ANTI-DISCRIMINATION CENTER, INC.

"ONE COMMUNITY, NO EXCLUSION"

January 29, 2021

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

Re: Response to Monitor's January 26, 2021 Report

Your Honor:

The Anti-Discrimination Center respectfully requests that the Court consider this response to the Monitor's Jan. 26, 2021 report (the "Report").[1] Before turning to the substance – and we have deep and profound concerns with the Report – I want to thank Judge Robinson publicly for his courtesy and professionalism in each of his interactions with me.

Unfortunately, the Report, almost four years in the making, does not provide the Court with the necessary information and context to understand Westchester's failure to meet either its unit-specific requirements or several other of its core obligations, including its obligation to require its municipalities to remove zoning barriers pursuant to paragraph 7(j) of the consent decree.

A. Introduction. As was pointed out in a proposed *amicus brief* from multiple fair housing organizations, this consent decree "provided more opportunity to effect significant structural change in hyper-segregated residential housing patterns than any other legal proceeding in the last 25 years."[2] Sadly, that promise has been squandered by an ongoing lack of compliance, lack of enforcement, and lack of oversight. We are well aware that the rejoinder over time has been to point to a limited number of instances where Westchester was belatedly forced to comply with an obligation – as though compliance with one part of a court order obviated the need to comply with the rest. But the broad picture is clear (although one would have no idea of any of these facts were one simply to read the text of Judge Robinson's report): (1) the distribution of completed units deviates substantially from the goal of the decree to have the overwhelming number located in the most-White jurisdictions; (2) Westchester has managed to place most units in a way to avoid development in existing ultra-White residential neighborhoods; (3) there has been very little easing

[1] Monitor's Assessment of Westchester County's Compliance, Jan. 26, 2021, ECF 731.

[2] *See* proposed brief for *amicus curiae* Enhanced Section 8 Outreach Program, Inclusive Communities Project, National Fair Housing Alliance, *et al.*, June 14, 2016 (ECF 620-1), at 1. By order of July 6, 2016 (ECF 654), at 5, the Court denied the *amici* leave to file the brief.

of exclusionary zoning in existing ultra-White residential neighborhoods; (4) Westchester, in defiance of its obligations pursuant to paragraph 7(j) of the decree, has manifested and continues to manifest an across-the-board, regardless-of-circumstance opposition to commencing legal challenges against those of its municipalities that fail to act to remove exclusionary zoning; and (5) Westchester is not only still assuring municipalities that they will not be forced to make change, its "needs assessment" for affordable housing does not assign municipality-by-municipality targets – the latter representing a retrogression even from what Westchester was prepared to do in the 1990s.

B. Unit-specific requirements. It has been more than 11 years and Westchester *still* has not quite gotten to the minimum of 750 units that were supposed to be completed in seven years (the raw count, per the Report, is 723 units).[3] That's an average of fewer than 70 units per year.[4] Worse, the distribution of consent decree units is nothing like what the decree intended. At least 630 of 750 units were supposed to be located in the most-White municipalities (those with Black population of less than 3 percent and Hispanic population of less than 7 percent). Consent Decree, ¶ 7(a). That represents at least 84 percent of units. In fact, Westchester acknowledges that 355 of the units being counted are, per 2010 Census data, *not* in paragraph 7(a) municipalities.[5] In other words, only 368 of the units being counted (only 50.9 percent) *are*, per 2010 Census data, in paragraph 7(a) municipalities. The Report neither brings this basic fact to the attention of the Court; nor explains why Judge Robinson did not use his own authority under paragraph 15(a)(iii) of the decree to seek to shift to the 2010 data when he became Monitor four years ago (or now); explains why the Government never used its power under paragraph 15(c) of the decree to recommend such a change early in the process, despite the Government's belated acknowledgment such a shift "may have merit"; nor otherwise discusses the issue.[6]

Likewise, the Report does not discuss another critical set of issues: the hundreds of units that have been inappropriately counted by using crude accounting tricks (like counting units that were required to be developed independent of the consent decree); by ignoring the fact that units did not affirmatively further fair housing ("AFFH") (like units where the barrier to development had been removed prior to the entry of the decree); and by proceeding despite a development being otherwise unsuitable (isolated or otherwise undesirable and thus not consistent with the

[3] *See* Report, at 7.

