all agree to work from a new, blank sheet of paper going forward, we will continue to fight amongst ourselves over silliness like this while other nations continue to destroy our economy and standing in the world.

21. A perfect example of back door reparation.

22. 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. Minorities don't have to move into high-priced white neighborhoods to achieve safety and order. They can create them right at home. Any community or neighborhood can be nice if the people in it keep it that way. But if they don't, moving into another neighborhood won't help. The problems continue, and are foisted on people who have worked very hard to create a lovely neighborhood, free from all those problems. People, and their behavior, make a neighborhood. Go to South Dakota sometime (where I was recently). People are very poor, but it's so clean you can eat off the street and children and adults can go anywhere day and night without fear. School achievement is near the top of the country. How do you explain that?

23. "This is consistent with the president's desire to see a fully integrated society," Everyone agrees with this but when will society realize that society segregates itself. Many minorities and ethnic groups, whether African American, Mexican, Dominican, Chinese, or Russian choose to live amongst their own. This is evident all across the nation, especially in New York. If however white native-born Americans feel the same it is unfortunately called racism.

24. If Obama euthanizes all the sick or handicapped white folks and those over age 50 who live

in Westchester, he can nationalize their homes and give them to blacks. Then there's no need for a subsidized project or segregation.

#### Comments on LoHud (Westchester Journal News) articles

25. I'm a white heterosexual Christian male, born and raised in Westchester. I've worked all of my life. A few years ago I needed to apply for an SBA loan. I wrote my Congresswoman, Nita Lowey, asking if she could help me. One of her staff contacted me. All the help I received was merely being told to contact the SBA, its number in Manhattan and the name of a "higher up" person there. I called and spoke with this man. He said: "Off the record, don't even apply." When I asked why, he replied, "You're the wrong demographic." So now this article displays an unmarried ghetto-breeder kicking back in a park waiting for the Mega Millions of the newest Ghetto Lottery. This destruction of all that is America is our worst nightmare and we have to end it. I truly hope that these ghetto mopes will next demand "affordable dues" to all of the exclusive country clubs - it's only right you know. Don't forget to invite a ghetto breeder to sit next to you at Starbucks. Hey! have a forced latte together!

26. There is no segregation going on anymore. Some times you just can't afford something. Some times you have save and sacrafice 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.

27. LET'S SPREAD THE CRIME AROUND. WHY SHOULD YONKERS AND MT. VERNON HAVE IT ALL. HOW ABOUT SCARSDALE AND HARTSDALE?

28. Thank the NAACP and other minority groups for encouraging the victim mentality. This is going to be a disaster. First of all I said yesterday you do not have a right to live where you want to live. You live where you can afford to live. My parents live in Mt Vernon, they would love to live in Scarsdale or Bronxville but guess what? they cant afford to live there

29. Now with the influx of con 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. It will be place upon the property owners. It gets even worse, There will be tons of illegal alien invaders moving in. Their anchor babies will allow them to live in subsidized housing. This country is done. Stick a fork in it

30. Once these projects are completed look for the following... Loud Music, fighting, drinking, drug dealing, dog fighting, murders, higher taxes, lower property, lower quality of life, over population, more illegals moving in.

31. It should be a requirement of all who live in affordable housing or getting any assistance from the government that they CANNOT have cable TV, cell phones or computers or for that matter any other monthly expense that is non-essential. Maybe they wouldn't need the affordable housing if they didn't have satellite dishes and blackberries.

32. You could fit quite a few affordable housing units in a wing of the White House. That would be a help. That fat bloated bigot Sonya Sotomayor is salivating at this. This is something out of her playbook

33. this is what is going to get me out of new york finally. i grew up in westchester. I have a college degree as does my wife and we had to move out of westchester and go to putnam because if inflated taxes and home prices. But wait let me be a fat lazy MINORITY who gets everything now. What happened to work and success will come. There are no more values in this country. I bust my hump daily and this is the pay off. Give to minorities. Why should they be ALLOWED to live in areas where people worked hard to get there. What has happened to this county, state and country. Why should people be forced to live where they should not be. Stop collecting welfare and get to work. thanks to our liberal government officials who live high on the hog as it is. 50 million dollars. wow. what is the difference wth this and Madoff wrote:

34. Fact: Blacks & Hispanics commit the overwhelming amount of crime in the US, especially violent crime. Look at the statistics! Fact: People work hard & save to buy a house in nice communities to provide safety for their families. Now: The Federal Government caves into a BS lawsuit and orders that subsidized housing be built in nice communities so that the crime can be taken to them. As they say in the commercial "Priceless."

35. It'll be sad to see Ardsley, Bedford, Bronxville, Scarsdale, North Salem, North Castle & Pound Ridge go the way of Yonkers and Mount Vernon! Those places where once beautiful too. Why work for what you really want when the county will just give it to you. PATHETIC!!!!

