UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA *ex rel.* ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC.,	:	
Plaintiff,	:	06 CV 2860 (DLC)
-v-	:	
WESTCHESTER COUNTY, NEW YORK,	:	
Defendant.	:	

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**REPLY BRIEF OF ANTI-DISCRIMINATION CENTER
IN SUPPORT OF THE COURT'S TAKING ACTION TO
VINDICATE THE INTEGRITY OF THE CONSENT DECREE**

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INTRODUCTION

Whether or not the Government and the Monitor are prepared to act on the issue, there can hardly be a question that Westchester has been pursuing an unvarying policy of *not* seeking to force municipalities to change their zoning, regardless of Consent Decree ¶¶ 7(i) and 7(j) requirements.[1] Likewise, there can hardly be a question that the units built do not comport with what was intended pursuant to the consent decree.

Among the things that are apparent from the submissions of the parties and the Monitor are the following: (1) the Beveridge Report (finding exclusionary zoning in 19 municipalities) is wholly unrebutted; (2) ADC's analysis of how unit distribution at the municipal level based on 2010 Census data varies dramatically from what was intended (a minimum of 84 percent in "under 3, under 7" jurisdictions) is unrebutted; and (3) ADC's explanation of why hundreds of units should not have been counted because they do not affirmatively further fair housing ("AFFH") or are units already required under an agreement independent of the consent decree is unrebutted.

ARGUMENT

POINT I

THE MAY 24TH ORDER DID NOT INTEND TO LIMIT ACTIONABLE "HINDERING" OR "FAILNG TO ACT" TO THE SPECIFIC CIRCUMSTANCES OF CHAPPAQUA STATION.

1. The scope and meaning of the first sentence of Consent Decree ¶ 7(j).

In its Chappaqua Station decision, the Court addressed itself to the circumstance where Westchester was "counting on" a particular development. But municipal "hindering" and "failing

[1] The Court has made clear that it has an independent juridical interest in protecting the integrity of the consent decree. *United States ex rel. Anti-Discrimination Center v. Westchester County, N.Y.*, 2016 WL 3004662 (ECF No. 608, "May 24th Order") at *12-13 (S.D.N.Y. May 24, 2016). As such, arguments about the parties remaining "in control" of the issues are inapposite: it is especially where parties are *not* apprising the Court of how its order is being undermined that the Court's ability to assess and exercise its independent juridical interest may be aided by an *amicus* providing that information and argument. In any event, "ADC's issues" are core issues: what does the decree require, is Westchester complying, and, if not, what are the appropriate remedial steps.

to act" in ways that trigger Westchester's own obligation to act occur in circumstances where a particular development is not being counted on.[2] The most critical factor is that it is the jurisdiction with the most severe restrictions on building that will most inhibit developers from taking the steps to put forward a project in concrete form. The absence of a particular "project," therefore, is not a sign that hindering is not going on, but rather a sign that in such a jurisdiction hindering may be especially pernicious. Consent Decree ¶ 7(j) does not allow Westchester to ignore such hindering.

2. The scope and meaning of the second sentence of Consent Decree ¶ 7(j).

Here, too, the Court had no need to resolve this question in its Chappaqua Station decision. The second sentence must be something beyond the first, but neither party nor the Monitor offers *any* explanation for what it *does* mean. However one interprets it, though, that second sentence is a mandatory obligation to initiate litigation. And the litigation has a specific target other than building a specified number of units: accomplishing the goal of the decree to AFFH. There is no reason to read into the decree a provision delaying the operative effect of the requirement to initiate litigation to accomplish the purpose of the decree to AFFH for a period of months, let alone years. Given the existence of so many barriers to fair housing choice in 2009 and thereafter, the initiation of such litigation was something that Westchester needed to consider early on, but did not.

3. Zoning barriers do not constitute mere "general opposition" to affordable housing

Consider the 19 highly-white jurisdictions where Dr. Beveridge found that little or no multi-family can be built as of right in principally residential areas. The Monitor and Westchester would place such jurisdictions in the category of "generally opposing" affordable housing;[3] in fact,

[2] *See* Brief of proposed *amici* Enhanced Section 8 Outreach Program *et al.*, June 14, 2016 (ECF No. 620-1) at 8-10. The brief points out that "hindering" and "failing to act" occur in real time and are measured by whether the status quo is the environment in which building of units can most readily occur; that Westchester did not and could not know which units it would ultimately be counting on; and that the goal of the decree was to maximize the number of units.