[4] Compare this paltry pace to the more than 1,000 units that Westchester has funded in municipalities *excluded* from the consent decree just since 2018. *See* Aug. 14, 2020 letter from County to Monitor, Report, Ex. 13 (ECF 731-24), at 2. That count includes 520 units in New Rochelle, 279 units in Yonkers, 185 units in White Plains, and 85 units in Peekskill. *See id.* This is how segregation is perpetuated.

[5] *See* Dec. 8, 2020 letter from County to Monitor, Report, Ex. 14 (ECF 731-25), at 2.

[6] A Monitor, either on his own initiative or at the behest of the Government, may seek to change unit locational requirements for a variety of reasons. Consent Decree, ¶ 15(a)(iii). These reasons are set forth as disjunctive. No "finding" is needed when the change is "to take into account 2010 Census data in the determination of eligible municipalities and census blocks set forth in paragraphs 7(a), 7(b), and 7(c) . . . ." The referenced acknowledgment of the Government is found in the June 24, 2016 brief of the Government (ECF 628), at 24.

requirement to produce AFFH units).[7]

B. Assessment of the units actually built. A glaring omission of the Report is its failure to address the troubling patterns that can be discerned in how and where the units developed (separate from the question of which municipality they are located in). Two things stand out. First, the Report fails to note or comment upon the fact that most units of the units that have been constructed are part of 100 percent (or close to 100 percent) affordable developments, a procedure that raised per-unit cost (foregoing the cross-subsidy that is provided by market-rate units in mixed-income developments) and marked the developments as distinctly separate from the rest of the municipality in which they were located. Second, the Report fails to note or comment on the fact that there has been a distinct pattern of siting units so that they are *not* located in existing ultra-White residential neighborhoods.

C. Very little exclusionary zoning has been modified. The Report spends extensive time discussing the so-called "model ordinance." But the model ordinance principally deals with mandating that a small percentage of units (10 percent) be affordable *when there is construction*.[8] It does nothing to mandate any increase whatsoever in the number or size of zones that permit multi-family housing as of right. Perversely, that means that the more restrictive a municipality's zoning is, the less impact the model ordinance has (10 percent of zero is zero).

The model ordinance simply has no bearing on the key issue of exclusionary zoning, most particularly the stark limitations of where multi-family housing can be built as of right.

The Report provides a remarkably restricted assessment of exclusionary zoning for a small subset of jurisdictions. Notably, Judge Robinson has taken his predecessor's "*Huntington* report" as one of his main points of departure. The problem with doing so is that his predecessor's *Huntington* report was entirely unsound and never completed. Leaving aside ADC's criticism (ECF 592-17) and the criticism of the Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense & Educational Fund, and the Poverty & Race Research Action Council (ECF 592-18), both HUD (ECF 578-48) and then the Government (ECF 578-49) critiqued the *Huntington* report. The previous Monitor then represented that he anticipated "undertaking additional work on a revised *Huntington* report in the coming months consistent with the Government's October 24, 2014 letter."[9] A year later the previous Monitor announced that he had abandoned that effort.[10] Nonetheless, the Report relies on the original, benighted product.

Likewise, Judge Robinson places reliance on his predecessor's *Berenson* report, which, as we pointed out in "Cheating On Every Level," was a report that "mangled the legal standards and

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[7] *See* illustrative chart, Ex. 8 to ADC's letter to the Court of May 11, 2016 (ECF 592-19). Per its order of July 6, 2016 (ECF 654), at 5, the Court denied ADC's motion to file the letter as an *amicus* brief.