36. Forced integration...now that's crazy. Most people in their right mind don't want to live where they are not wanted. Why don't they use that same force to get employment in Westchester to give people a better chance of progress.

37. Hey, can I get in on that affordable housing in Bedford. I've driven through that town and it's beautiful! I'm tired of working my a\*\* off for the last 25 years and trying to pay all my high bills every month so I can give my family a decent place to live in a nice neighborhood. OH WAIT.....I CAN'T.....IM WHITE.  
I guess I'll have to work more overtime to pay for the blacks and hispanics, so they can easily get, through my higher tax rates, what other people work hard for. This is the root cause of the animosity between the races. welcome to the Socialist Republic of the United States ruled by King Obama.

38. ....*but just think how good their High School basketball teams will be.....*

39. This isn't about diversity, integration or fairness, it is about placing black votes in "white" districts. It is a power grab that is going national with the help of Obama. Why do you think the first thing he did was grab control of the 2010 census? He'll redistrict and change the complexion of districts deemed "too white."

40. WHAT A JOKE.....HERE WE GO AGAIN.....THE WHOLE COUNTY WILL GO

DOWN HILL.....YONKERS ALL OVER AGAIN.....IT WILL NOT GO TO WORKING MINORITY FAMILIES IT WILL GO TO THE LOW LIFES THAT DON'T WORK WHAT A SHAME.....

41. Well the illegal immigrants have been allowed to snap up many affordable houses where black people live. If politicians and psychotic liberal "do-gooders" seeking to recover a good image of themselves were really concerned about affordable housing for blacks they would stop letting illegals jump them in line and take the houses. Forcing high cost areas to take blacks and Hispanics is like forcing expensive restaurants to serve McDonalds and Burger King because not enough minorities are present. These shallow racial quotas are anti white at the core and meant to divide people more than anything else. Gov has no business forcing social engineering. If more blacks want to live in the Hamptons then they need to stop the astronomical illegitimacy rates (caused by same selfish go-gooder libs and black culture (Rap) that glorifies the criminal lifestyle and rebellion. Cosby is right.

42. Ok, so let me get this straight; as a white woman, if I decide to move into an "affluent" area of Westchester but can't afford it, I won't be able to live there. Meanwhile, if a minority wants to move into that same area they can take advantage of this affordable housing "opportunity" and will be able to live in the same place I can't afford? And this is not discriminatory how? 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. How many housing applications were turned down once race was disclosed? I'm assuming not many, so how this can be called racist is beyond my understanding. You want to live in Westchester then you work to be able to afford that luxury. Otherwise, live somewhere else. 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.

43. No! It's that we who work hard for a living , pay taxes and have to support the mopes are now forced to have them live among us. Hard work gets the White middle class the shaft and the mopes get the keys to the city. This is not right!

44. No! You're white and have to suffer the consequences of a life of work.

45. Minorities want to be treated equal unless they are feel they are getting the short end of the stick; then it is racism and want special treatment. This is why they will never move forward; they are always playing the victim. Great job Al and Jessie.

46. 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. Why can't they just make the neighborhoods that they live in better. They cant. Crime in minority areas are ten times more than in other areas. I pose a question to the readers of this. Name me one affluent minority neighborhood that you would move to. I couldn't name one, maybe everyone can help me. Also I wonder if I qualify for these low income houses. My assumption would be no because im not a minority. I urge every white person to apply for these houses. Once we get rejected we can apply for our own discrimination lawsuit. Minorities cannot be the only ones who have low income.

47. Those towns should get to work immediately to ensure they have the right zoning in place to prevent the government from creating mini-slums in their downtowns.

48. Great to hear...Its not like we havent already experienced one of the worst financial collapses in American history by giving people credit who cannot ever afford to pay back what they are "stealing". 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...but now lets give them nice houses in nice areas so they can continue to destroy the areas that havent already been destroyed. It sickens me to know that people can do absolutely nothing with their lives and be rewarded for it...

49. Well at least these "minorities" will not be shot, stabbed, killed or robbed when living in a place they cannot afford. Must be nice...

50. And you thought that these minorities all ready had an arrogant sense of entitlement...you ain't seen nuthin' yet! RIP Westchester.

51. 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. By problem I mean, how are these folks suppose to get back and forth to work if they do not live close enough to public transportation? Will the townspeople then have to incur more taxes to provide such amenities? I think that with all the other issues and problems this country is going through, last thing we should be worried about is if the well to do neighborhoods are being discriminatory. It would be interesting to see exactly what the impact will be on towns such as Chappaqua when you have people who have earned enough money to live in an upper scale neighborhood/community once this housing is in full swing.

52. Simply shocking and ludicrous.....what a waste of federal money.....having fled westchester for living > 25yrs ago.....all of westchester will be a slum like yonkers, Mt.vernon and New Rochelle.....there goes the neighborhood

53. When is the NBA going to have more white people?

54. I remember when i moved to Yonkers in 1995 my East Yonkers Ave. neighborhood 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? Make andy spano pay for this. Vote this bum out.

