ANTI-DISCRIMINATION CENTER, INC.

"ONE COMMUNITY, NO EXCLUSION"

February 11, 2021

Hon. Denise Cote
United States District Judge
500 Pearl Street, Room 1910
New York, New York 10007

Re: Reply to ECF 735 and 736 (the letters of defendant Westchester County and of the Government to Monitor's Report and ADC's response thereto)

Your Honor:

We are compelled to request the Court's permission to reply briefly to the letter submitted yesterday afternoon by the U.S. Attorney on behalf of HUD (ECF 736) – in parts misleading, in other parts unintentionally illuminating – as well as to Tuesday's letter from defendant Westchester County (ECF 735).

The submissions seek to divert the Court's attention – *some* provisions of the consent decree have been enforced; ADC's attempts to intervene and to proffer arguments that the Government and the Monitors failed to make have been rebuffed[1] – from the profound failings that ADC identified in its letter of January 29th (ECF 734).

The Government, the defendant, and the Monitor will not speak to the critical ways in which the prefatory language of the decree informs its purpose and substantive provisions; will not speak to the lack of a decree-compliant Implementation Plan; and will not speak to how the defendant's undertaking pursuant to Consent Decree ¶ 31(a) has been ignored – all because to engage on those issues would make clear that the process of enforcement and oversight derailed early on and never recovered.

One would be hard-pressed to deny the overarching purpose of the consent decree to overcome exclusionary zoning in a way that opened the door to the racial desegregation of the County. But there is no dispute either that Westchester managed to place most units in a way to avoid development in existing ultra-White residential neighborhoods, or that there has been very little easing of exclusionary zoning in existing ultra-White residential neighborhoods.[2] Neither the

[1] Without a trace of irony, the Government, despite its having urged the Court since 2011 (successfully) *not* to entertain the arguments made by ADC, now says those arguments have been "considered and rejected before." ECF 736, at 9. In fact, the substance of ADC's arguments has not been considered, the Court having satisfied itself time and again that the Government and the (original) Monitor were performing the role of holding the civil rights defendant, Westchester County, to account. Thus, for example, when back in 2011, ADC made twin motions to intervene and to enforce, the Court denied the motion to intervene, but chose not to exercise its independent juridical powers to investigate the substance of the contentions that ADC raised in its motion to enforce.

[2] As previously noted, if the "model ordinance" were adopted in every single town and village in Westchester, the number of additional acres on which multi-family housing could be built as-of-right would be zero.

Government nor the Monitors have ever been required to explain how it is they allowed this to happen.

The Government and the defendant try to defend the continued use of Census 2000 data. But what is not contested is that the whole point of the municipal allocation portion of the decree was to place the overwhelming amount of housing (at least 84 percent) in the jurisdictions that were least-Black and least-Hispanic (under 3 percent and under 7 percent, respectively). Yet Westchester has been allowed to proceed for the last 10 years in the face of indisputable knowledge that a disproportionate amount of the housing was being developed in municipalities that no longer had these twin demographic characteristics. The Government has never been required to explain why it failed to use its authority pursuant to Consent Decree, ¶ 15(c) at any point in the process to request that 2010 Census data be used instead.[3]

Westchester writes that the original Monitor "'elected not to take into account the 2010 data because he determined there was no evidence of significant demographic shifts among the 31 municipalities that would materially affect the' purpose of the Settlement," *quoting* ECF 630, at 25. As pointed out in our January 29th letter, ECF 734, at 2 n. 6, there is no finding needed in order to take into account 2010 Census data. Moreover, the original Monitor's assessment was factually unsound, an error reflected in the fact (obvious at the time the original Monitor made his statement) that hundreds more units were being placed in municipalities that, as of 2011, had demographic profiles that were intended to be allowed to contribute no more than 120 units (a combination of the Consent Decree, ¶¶ 7(b) and (c) maximums).

The Government's argument that no municipality that had originally been included shall be excluded, ECF 736, at 9, is literally a strawman. No one is suggesting that municipalities be excluded from Consent Decree, ¶¶ 7(a) *and* 7(b) *and* 7(c). The point is that the 2010 data would have been used "in the determination of eligible municipalities and census blocks set forth in paragraphs 7(a), 7(b), and 7(c)," Consent Decree, ¶ 15(a)(iii); in other words, to decide which municipalities properly fell into which bucket. If you cannot cease to count a jurisdiction under paragraph 7(a), the 2010 data provision would have no meaning.