[8] *See* County AFFH Model Ordinance, Report, Ex. 9 (ECF 731-20), at ¶ 2.

[9] *See* Monitor's April 1, 2015 report (ECF 506), at 48.

[10] *See* Monitor's April 28, 2016 report (ECF 576), at 42.

failed to apply the facts to the law."[11]

What we respectfully submit Judge Robinson should have done at a minimum (and what we asked him to do) was to utilize the 2016 report by ADC's expert, Professor Andrew Beveridge. That report that showed that, of the 25 towns and villages in Westchester that had African-American populations under 3 percent according to 2010 Census data, 19 of those jurisdictions "had highly restrictive zoning on the dimension of multi-family as-of-right zoning, that these jurisdictions contribute thereby to perpetuation of segregation of African-Americans, and that the restrictions operate disproportionately to the detriment of African-Americans (*i.e.,* have a disparate impact)."[12]

The Government wrote that the Beveridge Report "offers a useful view of the evidence that warrants consideration," and that the Court should "accept the Beveridge Report."[13] The Court reserved decision as to whether to accept the report in its order of July 6, 2016 (ECF 654). Since then, more than four years have passed. Nevertheless, the Report offers no view (neither the Monitor's view nor the Government's view) on the issues raised by Professor Beveridge.

The failure of the Report to offer a robust analysis in respect to exclusionary zoning is particularly striking because Judge Robinson understands that "[b]uilding 750 units of affordable housing in a county of almost one million residents was not intended to be the end goal but instead a runway" to create the conditions for making change.[14] That failure is also striking because the failure of numerous municipalities to take action to rid themselves of exclusionary zoning in order to promote the objective of the decree to cause the construction of at least 750 affordable AFFH units, and Westchester's failure to hold those municipalities to account, lies at the heart of Westchester's most consequential contempt: its rejection of paragraph 7(j).

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[11] *See* Anti-Discrimination Center, "Cheating on Every Level: Anatomy of the Demise of a Civil Rights Consent Decree," as revised in May 2014, at 23-27 (ECF 592-14).

[12] *See* May 11, 2016 report of Professor Andrew Beveridge, entitled "Report on Zoning of Westchester Municipalities and the Perpetuation of Segregation and Creation of Disparate Impact" (ECF 592-1), at 4, ¶ 16. The exhibits to the report are found at ECF 592-2 to 592-12.

[13] *See* June 24, 2016 brief of the Government (ECF 628), at 22 and 25.

[14] *See* Report, at 2. The Report strays from what the consent decree says insofar as it fails to recognize that Westchester is not simply required to "encourage" its municipalities to act, but also to "require" its municipalities to act. Likewise, the framing of the obligation simply in terms of "affordable housing" misses the point that the decree was not simply to construct affordable housing for the sake of affordable housing (important as that is), but to construct affordable housing that affirmatively furthered fair housing and began to end the pervasive housing segregation that plagues the County. *See also* Consent Decree, ¶ 31(a) (stating that "the elimination of discrimination, including the present effects of past discrimination, and the elimination of de facto residential segregation are official goals of the County's housing policies and programs"). Perversely, beyond the initial adoption of the required policy statement, the term "official goals" has not been treated as meaning "important goals, progress as to which needs to be monitored," but rather "formalistic and nominal goals that can be ignored."

D. Failure to compel municipalities to modify exclusionary zoning. Paragraph 7(j) of the consent decree provides that:

> In the event that a municipality **does not take actions needed to promote the objectives of this paragraph**, or undertakes actions that hinder the objectives of this paragraph, the County **shall** use all available means as appropriate to address such action or inaction, including, but not limited to, pursuing legal action. The County **shall** initiate such legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH.

Consent Decree, ¶ 7(j) (emphases added).