55. Do i think affordable housing is fair? Yes, for working people like firemen, police officers, teachers, and registered nurses. who work here in Westchester, but have to commute 1 1/2 hours

in traffic from Dutchess, and Orange County because they cannot afford to live here. Affordable housing for working people. Have the individuals show most recent W2's, be employed full-time, a show of profession and education status, and perhaps even require a written essay.

56. White Flight has returned! Westchester will be the new Bronx, nice neighborhoods turning to garbage. Look at areas where the projects were built or affordable housing. Hard working people fled these areas because the crime soared and quality of life went down. If all of you are against this you need to stand up and get together and bring in your own lawsuit, don't back down and go to your local council meetings to tell them no! Property values will decline immediately and graffiti, hispanics and blacks hanging out in the corner selling drugs, trash everywhere. Shouldn't be forced to accept this. In a way it's racism. These people want handouts, why this country has no more money. Wait for King Obama's healthcare plan to take shape, really in trouble then.

*57. 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. We have a half black president now. You cannot tell me that discrimination is largely responsible for minorities not being able to live in these areas. This not good because you have seen these minority communities. They are run down, the houses are not kept and the streets are filthy and this is what the county is going to force into nice neighborhoods. Would you want to live near these people? I already do and it's a disaster...*

*58. I'm not a racist, I'm a realist. I look at what I see with my own two eyes in my own neighborhood.*

59. All those things you mentioned: education, lovely homes, beautiful neighborhoods are considered EVIL AND RACIST and therefore must be destroyed because there aren't enough minorities. Do you have any idea as to what will happen once the libs/dems force these people down your throat? Here's a clue...leave your cocoon for a few hours and take a stroll down to Yonkers...or Mt. Vermin...or New Rochelle...or any other town/city where blacks and hispanics have invaded and destroyed and ask yourself this question, "do I really want this in my backyard?"

60. And before the deluge of savages into Yonkers it had many proud residents. Just wait and see. You libs are so blind to reality it makes me sick!!!

61. Of course, they will "build new shops" !! A person has to have a nice place to steal from !

62. There goes the neighborhood... move out now...

63. In response to DMcD1209, I can only wonder if you are an idiot, or just on heavy narcotics? People are not racists because they believe you need to work hard and EARN their way into nice neighborhoods... the American way WAS to get an education, a good job, make money and then buy a nice home in a nice town ....now the government is going to tell us who should live where... that is complete garbage brought to us by the pathological liar in the White House, and

idiots like you who undoubtedly voted for him. I suspect you are an idiot AND use heavy drugs.

64. yeah, low income housing AKA projects=drugs,crime increase,high birth rate, tax dollars going to support mistake babies,and oh course. cant wait to see MLK BLVD in Chappaqua.

65. Are you high?! You obviously don't live in westchester or, are on public assistance , live in a rat hole and want out. NO WHERE DO THESE SO CALLED MINORITIES LIVE, DO THEY TAKE PRIDE IN THEIR HOMES AND THEMSELVES. ( OTHER THAN HOLING ONTO THE ARROGANT UNITED RACIST BELIEFS OF THE PLANTATION)

66. To all the liberal democrats in chappaqua that voted in this circus, theres an old saying.. WATCH WHAT YOU WISH FOR, IT MAY COME TRUE!!!..... im sure as long as its not in their backyard, its ok.. GREELEY BASKETBALL IS ABOUT TO HAVE A GREAT TEAM!!

67. More projects and crack, we need that with some more illegal aliens too , Why should white people live a clean life and enjoy it when the baby mamas need there housing and welfare checks , Come live in my nice street and ruin it , I will pay high taxes so you can live for free I dont mind I am a stupid white person

68. I am a single divorced 50 year old woman. I have worked for the same employer for 27+ years. I have owned my own home since 1987. It was and has been at times (with the current recession/depression) difficult to pay the mortgage, taxes, fuel oil bill, water bill, etc. But I did and have done it, on my own, without a handout from anybody. It is (or was) the American way to work hard to achieve your goals (such as owning a home). The community I live in is overrun with illegal hispanics who see nothing wrong with throwing trash, empty beer cans, etc. on the ground rather than using a garbage can. I have seen people buy scratch off lottery tickets, take them outside the store, scratch them, and then throw them on the ground. This may be the way you do it "in the mother country", but don't come here and make our communities look like garbage dumps. With this new "affordable housing plan" for everyone, things can only get worse.

**Appendix B:**

**ADC Letter to Monitor, August 24, 2009 (exclusive of exhibits)**

# ANTI-DISCRIMINATION CENTER, INC.

“ONE COMMUNITY, NO EXCLUSION”

WRITER'S DIRECT DIAL: 212-655-5790

August 24, 2009

## BY HAND

James M. Johnson, Esq.  
Debevoise & Plimpton LLP  
919 Third Avenue  
New York, NY 10022

Dear Mr. Johnson:

I write to offer some initial observations as you embark on monitoring Westchester's compliance with the letter and spirit of the Settlement Order that has been entered in this case.