[3] Monitor Submission of June 24, 2016 ("Monitor Submission"), ECF No. 630, at 18, 20; Westchester Brief of June 17, 2016 ("Westchester Main Brief"), ECF No. 626, at 26.

such jurisdictions powerfully, effectively, and *concretely* limit the construction of affordable housing with desegregation potential. Those limitations do not only exist when a developer comes forward; it is reasonable to expect that they deter any and every developer that is not prepared to engage in either Fair Housing Act or *Berenson* litigation. The term "general opposition" could not have been meant to hold harmless restrictive zoning ordinances that operate continually to substantially limit or eliminate the ability to develop affordable housing.

POINT II
THE DECREE'S PREFATORY LANGUAGE PROVIDES CRITICAL ILLUMINATION OF THE CONSENT DECREE ¶¶ 7(I) AND 7(J) REQUIREMENTS.

"Although the 'Whereas' clauses of a contract do not determine its operative effect, they do furnish a background in relation to which the meaning and intent of the operative provisions can be determined." *Jim Bouton Corp. v. Wm. Wrigley Jr. Co.*, 902 F.2d 1074, 1077 (2nd Cir. 1990). This decree's prefatory language provides critical illumination of the meaning and intent of Consent Decree ¶¶ 7(i) and 7(j). In referencing both the *Berenson* and *County of Monroe* doctrines, the prefatory language makes clear that these are among the types of litigation that were intended to be utilized pursuant to Consent Decree ¶ 7(j); indeed, Consent Decree ¶ 7(j)'s language is anticipated in the phrase that "it is appropriate for the County to take legal action to compel compliance if municipalities hinder or impede the County in its performance of such duties, including the furtherance of the terms of this [consent decree.]" Consent Decree, page 2, para. 1.[4]

Given the intent that *Berenson* and *County of Monroe* be utilized, it is implicit that a necessary prerequisite activity would be acquiring interests in property. Because neither is a

[4] The decree goes to further lengths to establish that Westchester's interest outweighs local interest in the *County of Monroe* context. This is done both in the prefatory language by describing Westchester's broad and important interests, and in Consent Decree ¶ 31(b), reciting that "AFFH significantly advances the public interest of the County and the municipalities therein."

private-attorney-general doctrine, a litigant must have traditional standing. Standing here means having a direct or indirect interest in property. Otherwise, these actions would be forestalled. Such a self-defeating interpretation of the decree cannot be countenanced. *See* May 24th Order, *supra,* 2016 WL 3004662 at *12 (citation omitted) (do not consider decree obligations "in isolation," but rather "in the light of the obligation as a whole and the intention of the parties manifested thereby").

Not only was acquiring interests a necessary prerequisite to fulfilling Westchester's Consent Decree ¶ 7(j) obligations, doing so was also something that fell within the Consent Decree ¶ 7(i) obligation that Westchester "always" has to "use all available means as appropriate" to "achieve the development of 750 new units." *Id.,* 2016 WL 3004662 at *16. If Westchester had been compliant with instead of sabotaging of its obligations, the prospect of *Berenson* or *County of Monroe* litigation would have encouraged municipal cooperation with changing the status quo.

That the decree did not itemize the specific step of acquiring interests in property where appropriate units could be built if zoning restrictions were loosened (voluntarily or through litigation) is of no moment. The term "all available means" encompasses this step.[5] *Cf.* May 24th Order, 2016 WL 3004662 at *16 (the consent decree did not mention Westchester purchasing land for the developer nor require attendance at Town Board meetings, but the Court found nevertheless that the failure to take these steps promptly or fully were among the reasons that, independent of Consent Decree ¶ 7(j), Westchester violated its Consent Decree ¶ 7(i) obligations).[6]

[5] The recent decision *MHANY Management, Inc. v. County of Nassau,* 819 F.3d. 581 (2nd Cir. 2016), is not relevant to this matter. One question in that case was whether defendant Nassau County had a free-standing obligation to bring a *County of Monroe* action "on [the plaintiffs'] behalf." *Id.* 819 F.3d at 623. Here, by contrast, the obligation arises from the decree and the property interests would be acquired for the County itself. That a finding of County immunity may not cause a zoning ordinance to be struck down *generally* (that is, if there is not a finding of a *Berenson* or a Fair Housing Act violation, as well), does not change the fact that a *County of Monroe* challenge can be effectively used to cause housing that can AFFH to be built when it otherwise would not have been able to be built.