Failing to get rid of exclusionary zoning is not merely "generalized opposition" to affordable housing. Rather, exclusionary zoning acts as specific, concrete, and practical imposition of municipal *resistance* to any developer who might wish to consider building affordable housing. Indeed, the more restrictive the zoning, the more effectively a municipality can cause developers of affordable housing (including mixed-income housing) to recognize the futility of trying to proceed. It would be a perverse result if the modification of exclusionary zoning was not treated as an action needed to promote the objectives of paragraph 7(j) *until a developer submitted an application to the jurisdiction despite the apparent futility*. This point is actually very straightforward: since eliminating exclusionary zoning promotes the construction of affordable housing, failing to eliminate such zoning constitutes a failure to take an action needed to promote the objectives of paragraph 7(j).

And it is also straightforward that the obligation on Westchester was operative as of the moment the decree was entered. There is no "delaying" or "deferring" language in the provision.

It is, of course, a shocking breach of its basic duty that the Government – charged with enforcing the decree – has never in 11 years provided *its own analysis* of which municipalities failed to take sufficient action to remove exclusionary-zoning barriers so as to promote the objectives of building AFFH units. *But the extreme position taken by Westchester made the County's contempt clear even in the absence of specific guidance from the Government.* Westchester has never been willing to assess when legal action was "appropriate." Instead, across-the-board and regardless of circumstance, it has maintained the unyielding and unequivocal position that it would not initiate litigation. That is an ongoing, 11-year-long violation of paragraph 7(j). The Report does not speak to this issue – even though Judge Robinson must know that Westchester's position (there are no exclusionary jurisdictions) is untenable.

E. Westchester's current posture. Despite Judge Robinson's optimism, Westchester still has its head in the sand. In a 175-page "housing needs assessment," issued in November 2019,[15] the county did not mention the word "segregation" once. Its "action steps," far from directly confronting calcified exclusionary zoning, are entirely deferential to municipalities. Indeed, one of its so-called action steps seems more like a caricature of how to *avoid* action: establishing "a task force to facilitate municipal conversations to explore the development of a countywide

[15] *See* Westchester Housing Needs Assessment, Nov. 2019, Report, Ex. 37 (ECF 731-73 and 731-74).

housing compact."[16] And the needs assessment pointedly "does *not* seek to establish a specific number of affordable housing units required to be constructed within an individual municipality."[17] In this last respect, Westchester is now *less* proactive then it was in the 1990s.

F. Why and how was the promise of the consent decree not fulfilled? The "why" is easy: because full compliance – including with provisions that have required and continue to require structural change in residential patterns – is politically treacherous. For the defendant, that meant a policy of resistance; for those charged with enforcement and oversight, we are respectfully constrained to point out once more[18] that meant going along with the defendant in crucial respects, such as justifying the failure to enforce the decree *as written* as somehow being the "practical" approach.[19]

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[16] *See id.* at 159.

[17] *See id.* at 3.

[18] *Cf.* Anti-Discrimination Center, "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 (ECF 592-20), at 43 (footnotes omitted) ("Two weeks after Judge Cote signed the Settlement Order in August, ADC sent the Monitor a letter. In that letter, ADC warned that, 'Appeasement only emboldens resistance.' 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."). These observations from 11 years ago required no special clairvoyance; the risks of non-enforcement were entirely predictable, requiring only a willingness to refuse to avert one's eyes from what was unfolding.

[19] Each Monitor report to the Court shall address, *inter alia*, "the adequacy of the County's implementation plan . . . ." Consent Decree, ¶ 39(c). Most of the injury to the integrity of the decree was effected prior to Judge Robinson assuming the Monitorship. But his observation that the decree is "positive not punitive[;] practical, not political" (Report, at 2) deserves comment, especially since the most salient characterization of the decree (beyond it being a court order that needs to be obeyed as written) is that it is *remedial*. Moreover, to see how easily the "political" becomes what is seen as "practical," the Court need only look to the next page of the Report, where Judge Robinson "acknowledges" that "aligning a critical mass of public support behind measures that may sometimes appear to be inconsistent with pecuniary interests is daunting." *See id.* at 3. However daunting "aligning a critical mass of public support" may be, that kind of *political* calculus should not have had any influence on the necessity of enforcing *all* elements of the decree. If lack of public support were a basis for modifying consent decrees, after all, few if any civil rights orders– from the 1950s on – would ever have been enforced as written.