### **A. Appeasement only emboldens resistance**

There will undoubtedly be some who entertain the fantasy that a “patient” and “compromising” approach holds the promise of change without acrimony. There is no surer path to failed implementation.

#### **1. The Settlement Order is a remedial order and must be enforced as such.**

Whatever the Department of Housing and Urban Development (“HUD”) comes to decide on a go-forward basis with respect to affirmatively furthering fair housing (“AFFH”) obligations of federal grantees generally, this settlement springs from a particular history and a particular context. Westchester not only remains remarkably segregated – a dozen of its municipalities have African-American populations under one percent – its longstanding wrongdoing is clear. When the presiding judge, the Hon. Denise Cote, examined the record in the light most favorable to Westchester, she still found as a matter of law that Westchester had “utterly failed” to meet its AFFH obligations. She also found as a matter of law that every single representation of compliance in the period 2000-2006 was “false or fraudulent.”

A remedial order is not intended as a balancing act; rather, it is intended as a *counter-balance* to the consequences of past wrongdoing. As such, we respectfully submit that the task is not monitoring whether Westchester is doing “just enough” to stay within the letter of the agreement, but rather monitoring and insuring that Westchester is doing the maximum to undo the residential racial segregation that it has helped to perpetuate.

**2. The lessons of history tell us unmistakably that resistance can be given no quarter.** One of the hats I wear is that of an Adjunct Professor of Law at Fordham Law School,

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where, *inter alia*, I lead a seminar in “Housing Discrimination: History, Demographic, Law, and Remedies.” Among the materials we cover are Eric Foner’s *Short History of Reconstruction* and Arnold Hirsch’s article entitled *Massive Resistance in the Urban North: Trumbull Park, Chicago, 1953-1966*. I have enclosed a copy of both (the Hirsch article is Exhibit 1 to the Addendum to this letter). In those circumstances, as in countless others, the failure to meet resistance with overwhelming force did not engender hoped-for “reconciliation” or a “spirit of cooperation.” On the contrary, the forces of resistance, alert to any sign of weakness, were only emboldened by the failure of the relevant government bodies to act promptly to squelch all such resistance.

**3. Racism in Westchester is alive and well.** I do not use the term “racism” lightly. Doing so would not only be gratuitously provocative, it would be an insult to all those who have suffered its effects. Thus, throughout the litigation, I never once referred to any person or practice as “racist.” In the short time since the Settlement Order has been announced, however, there has been an outpouring of comment that must be named for what it is: vicious and racist stereotyping and hate-mongering. As one individual wrote to the Anti-Discrimination Center:

You folks are complete idiots, and must really love destroying productive white communities. I find your actions TOTALLY disgusting and unconstitutional. Please take your fake "president", Obama, and fly off to the third world and live in the crap and poverty that you so obviously desire. Whites should, and can, segregate themselves AS MUCH AS THEY WANT TO DO SO. No social engineering is going to change that. In short, GET STUFFED!!

This was no isolated remark. I have included as Exhibit 2 to the Addendum a sample taken from the *hundreds* of comments reflecting baldly race-based and class-based stereotyping (most being comments to newspaper articles reporting on the settlement). As bad as those offering “commentary” may be, it is not those individuals that are of primary concern. It is *people of good will* (including some municipal officials) who, as an initial matter, may be willing to cooperate. If people of good will see that resistance is tolerated, some will begin to ask, “Why should we step up to the plate when others are being permitted not to?” In other words, tolerating resistance will yield only a cycle of declining cooperation.

**4. Municipal resistance has not gone away.** Municipal resistance to affordable housing construction in Westchester has long been widespread and intense. As pointed out by Westchester’s own Housing Opportunities Commission (“HOC”) in 2004, progress in taking steps to facilitate the production of affordable housing “has been minimal in most municipalities,” and that “it is the municipalities who will determine whether the affordable housing crisis will be eased or whether it will continue to worsen for another decade.”<sup>1</sup>

An article in the August 23rd Real Estate Section of *The New York Times* (Addendum, Exhibit 4) begins to give the flavor of the continuing nature of this resistance. Listen to the Mayor of Scarsdale. She says that the village remains an unlikely place for affordable housing

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<sup>1</sup> The HOC’s 2004 Action Plan is Exhibit 3 to the Addendum.

because “it has no room” and because “most residents would likely resist it.” Harrison, like Westchester, has developed *none* of the housing allocated by the HOC. Yet its supervisor is quoted as saying the town “already had enough low-cost housing.”

As George Raymond, HOC’s Chair is quoted as saying in response, ““All the zeros on our allocation plan represent communities that don’t want to try.” The problem, of course, is that the lesson that these municipalities have learned from years of resistance is that simply reciting the “we can’t do it” incantation is an effective means to ward off any change.