[6] The Monitor protests that acquiring interests would be "prohibitively expensive," Monitor Submission at 21, but fails to recognize that there are a variety of ways to reduce this cost. First, there is the cross-subsidy provided by mixed-income developments: the more expensive the jurisdiction, the more cross-subsidy thrown off by the market-

POINT III

THE COURT IS ENTITLED TO THE GOVERNMENT'S AND MONITOR'S FULL VIEWS OF THE EXTENT TO WHICH WESTCHESTER HAS AND CONTINUES TO FAIL TO MEET ITS CONSENT DECREE ¶¶ 7(I) AND 7(J) OBLIGATIONS.

As the Beveridge Report makes clear, there remain massive restrictions on the ability to build affordable housing that would AFFH in 19 of the least African-American jurisdictions in Westchester.[7] No one suggests that Westchester is trying to get that zoning changed. Indeed, the Government states that it "agrees with the general view that the County's conduct has warranted contempt." Government Brief, June 24, 2016 ("Gov't Brief") at 24. The Monitor stated in his last Biennial Report that "rather than promoting inclusionary zoning, the County essentially informed the municipalities that zoning currently in place should not be challenged." Monitor's April 28, 2016 Biennial Report at 43.

Nevertheless, nearly seven years after the entry of the decree, the Government has still not made an application to the Court to declare Westchester in breach of its Consent Decree ¶¶ 7(i) and 7(j) obligations in respect to any or all of the structural barriers that Westchester has left untouched.[8] The Court's direction to discuss which remedies proposed by ADC should be granted,

rate units. Second, an interest can be a relatively inexpensive option. Third, Westchester can partner with a private developer, with the latter either being a co-owner or being the entity with which Westchester contracts to fulfill its own interest in affordable housing that will AFFH. Notably, the decree itself identifies "exploring all opportunities to leverage funds for the development of the [AFFH] Units" as being within the category of "all possible actions to meet [Westchester's] obligations." Consent Decree ¶ 15.

[7] The essential fact about the zoning in the 19 jurisdictions that Dr. Beveridge found to be exclusionary is that *whatever* individual "preferences" may be, the cost of housing under a restrictive zoning regime is higher than it would be under a less-restrictive zoning regime. The pool of African-American households who are income-eligible for such housing is thereby smaller under a restrictive zoning regime than under a less-restrictive zoning regime. That is the definition of the perpetuation of segregation. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* 135 S.Ct. 2507 (2015), did not require a showing that *all* perpetuation of segregation be caused by restrictive zoning; so long as restrictive zoning *contributes* to the perpetuation of segregation, the Fair Housing Act is violated.

[8] The government's discussion of the limited enforcement actions it has taken is diversionary. Simply put, source-of-income legislation, Chappaqua Station, and late-stage public education do not the whole consent decree make. The heart of the decree concerned the exclusionary zoning that perpetuates segregation, and, thus, Consent Decree ¶¶ 7(i) and 7(j). The Government's extensive discussion of the defensive litigation it performed in response to Westchester's action challenging loss of federal funding because of the failure to submit an adequate analysis of impediments (AI)

if any, cannot be complied with in a vacuum (that is, without assessing Westchester's course of conduct to determine appropriateness of remedy). Even so, neither the Government nor the Monitor provide any direct answer to the question of the extent to which Westchester has been and continues to be in breach of its Consent Decree ¶¶ 7(i) and 7(j) obligations. (On the merits, the answer should be the same as the Government provides in respect to the continuing breach of Consent Decree ¶ 32: "The Court is entitled to assume, after a delay of six years, that the County is unable or unwilling [to comply]." Gov't Brief at 12.)

As for contempt, is it the Government's view that the decree obligations are clear and unambiguous or not? That proof of Westchester noncompliance is clear and convincing or not? That Westchester has not diligently attempted to comply in a reasonable manner or not? The Government's brief, and the Monitor's submission, leave the Court in the dark on these questions.

POINT IV
THE DECREE-VINDICATING RELIEF APPROPRIATE TO BE ORDERED IS TIED TO HOW EXTENSIVELY THE INTENDED COURSE OF THE DECREE HAS BEEN PERVERTED.