As to the "how," we point the Court to two critical issues. First, Westchester failed to produce a compliant Implementation Plan ("IP") and was then not held to account. We can assure the Court that, during the process of negotiating the consent decree, it was well understood that Westchester, not unlike other civil rights defendants, would seek to get away with what it could. To prevent that, the required Westchester – promptly – to submit for Monitor review an IP that set forth "with specificity" the manner in which the County plans "to implement the provisions of this Stipulation and order, set forth in paragraph 7*,* concerning the development of Affordable AFFH Units . . . ." Consent Decree, ¶¶ 18, 20.

When the County failed (*back in 2010!)* to produce a compliant IP in its first two attempts, the then-Monitor had a mandatory duty to "specify revisions or additional items that the County *shall* incorporate into its implementation plan." *Id.* at ¶ 20(d) (emphasis added). Following the completion of that mandatory duty, the County had a mandatory duty to "incorporate the implementation plan into its [analysis of impediments]." *Id.* at ¶ 21.

The then-Monitor did not fulfill his mandatory duty. None of this failure of compliance and enforcement is discussed in the Report.[20]

Most importantly, none of those responsible for enforcement or oversight have wanted to acknowledge or accept how that the requirement that defendant initiate legal actions against municipalities whenever necessary was *central* to the conception of how the decree would work. The Court has noted that the drafters of the consent decree "evidently envisioned" that there would be municipal resistance to the construction of affordable housing in the covered jurisdictions. *United States ex rel. Anti-Discrimination Center,* 2016 WL 3004662, at *16. (S.D.N.Y. May 24, 2016). We can respectfully confirm that this was putting it mildly.

In fact, having litigated the case against Westchester County along with our indispensable co-counsel (the Government having been unwilling to do so), it was not that we were concerned that there *might* be municipal resistance -- we *knew* that there would be municipal resistance. As importantly, we also *knew* that it was Westchester's policy: (a) to take a hands-off approach to its municipalities; and (b) to claim that it was without authority to impinge on "home rule." And thus we knew that realizing the overarching purpose of the decree – to open the door to the breaking down of residential segregation – required a decree that built in litigation by the County as a central focus.

This is why it has been so tragically consequential that those responsible for holding the defendant accountable have themselves failed to accept and deploy the language and necessary implications of not only paragraph 7(j), but also of the prefatory language of the decree. (The

[20] Just to be clear, all the subsequent sound and fury over the analysis of impediments could have been avoided if the then-Monitor had met his obligations pursuant to paragraph 20(d). Note that the Monitor was able to designate any elements of an IP as benchmarks to be enforceable in the same manner as other terms of the decree. *Id.* at ¶ 24. And yet this, too, was not done.

ignoring of the prefatory language continues. It is a notable part of what is missing in the Report.)[21]

The County's agreement and acknowledgment that "pursuant to New York State law, municipal land use policies and actions shall take into consideration the housing needs of the surrounding region"[22] is a restatement and acknowledgment of the *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (N.Y. 1975) doctrine (each jurisdiction must take account of regional in its zoning). The County's agreement and acknowledgment that "pursuant to New York State law, municipal land use 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"[23] is a restatement of the *Matter of County of Monroe (City of Rochester)*, 72 N.Y. 2d 338 (N.Y. 1988) doctrine (the interests of a county in achieving its objectives can outweigh the local zoning interest).