**5. County officials are already undermining the Settlement Order.** The County Executive has described the 750 units as a maximum (not the minimum, as set forth in the Settlement Order). Indeed, at his appearance before the Budget and Appropriations Committee of the County Legislature on August 17th, he estimated that the funds being provided under the settlement would provides somewhere between only 150 and 750 units.<sup>2</sup> His deputy, Susan Tolchin, has suggested that the County’s obligations could be watered down “if local zoning or property prices prove to be barriers.”<sup>3</sup> Her comments echo that of the County’s August 10th press release on the Settlement Order, which also linked modifications to the assertion that “the county does not control local zoning.”<sup>4</sup>

Other officials have received and are channeling this wrong-headed message. The Lewisboro housing committee chair has asserted that “the settlement requires that the county respect individual towns’ zoning laws”; the County Legislator whose District includes Lewisboro has said that, notwithstanding the provisions of the Settlement Order, “It makes no sense for the county to litigate,” and that he did not expect litigation to occur.<sup>5</sup>

**B. Overcoming zoning barriers is the linchpin of successful implementation of both the County’s unit-specific and broader Settlement Order obligations.** We need not speculate about the efficacy of an approach that tries to work within the constraints of existing zoning. That has been Westchester’s policy, the County’s AFFH obligations notwithstanding. The policy has been an abysmal failure. The Settlement Order recognizes that a different path is required. That is, one must take the objectives of the agreement as the starting point (not existing zoning), and then determine the steps that are necessary to achieve the Settlement Order’s objectives. It is this reorientation – acknowledging the primacy of the broad public

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<sup>2</sup> See [http://www.westchestergov.com/news\\_spanohsgtestimony.htm](http://www.westchestergov.com/news_spanohsgtestimony.htm).

<sup>3</sup> See *The New York Times*, “In Westchester, an Open Plea to Accept a Housing Accord” (online edition only), attached as Addendum Exhibit 5. Tolchin chose to ignore the actual terms of the Settlement Order. Those terms intentionally require extraordinarily difficult showings for the County to make before the Monitor could properly reduce the County’s obligations. See, e.g., Settlement Order ¶15(a)(vi).

<sup>4</sup> The County press release is annexed as Addendum Exhibit 6.

<sup>5</sup> The article in the *Lewisboro Ledger* is annexed as Addendum Exhibit 7.

interest in AFFH and no longer subordinating that interest to an exclusionary status quo – that must drive implementation planning.

**1. Without confronting local zoning barriers, neither the County’s obligation to place units on the Census blocks with the lowest concentrations of African-Americans, nor the County’s broader obligation to eliminate *de facto* residential segregation will be achieved.** Westchester is obliged in the implementation plan to assess 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.” Settlement Order, ¶22(f).

As a matter of land and demographics, the task is easy. Attached to the Addendum as Exhibits 8 and 9 are a map and accompanying Excel table.<sup>6</sup> What we have done is demonstrate that the County has a massive amount of land available where, on the Census Block level, the percentage of African-Americans is less than 3% and the percentage of Latinos is less than 7%. Indeed, the data show just how much land is available on Census blocks where the percentage of African-Americans is less than 1% and the percentage of Latinos is less than 3%.

Just looking at the more than 20 jurisdictions that, on the municipal level, have African American populations of less than 3% and Latino populations of less than 7%, one finds the following:

<b>Census Block Type</b>	<b>Number of Blocks</b>	<b>Number of Acres</b>	<b>Population</b>
LT 1% AA and LT 3% Latino	438	<b>40,222</b>	58,939
1% to LT 2% AA and 3% to LT 5% Latino	330	<b>24,843</b>	38,067
2% to LT 3% AA and 5% to LT 7% Latino	2,366	<b>73,851</b>	116,799
<b>Total</b>	<b>3,134</b>	<b>138,915</b>	<b>213,805</b>

**In other words, leaving aside “no population” Census blocks, and leaving aside low minority concentration blocks in higher concentration municipalities (the 60-unit-maximum sets of municipalities), there are Census Blocks encompassing more than 138,000 acres where the Settlement Order’s command to find means to develop on the blocks with “the lowest concentrations of African American and Hispanic residents” can be satisfied.**

Nevertheless – as day follows night -- the naysayers (be they in municipal or County government or elsewhere) will surely try to come up with excuses as to why this acreage –

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<sup>6</sup> I have also enclosed a disk containing the map in PDF format, and suggest printing it out in its full size (36” x 48”) to see block-level detail best.

probably more than 500,000 times the total acreage needed – should not be used (or else used only sparingly), and why Census Blocks with higher concentrations of African-Americans or Latinos should be selected. The fallacy of the expected claims of “no land” and “too costly development” lies in the shallow assumption “that which is, must be.”