Even apart from the 2010 Census issue, the Court will note that neither Judge Robinson, the Government, nor Westchester deals with the hundreds of units that have inappropriately been counted by "using crude accounting tricks," or "ignoring the fact that units did not affirmatively further fair housing," or were otherwise unsuitable.[4]

If the defendant had not been so persistently non-compliant with core provisions of the consent decree, one can certainly imagine Westchester's complaint that it relied on the collaboration of the Government and the original Monitor in developing where it did. But any such reliance interest must be weighed against the fact that the defendant was and remains unwilling to avail itself of its legal rights that the consent decree was so careful to force the County

[3] The answer is quite obvious: reducing the number of Consent Decree, ¶ 7(a) municipalities would have made it more difficult to get to a minimum of 630 units in the remaining 7(a) jurisdictions without tackling zoning barriers. No "interest" of the consent decree was served by sticking with data from 2000.

[4] *See* ADC's January 29th letter, ECF 734, at 2-3 and at 3 n. 7 (referencing illustrations).

to acknowledge as appropriate and in its power. That is a balancing of the equities that surely cannot result in Westchester having to do nothing more.

Turning to Consent Decree, ¶ 7(j), the Government confirms that it, contrary to the Court's expectation, never performed its obligation to hold the defendant to account.[5] Responding to ADC's point that the Government had not analyzed which municipalities failed to remove exclusionary-zoning barriers, the Government asserts that it was the defendant's job (specifically in connection with the Analysis of Impediments), not its job, to examine this question.

The Government is one-third right. Yes, in the first instance, it was (and remains) the defendant's obligation to identify those municipalities that do not take actions (such as removing zoning barriers) needed to promote the objectives of building the units. But that paragraph 7(j) obligation existed separate from and in addition to the Analysis of Impediments obligation.

Moreover, the paragraph 7(j) determination is not a subjective determination, placed in the County's discretion, but rather an objective one which depends on the facts on the ground,

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[5] A useful early clue of this was who the Government relied on, in opposing ADC's motions to intervene and to enforce, to aver that everything was going fine: a legislative official *of the defendant* (now the County Attorney). I cannot say for a fact that this kind of collaboration with the defendant that the Government is supposedly overseeing is literally unprecedented, but it is certainly unusual. Subsequent to the denial of the motion to intervene, there was reporting in Pro Publica (by Nicole Hannah-Jones) that sheds further light on the disconnect between the Court's expectations on one hand, and the conduct of HUD and the original Monitor on the other:

> County officials put forward the Rye project that is cut off from the rest of the city by two interstate highways. In a letter to the county, Johnson called the project a "missed opportunity." Then he approved it.
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> Officials proposed a development on a strip of land in the community of Cortlandt, wedged along a highway and a railroad track. The site met the criteria for low concentrations of African Americans and Latinos only because, other than the residents of the nursing home, two homeless shelters and psychiatric hospital nearby, no one lived on that land.
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> Johnson, in a letter to the county, said the site wasn't "ideal for promoting residential integration." He approved it anyway.
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> Gurian contends HUD should have rejected the proposed sites, forcing the county to find better ones or pay fines when it failed to meet deadlines. Johnson countered that such an approach would have been risky.
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> "I can't predict what the county's behavior would be in that circumstance," he said. "I could have played a game of chicken, but I wasn't going to do that."
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> Instead, Johnson and HUD decided to go after what they called "low-hanging fruit," hoping to build good will with Astorino and the county's leadership. They feared the settlement could fall apart entirely if they pushed too hard.
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> "The key was not to make mistakes," said a former high-ranking HUD official who worked on Westchester strategy. "We were an agency that had not been thorough for decades, had been sitting on its hands and doing nothing for people who had been faced with systematic discrimination in this country. HUD loses this case, we're back to a loss of confidence and people would say we're worthless."

ultimately to be decided by the Court in the event of a dispute between the defendant and the Government or the defendant and the Monitor. Without its own evaluation of what the facts on the ground were, the Government was in no position to play the role the Court expected it to play as what was supposed to be the party in interest.