There could be no question as to the relationship of affordable housing with desegregation potential to the County's duties "for the benefit of the health and welfare" of County residents, since the prior page of the decree states the following (in the second whereas clause):

> [T]he 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 the defendant County of Westchester . . . .[24]

So that there was no question about the important weight that affirmatively furthering fair housing should play in a *County of Monroe* analysis or otherwise, the decree begins by stating that "the development of affordable housing in a way that affirmatively furthers fair housing is a matter of significant public interest,"[25] and, subsequent to the prefatory paragraphs, reemphasizes that "AFFH significantly advances the public interest of the County and the municipalities therein."[26]

And to underline the fact that litigation was a tool that could not be shied away from, Westchester had to acknowledge and agree without equivocation 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."**[27] The term "such duties" refers back to duties for the health and welfare of county resident, and, as we have already noted above, the decree is explicit

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[21] "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).

[22] Consent Decree, at 2, ¶ 1.

[23] *Id.*

[24] *Id.* at 1, ¶ 2.

[25] *Id.* at 1, ¶ 1.

[26] *Id.* at ¶ 31(b).

[27] *Id.* at 2, ¶ 1 (emphasis added).

that the "broad and equitable distribution of affordable housing" that "promotes sustainable and integrated residential patterns . . . advances the health and welfare" of such residents.[28]

Thus, the language of the first two pages of the decree makes clear in the first instance that it is Westchester's *own interests* that need to be vindicated. This fact is inconsistent with an interpretation of paragraph 7(j) that would leave Westchester unable to act unless and until a developer happened to come along independently and choose to try to develop affordable housing where such housing is not permitted by local zoning, something that has happened in Westchester only rarely over the course of the last few decades.

Beyond identifying the need for the County to vindicate its interest in creating affordable housing with desegregation potential, the prefatory language also: (a) lays out for all parties the contours of two of the expected legal routes for compelling compliance; and (b) leaves no doubt about the appropriateness of legal action in the face of municipal hinderance or impeding of County duties.

By ignoring the animating principles articulated in the decree's preface, the Report does not engage with these basic aspects of the consent decree.

Even now, Westchester questions how it would have gone about developing the litigation, arguing it cannot do so "in the abstract" and citing the Government's opposition to Westchester purchasing property in order to make a dispute concrete.[29] But both Westchester and the Government fail to grapple with what the decree requires. "The County always has a duty to 'use all available means as appropriate' to achieve the development of 750 new units," referencing paragraph 7(i) of the decree. *United States ex rel. Anti-Discrimination Center,* 2016 WL 3004662, at *16. By definition, identifying specific sites, or purchasing an option on appropriate sites, or partnering with affordable housing developers to try to build in a municipality are within the scope of "all available means." As to the last, the decree specifically requires that part of a compliant IP is conducting "meetings with developers (for-profit and non-profit) and property owners (including office park owners) to determine their interest in furthering developments that will AFFH." Consent Decree, ¶ 22(b).

Armed with developers prepared to develop sites in partnership with the County and the County's own need to create integrated residential patterns that exclusionary zoning impedes, the dispute between the County's interests and that of any given municipality's would not be "abstract."

Westchester's view boils down to the unsupportable proposition that a decree obligation can be neutered because the decree does not contain a roadmap of each of the steps prerequisite to the ability to commence litigation. In fact, the obligations of a decree are expected to be able to be executed. The necessary prerequisite steps, in other words, are implicit components of the ultimate action required. (Here, of course, there is even more: the explicit language of paragraph

[28] *Id.* at 2, ¶ 1 and 1, ¶ 2.

[29] *See* Aug. 7, 2020 letter from County to Monitor, Report, Ex. 11 (ECF 731-22), at 3.

7(i) that Westchester "shall use all available means as appropriate to achieve the objectives set forth in this paragraph.")

Notwithstanding the plain language in paragraph 7(j) requiring litigation to be commenced as appropriate and the plain language in the whereas clauses that it *is* appropriate to commence litigation when municipalities "hinder or impede" the County in the performance of its duties, including the duties in furtherance of the terms of the consent decree, the Report fails to discuss paragraph 7(j) outside of the context of the model ordinance. The Report thus leaves a long trail of non-compliance and non-enforcement hidden from view.