In fact, any sober evaluation recognizes development ability and land cost is dynamic. Up-zoning acts a critical factor in facilitating moderate-density development and in lowering the cost of such development.<sup>7</sup> That is one of the key reasons that the Settlement Order requires the County to overcome municipal barriers with legal action. *See, e.g.*, Settlement Order, ¶7(j). Moreover, the difference between *working around* existing zoning and *causing existing zoning to be modified* is substantial. The “work around” method has no multiplier effect: the affordable housing and AFFH yield is one unit for each unit developed. By confronting and overcoming zoning barriers, by contrast, one achieves an enormous multiplier effect. Latent developer interest in affordable housing development will be unleashed, and much greater number of affordable AFFH units will be able to be created.

Crucially, only by proceeding by promptly acting to overcome zoning barriers will one of the key *broader* commands of the Settlement Order be able to be satisfied. While public attention has focused on the minimum 750 units of affordable housing to be developed, Westchester is also required to enact a policy by which the County seeks to achieve “the elimination of discrimination, including present effects of past discrimination, *and the elimination of de facto residential segregation...*” Settlement Order, ¶ 31(a). That obligation, amplified, *inter alia*, by the obligation to take the actions necessary to “facilitate the implementation of this Stipulation and Order” (Settlement Order, ¶ 32(a)) is ongoing, relates to *all* County housing policies and programs, and operates as a supplement to the County’s prospective obligations to affirmatively further fair housing in respect to all of it and its sub-recipients activities.

There is a clear bottom line: if the over 138,000 acres of Census Blocks with low concentrations of minority residents were perceived to be insufficient to develop a mere 750 units of affordable housing, then any effort to engage in a serious program of affordable housing development – let alone any effort to end *de facto* residential segregation – would be doomed.<sup>8</sup> As such, prompt action to overcome zoning barriers is essential, and, as discussed next, is both contemplated by the Settlement Order and amply supported by many sources of County

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<sup>7</sup> In highlighting up-zoning, we do not mean to suggest that other tools (such as taking advantage of the cross-subsidy of mixed-income and mixed use development, and of incorporating the multiplier effect of a revolving fund) would not be extremely useful adjuncts to the up-zoning process.

<sup>8</sup> Note that the *unmet* HOC-defined obligations of the just set of municipalities where the minimum of 630 units may be developed under the Settlement Order is well over 6,000. Thus, the County had conservatively allocated more than eight times the number of these units for these municipalities than is the minimum 750 units that are to be developed under the Settlement Order.

authority.

**2. The County's authority to override local barriers.** While the Settlement Order is notable in recognizing, bolstering, and requiring the use of County authority to overcome local zoning and other barriers, that authority has long-existed. The Settlement Order required Westchester to acknowledge several components of that authority. The first “whereas” clause of page 2 of the Settlement Order provides that the County acknowledges and agrees that “pursuant to New York State law, municipal land use policies and actions shall” act in two ways. First, those land use actions and policies “shall take into consideration the housing needs of the surrounding region,” a recitation of the *Berenson* doctrine.<sup>9</sup> Under that doctrine, any party that owns or controls land may challenge a municipality’s restrictive zoning on the grounds that such zoning does not take sufficient account of regional housing needs for multi-family housing.

Second, the Settlement Order provides that municipal land use actions and policies “may not impede the County in its performance of duties for the benefit of the health and welfare of the residents of the County,” a recitation of the *County of Monroe* doctrine.<sup>10</sup> Under this doctrine, a County may challenge a municipality’s restrictive zoning on the grounds that the County’s public interests in proceeding with development outweigh the municipality’s interests in restricting such development.<sup>11</sup>

Third, the Settlement Order, in the same “whereas” clause referenced above, provides that it is incumbent upon municipalities “that are parties to the Urban County Cooperation Agreement to comply with that agreement, including the commitment to AFFH...” Judge Cote’s decision granting the Anti-Discrimination Center’s motion for partial summary judgment specifically referenced the Urban County Cooperation Agreement:

Westchester entered into Cooperation Agreements with municipalities participating in the Consortium. The agreements

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<sup>9</sup> *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 107 n.1, 110; 378 N.Y.S.2d 672 , 677 n.1, 681 (N.Y. 1975).

<sup>10</sup> *Matter of County of Monroe (City of Rochester)*, 72 N.Y.2d 338, 341, 343; 533 N.Y.S.2d 702, 703-04 (N.Y. 1988).