(Note: the Beveridge Report found that 19 of 25 of the municipalities with Black population under 3 percent – 76 percent of such municipalities – had exclusionary zoning on the basis of restrictions on multi-family housing.)

Neither the Government nor Westchester (nor Judge Robinson, for that matter) deal with the fact that it would be counter-intuitive in the extreme if, for example, you had municipalities that permitted no multiple-family housing whatsoever (municipalities where it would make no sense to expect that a developer would magically emerge on its own to engage in the futile task of seeking to build there), and yet would be exempt from paragraph 7(j) action because there was no specific project. Likewise, none have explained why a County-developer partnership to seek to build where exclusionary zoning precludes affordable housing would not be among the actions contemplated by paragraph 7(i) (requiring the use of all means appropriate to accomplish the purposes of paragraph 7); paragraph 15 (biennial assessment of whether defendant has taken *"all possible actions to meet its obligations,"* including, if necessary, taking legal action); and paragraph 18 (creation of an Implementation Plan). The Court has not entertained these issues.

That the failure to modify exclusionary zoning is a failure to take action needed to promote the objectives of paragraph 7(j) is also the only interpretation consistent with the second sentence of paragraph 7(j): "The County shall initiate such legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH." The Court has interpreted "such legal action" to refer to legal action in connection with the minimum of 750 units of housing. *United States v. Westchester County*, 2016 WL 3566236 (S.D.N.Y. June 27, 2016), at *3 n.3. But the Court did not have occasion to reckon with the fact that the rest of the sentence had to mean something. It was not, in other words, mere surplusage. The mandatory "shall" is underlined in respect to accomplishing the purpose of the consent decree to AFFH, something not mentioned in the preceding sentence. The very definition of affirmatively furthering fair housing is *overcoming barriers to fair housing choice.*

So, throughout many years of the decree period, it is the case that: (1) Westchester did not know where all the 750 units were going to coming from; (2) Westchester needed *barriers to be removed* to facilitate the construction of the units and to vindicate its own interests in integrative affordable housing (as spelled out in the prefatory paragraphs); and (3) Westchester opposed – across-the-board and regardless of circumstance – any effort to challenge its exclusionary towns and villages. The Government boasts that it sought compliance in respect to a single project (an ill-located one at that) but has wanted and continues to want the Court to ignore Westchester's posture of universal non-compliance.

It is absolutely true that, with the change in County Executive as a result of the 2017 election in Westchester, no County official is making media appearances decrying the consent decree. But little has changed substantively on this set of issues. Westchester is *still* describing exclusionary zoning as "amorphous municipal opposition to affordable housing," ECF 735, at 2,

rather than the concrete barriers that exclusionary zoning presents;[6] *still* asserting that it has no power to redress exclusionary zoning; *still* denying that its municipalities have exclusionary zoning; and *still* assuring its municipalities that it will not even impose numerical *goals* on them for the construction of affordable housing. This set of postures are what the U.S. Attorney, representing HUD, agrees with the Monitor is a local administration showing a renewed commitment to fulfilling both the letter and spirit of the consent decree.

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Court orders are not supposed to be menus where the parties get to choose which of the provisions they will obey (or enforce) and which they will pass on. *All* provisions are supposed to be obeyed and enforced. That has not happened over the course of more than 11 years. The Court still has an opportunity to avail itself of its independent juridical interest in securing the integrity of the court order and we request that it repair some measure of the damage that has been done.

Respectfully submitted,

Craig Gurian

Craig Gurian
Executive Director

[6] The opinion that defendant cites did not characterize exclusionary zoning as amorphous opposition to affordable housing. *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 2016 WL 3004662 (S.D.N.Y. May 24, 2016), at *17-18. Moreover, the Court pointed out that "[t]his Opinion is not the occasion to address whether municipal opposition to the affordable housing goals of the Consent Decree implicates other duties that the County agreed to assume when it executed the Decree." *Id.* at *17 n.32. This is another issue that neither the Government nor the Monitors pursued.