Since 2009, the principal mechanisms to force local zoning change have been avoided, Westchester has been allowed to count hundreds of units that should not have been counted,[9] and the failure to use 2010 Census data has resulted in a much smaller percentage of units being built in jurisdictions that are actually "under 3, under 7."[10] The AI process has been a failure,

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to HUD neither speaks to any consent decree enforcement, let alone Consent Decree ¶¶ 7(i) or 7(j) enforcement. Similarly, the Monitor's recitations of progress in terms of the "model ordinance," *see, e.g.,* Monitor Submission at 15-16, should not lead the Court to believe that jurisdictions that have adopted some version of the ordinance have "model zoning." In fact, the adoption of the zoning does not yield even a single new as-of-right multi-family parcel: the "model ordinance" leaves restrictions on such housing fully in place.

[9] *See* Exhibit 8 to ADC's May 11, 2016 letter (ECF No. 592-19). Assertions that Westchester is meeting its unit-based benchmarks depend on the premise that all of the improper units should be counted.

[10] This is because 10 of the original "under 3, under 7" jurisdictions pursuant to 2000 Census data migrated to either the "under 7, under 10" or the "under 14, under 16" category pursuant to 2010 Census data. Through 2015, ADC calculated the share of "under 3, under 7" units at about 46 percent, as opposed to the minimum of 84 percent contemplated. The addition of 28 Chappaqua Station units brings the share up to about 48 percent. The Monitor

Westchester's Consent Decree ¶ 31(a) commitment to have as a goal the ending of *de facto* residential segregation has been treated as a nullity, and the Implementation Plan process, a centerpiece of the decree, has failed, too (as further detailed below). In short, the decree being seriously off the rails, the remedies needed now must involve an equally serious course correction.

The centrality of the IP cannot be underestimated, and an understanding of its role makes clear that concerns about "adding" to the decree would be misplaced even in the absence of the widespread noncompliance that has occurred. The Monitor was supposed to ensure that the IP not only accomplished the terms of the decree, but its "objectives," as well. Consent Decree ¶ 20(d). The purpose of the decree, explicitly identified in Consent Decree ¶ 7(j) is "to AFFH."

The IP was supposed to set forth "with specificity" the "manner" in which the County planned to implement the provisions of Consent Decree ¶ 7 (subparagraphs ¶ 7(i) and 7(j) were not exempted). Consent Decree ¶ 18. The IP also had to specify the "steps and activities that will be needed" to meet the interim annual benchmarks. Consent Decree ¶ 24.

Unfortunately, Westchester did not comply. "The Monitor did not approve the three draft IPs the County submitted in January, March, and August 2010." Monitor's January 6, 2012 Report ("Monitor's 2012 Report") (ECF No. 391) at 13. By August 2010 at the latest, these failures mandated that the Monitor direct the revisions and additions sufficient to accomplish the decree's terms and AFFH objectives (and mandated the County to incorporate them). Consent Decree ¶ 20(d). The Monitor, however, did not do so. "Following the County's submission of its third draft

leaves the impression that the trigger for changing to 2010 data was a finding that sticking with 2000 data would not AFFH. Monitor Submission at 22. In fact, changing to 2010 Census data, unlike other changes contemplated by Consent Decree ¶ 15(a)(iii), had no such trigger: doing so was useful for the obvious reason that a decree provision premised on a jurisdiction's demographic profile should rely on up-to-date information not available in 2009. The Government allows that changing to 2010 data "may have merit," Gov't Brief at 24, but does not explain its failure over the years to propose that shift (the Government first had the opportunity to do so, as contemplated by Consent Decree ¶¶ 15(c) and (f), in the period following the Monitor's filing of his first Biennial Report on January 6, 2012 (ECF No. 391)).

IP…, the Monitor adopted a segmented approach...." Monitor's 2012 Report at 13.[11] More critically, Westchester's IP was *never* revised to meet the goal of AFFH, as reflected by where units have been built and the almost complete absence of units that overturn restrictive zoning barriers that were in place as of the entry of the decree. Nothing in the IP prevents isolated placement, promotes mixed-income housing, or provides benchmarks or means for overcoming hindering. The Monitor did not have authority to exempt himself either from Consent Decree ¶ 20(d)'s mandatory duty or from Consent Decree ¶ 53's prohibition on changes to the decree not executed by the parties.