<sup>11</sup> *See also Matter of Crown Communication, N.Y., Inc. v. DOT*, 4 N.Y.3d 159, 791 N.Y.S.2d 494 (N.Y. 2005) (applying the *County of Monroe* balancing test to hold that even a project that provided some benefit to private parties was exempt from a municipality’s zoning because the project’s public benefits to New York State outweighed the municipality’s interests). Note that, prior to the false claims period, Westchester itself successfully argued in *Westhab, Inc. v. Village of Elmsford*, 151 Misc.2d 1071, 574 N.Y.S.2d 888 (Sup.Ct., Westchester County, 1991) that the *County of Monroe* doctrine should permit the County to be exempt from local requirements in connection with housing it sought to build independent of local regulation (the Court permitted development to go forward, holding that the County’s interests outweighed the locality’s interests).

pertained to, *inter alia*, CDBG grants, and *provided that the County is prohibited from expending community development block grant funds for activities in or in support of any local government that does not affirmatively further fair housing within its jurisdiction or that impedes the County's action to comply with its fair housing certifications.*

*United States ex. rel. Anti-Discrimination Center v. Westchester County*, 2009 WL 455269, \*2-3 (S.D.N.Y. February 24, 2009) (emphasis added).

There is another powerful and longstanding doctrine of law relating to exclusionary zoning that was not explicitly acknowledged in the “whereas” clause, but which is available to Westchester. The Fair Housing Act itself allows for challenges to municipal restrictions on housing where those restrictions perpetuate segregation or otherwise have a disparate impact on the basis of race or other protected class status. *Huntington Branch, NAACP v. The Town of Huntington*, 844 F.2d 926 (2nd Cir. 1988).

As anyone who has been involved in real estate development knows, there are myriad ways by which development can be structured, many of which would involve Westchester having an ownership, option-to-buy, or other legal interest in property intended for affordable AFFH development. In following the Settlement Order’s command to develop affordable AFFH units in municipalities *and on the Census Blocks* with the lowest concentrations of African-Americans and Latinos, Westchester can and should acquire an interest in property meeting those criteria (*see* page 4, *supra*), and then vindicate its rights through the various means described above.

**C. Mt. Pleasant and the moral of the story.** In these last two weeks, there have been some who have taken the line that the moral to be taken from the *Anti-Discrimination Center’s* success in bringing Westchester’s fraud against the federal government to light is that jurisdictions should simply disdain participating in federal community development programs. This view was explored in a recent column in the *Westchester Journal News*,<sup>12</sup> which featured an interview with the Town Supervisor of Mt. Pleasant (the unincorporated part of Mt. Pleasant was the one jurisdiction that chose not to participate in the Urban County Consortium).

Meehan explained that he turned down the opportunity for CDBG funds because “there were certain conditions that he couldn’t agree to in principle.” The article reports Meehan as seeing that there were “clear warning signs that if a municipality accepted the money, it would lose control over its destiny,” but that, “I was assured many times by different officials that, ‘Oh, don’t worry about it. That’s never going to happen,’ ” he recalled. “But I said, ‘Well, that’s what it’s saying, so we’re not signing. We’re not participating.’”

On one level, of course, the comments are devastating confirmation of the fact that the County, at the same time it was certifying AFFH compliance to the federal government, was letting municipalities know that the County had no intention of actually enforcing the terms of

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<sup>12</sup> Attached as Addendum Exhibit 10.

the Cooperation Agreement. More importantly at this stage, however, is that the false notion that non-participation can insulate exclusionary zoning from challenge. The only tool *not* available to the County in respect to a jurisdiction like Mt. Pleasant is that of a federal funds cut-off. All the other legal tools described above in Section (B)(2) are fully applicable to all jurisdictions, and it is important for that point to be illustrated.

**D. Real affirmative marketing** Too frequently, “affirmative marketing” has consisted of no more than token efforts (*e.g.*, thinking that the placing of an advertisement in the *Amsterdam News* is sufficient to meet the affirmative marketing obligation). Not surprisingly, these types of efforts tend to fail.

These efforts are completely different from those that are made by those seeking to market virtually any consumer product in the United States. Those marketers recognize that consumer preference is dynamic, not static, and is influenced by external variables. What do these marketers do when they find a group that seems to be resistant to or inhibited from purchasing its product? *These marketers go and find out why.* They then make substantive and/or presentation changes in the product to encourage the inhibited group to buy the product in question.

The fundamental recognition that is needed for the requirement that affordable AFFH units be marketed to persons of color in New York City and elsewhere is that *neighborhoods are consumer products, too.* Rather than making facile assumptions about housing “choice,” it is incumbent on Westchester – prior to the development of a single unit – to apply well-proven market research techniques to the tasks of determining *why* some potentially eligible persons of color may be reluctant to move to Westchester and of *how* that reluctance may be overcome.<sup>13</sup>

**E. Effective use of carrots and sticks.** Carrots often fail to provide the intended incentive to act because the person or entity sought to be influenced retains an assumption that the “non-