G. What now? We are very much aware that it has been this Court's consistent view that the Government (on behalf of HUD), along with the previous Monitor, were properly performing their roles in enforcing and overseeing the decree, thus obviating the need for the Court to exercise what it recognizes as its "independent, juridical interests" to ensure compliance. *United States v. Westchester County*, 2016 WL 3566236, at *6 (S.D.N.Y. June 27, 2016) (citation omitted).

But we are constrained to say – with greater regret than Your Honor may appreciate – that this rosy view has not been borne out by the facts. Critical elements of the consent decree have been and/or continue to be ignored or interpreted in a way to pervert both the provisions themselves and the goals and purposes of the decree. The unvarnished truth is that the various institutional players have been unwilling to rock the boat; unwilling, that is, to insist that the *structural* change to ultra-White existing residential neighborhoods actually be carried out as contemplated by the decree.

We recognize that it is too late now to restore all the promise of the decree. But Westchester's reliance interest, such as it is (tantamount to "we've been getting away with non-compliance on these issues since the beginning"), should not stop the Court from exercising its independent, juridical interest to remediate some measure of the non-compliance. To that end, there are a series of steps that should be taken next, subject to such fact-finding as the Court finds appropriate.

1. Direct the Monitor to remedy the deficiencies in the Report identified in this letter.

2. Find that Westchester's across-the-board, regardless-of-circumstances refusal to initiate litigation against municipalities has violated paragraph 7(j) of the decree.

3. Direct the Government and the Monitor, jointly or separately, to submit to the Court a list of municipalities that would qualify under paragraph 7(a) pursuant to the 2020 Census (data from which is expected to become available in April).

4. Direct the Government and the Monitor, jointly or separately, to identify those municipalities from the list generated pursuant to paragraph 3, *supra*, where the removal or modification of zoning barriers would:

(a) promote the objectives of paragraph 7 to build AFFH units; or

(b) help accomplished the purpose of the consent decree to AFFH.[30]

5. Direct the defendant to respond to the submission or submissions by the Government and the Monitor required by paragraph 4, *supra.*

6. Determine which municipalities, if any, the Government and/or the Monitor have correctly identified.

7. Direct defendant – or, if defendant is not prepared to work in good faith as required by this paragraph, designate a Special Master to act in the place and stead of defendant – to undertake the following:

(a) Take the necessary steps, in conjunction with developers and defendant's planning staff, to identify at least one existing residential neighborhood in each municipality identified by the Court pursuant to paragraph 6, *supra,* that: (i) currently has a low concentration of Black and Hispanic residents; (ii) does not permit multi-family housing as-of-right; and (iii) could reasonably (consistent with environmental concerns) accommodate multi-family housing if permitted by zoning.

(b) Direct defendant or the Special Master to determine which of the municipalities are prepared to modify their zoning as needed to permit multi-family housing as-of-right in the neighborhoods identified pursuant to paragraph 7(a), *supra*.

(c) For those municipalities that do not modify the challenged zoning, direct defendant or the Special Master to initiate litigation (pursuant to *County of Monroe*, and, as appropriate, pursuant to *Berenson* and the Fair Housing Act) against no fewer than three such municipalities, having first taken the necessary prerequisite steps.

8. Direct that the development contemplated pursuant to paragraph 7, *supra*, must consist of mixed-income housing (at least a majority of which must be market-rate) and must seek to generate 150 units of affordable housing in the aggregate. Defendant shall substantially fund the costs attributable to the development of the affordable housing units and shall fund entirely the costs attributable to the litigations.

Respectfully submitted,

Craig Gurian

Craig Gurian
Executive Director

[30] To the extent that municipalities still have zoning barriers the removal of which would facilitate the construction of Affordable AFFH units, those barriers have been in place throughout the time when Westchester was supposed to be utilizing paragraph 7(j) on the way to generating the required units and trying to accomplish the purpose of the consent decree to AFFH.