ADC's request for acquiring interests in appropriate properties (Proposed Remedy "c") is what the IP should have planned for all along in terms of taking all appropriate steps under Consent Decree ¶ 7(i) and being ready to counter hindering and litigate to AFFH pursuant to Consent Decree ¶ 7(j). ADC's Proposed Remedy "e" requires the very IP that the decree had demanded be put in place by early 2010. Consent Decree ¶ 18. ADC's Proposed Remedy "g" helps achieve the specific requirements of Consent Decree ¶ 22(f) of trying to maximize housing *in municipalities* and *in Census blocks* with the lowest concentrations of African-Americans and Latinos (sub-items (i) and (iii)). Proposed Remedy "g" also assures that the housing does AFFH and is actually supplementing the supply of housing that would otherwise exist (sub-items (ii), (iv), and (vii)).

It is also essential to note that it was contemplated that steps and activities like these could be turned into consent decree obligations *without Westchester having any further say whatsoever.* Westchester agreed not only to Consent Decree ¶ 20(d) that allowed the Monitor to determine the shape and content of the IP, but also agreed to Consent Decree ¶ 24. That provision allows the Monitor to designate any elements of the IP as "benchmarks that shall be incorporated into the

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[11] The Monitor's 2012 Report stated that, "once the [County's] financing strategy has been finalized, the IP," in his view, "will be substantially complete." *Id.*

[decree] and shall be enforceable in the same fashion as the other terms of the decree." In other words, anything that is in a proper IP is an "addition" to which Westchester has already consented.

Westchester's non-compliance provides additional justification for some of these same steps (for example, acquiring interests to be able to litigate under *Berenson* and *County of Monroe*), but it also justifies additional steps. Because Westchester has, for example, undercut the efficacy for decree purposes of units that are newly-constructed and not restricted by age (because they do not AFFH, are poorly located, etc.), its remaining development-promoting activities should be limited to proper development of that type of unit (Proposed Remedy (g), sub-items (v) and (vi)).

The Government wonders why Westchester's obligations would not be fulfilled "now" as opposed to the upcoming seven-year period that ADC proposes. Gov't Brief at 25. The answer is that the decree required seven-years' worth of Consent Decree ¶ 7(i) efforts as the Court has defined them and, because of the extent of exclusionary zoning that remained in place after the entry of the decree, seven-years' worth of Consent Decree ¶ 7(j) efforts. So far, Westchester has provided no effort, so the proposed remedy of seven additional years is intended to make Westchester do only that which it was supposed to do in the first place.[12]

The Monitor repeatedly criticizes ADC for focusing on zoning and the original litigation-based strategy. Monitor Submission 11, 13, 14 n.12, 17, 18, 21. But the approach that the Monitor is criticizing is not the private approach of ADC: it is the approach of a decree dedicated to remediating *Westchester's* conduct, and adherence to the decree's approach is not optional.[13]

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[12] If Westchester had been proceeding as it was supposed to, it could have leveraged the costs of its Consent Decree ¶¶ 7(i) and 7(j) activities (including acquisition of interests) with funds being spent on units being developed in the 2009 to 2016 period. That Westchester does not have that leverage available is squarely Westchester's responsibility.

[13] This is true in the first instance because the Monitor does not have authority to substitute his policy judgment for that which is embodied in the decree. More than that, though, there is no indication that "voluntary cooperation" has or will be effective in connection with changing the status quo of *existing, highly white, low-density, principally residential neighborhoods.* There, zoning barriers, along with opposition to change, remain deeply entrenched. It is certainly *not* where the overwhelming bulk of consent decree housing has been built, and *not* where such limited

Finally, the proposal for potentially appointing a Special Master is responsive to the point that the Government made in 2014 when it successfully dissuaded the court from taking action at that juncture based on the information about noncompliance that ADC had provided. The Government had argued that it is only "once we get the county to agree that there are those towns that have exclusionary zoning, then the county is well suited to bring suit against those."[14] The flaw is obvious: the more a defendant denies objective reality, the more it can sabotage the ability to carry out its obligations successfully. The solution is not to reward that party and relieve it of its obligations, it is to appoint a Special Master to act in the noncompliant party's place and stead (if the Court concludes that the process of holding the defendant in contempt would be futile).

CONCLUSION

It is imperative that the Court take action to vindicate the integrity of the consent decree.

Dated: New York, New York
June 27, 2016

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zoning changes as have been made have occurred.

[14] Transcript of May 2, 2014 conference (ECF No. 629-5) at 18:13-16. ADC disagrees with the Government's attempt to explain away its statement that "because the county says that none of the municipalities within its area have exclusionary zoning the obligation to [file] any lawsuit is not triggered," *Id.* at 18:2-4, but, more importantly, is pleased that the Government is not taking the position now that a defendant's subjective view of facts can limit its obligation.