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<sup>13</sup> You will notice that people almost universally think of neighborhoods as entities that developed “naturally” or “organically,” with an emphasis on the idea that those who are in a neighborhood are those who “deserve” to be there. As we know, nothing could be further from the truth. Post- World War II suburban residential patterns were created in significant part by *intentional* discrimination practiced both on the governmental level (*see, e.g.*, Ken Jackson's *Crabgrass Frontier*), and by private actors in the real estate market (brokers, landlords, homeowners, neighborhood associations, etc.). And patterns, once created, can themselves send a message of exclusion. The resort to “economics” as the sole explanation for segregation fails as well to come to grips with one of the demographic realities demonstrated by Professor Andrew Beveridge in the course of the litigation: the level of segregation for African-American households in Westchester earning \$150,000 per year and up is actually higher than the level of segregation for African-American households in Westchester earning less than \$50,000 per year. For a thorough debunking of the “personal choice” or “preference” argument, and a recognition that, more many African-Americans, the neighborhood of choice is an integrated one, *see* Krysan and Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation*, *Social Forces*, March 2002 80(3): 937.

cooperation” option will remain a viable option. Change the viability of the non-cooperation option, and you change the calculus of the person or entity deciding on a course of conduct.

No carrot will work unless all municipalities see that a non-cooperation posture means *losing the opportunity to influence the County* as the County decides the location, manner, scope, and timing of affordable AFFH development in particular jurisdictions. If that stick is in place, then influencing the County on these issues itself becomes a carrot. It is a carrot that should be offered *selectively*, with preference given to the first five or 10 municipalities that step forward and enact *comprehensive* inclusionary zoning. Because of the vast amount of land that is available for affordable AFFH development, because comprehensive rezoning will ultimately yield more units than the unit-specific provisions of the Settlement Order possibly could, and because the County and its municipalities will continue to have AFFH obligations independent of the Settlement Order, it is sensible to weight the placement of Settlement Order units towards those jurisdictions that fail to cooperate promptly.

Put another way, the idea that one would offer either equivalent input or equivalent result to a municipality regardless of whether that municipality is cooperating or not is naïve and counterproductive.

**F. Transportation, infrastructure, and jobs.** Unsurprisingly, proponents of the status quo will pick up any shibboleth close to hand in order to forestall the changes contemplated by the Settlement Order. These shibboleths need to be exposed for what they are. First, they reflect remarkably frank race-based and class-based assumptions about the people who are prospective residents of affordable AFFH units. One thing we know is that it is preposterous to assume that a family with household earnings of \$50,000 or \$75,000 per year will not have an automobile is not reality-based. We know as well that there are programs (like Wheels to Work) that can assist families with lower household earnings.

We know – or should know – that some infrastructure concerns are wildly exaggerated: in the context of a modest-density, mixed affordable and market-rate development, *it is not difficult for the developer to enhance the infrastructure*. It is done throughout the country. To the extent that the “infrastructure” concern is an influx of children needing schooling, municipalities should recognize that the Fair Housing Act, specifically 42 U.S.C. § 3617, makes it unlawful to interfere with a person in the exercise of rights protected by the Act (including the right to occupy housing without discrimination, through intent or impact, on the basis of familial status).

Perhaps most importantly from an AFFH point of view, every hurdle that has been mentioned is precisely among the factors that *are properly to be characterized as barriers to fair housing choice in an analysis of impediments to fair housing choice*. Like other impediments, they are not to be accepted as a reason not to act, they are properly the subjects of County action to remove them as impediments.

### **G. A revolving fund.**

The Settlement Order sensibly recognizes the importance of a revolving fund: rather than having precious Settlement dollars being “used up” in the first round of subsidy, a revolving fund would insure that some of those dollars were returned to a fund to be used to create follow-on rounds of subsidy of more affordable AFFH units. We urge you to be skeptical of any argument that there are legal or other barriers to the creation of a revolving fund.

### **H. Conclusion**

In yesterday’s article on the case in the Week in Review Section of the *New York Times* (“Integration Faces a New Test in the Suburbs”), attached as Addendum Exhibit 11, I was quoted as saying that “I think we may be at the beginning of the first sustained commitment to open, inclusory communities that we have seen.” The article also referenced my applauding the call by the HUD Deputy Secretary for a “fully integrated society,” and my statement that the success of the agreement would depend on how aggressively the government enforced it, particularly in the most affluent and least diverse communities. I believe all of those things, and I believe that this is an important moment to put our task in perspective.

In the aftermath of the assassination of Medgar Evers, one of the true heroes of the civil rights movement, there were a number of songs written, the most famous of which is Bob Dylan’s *Only A Pawn In Their Game*. Another song, by Donal Leace, was entitled *Death of Medgar Evers*. That song is less-well known today, but is well worth thinking about. We live in relative privilege and affluence. We are not required to summon the profound courage needed to face down violence. In the end, we need only resist the importuning of those who, for the sake of political expediency, would have you allow the promise of this Settlement Order to be squandered. As you begin your work, I can think of no better place to do so than with Leace’s composition (I have enclosed a CD with the song).

The Anti-Discrimination Center stands ready to assist you in any way you wish.

Very truly yours,

[Signed]

Craig Gurian  
Executive Director