

ANTI-DISCRIMINATION CENTER, INC.

“ONE COMMUNITY, NO EXCLUSION “

June 12, 2013

VIA EMAIL

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

Re: U.S. ex rel. Anti-Discrimination Center v. Westchester County

Dear Jim:

I have not had the opportunity to review in any detail what the County describes as your “report cards” on individual municipalities but write to offer six preliminary observations and statistical evidence of how consequential it has been to leave zoning barriers in place.

First, we are pleased to see an acknowledgment that — contrary to the facile argument that the more expensive a community the more difficult it is to build affordable housing — it is precisely wealthy municipalities with high property values where the greatest amount of cross-subsidy for affordable units can be achieved.¹

Second, we are pleased that you are apparently incorporating the County’s 2005 Affordable Housing Allocation Plan in your analysis and description.² That Plan is obviously relevant to an analysis of whether barriers to fair housing choice remain in place in (at least) a

¹ Had all development proceeded pursuant to a Decree-complaint Implementation Plan that met the objectives of the Consent Decree to affirmatively further fair housing (as contemplated and required by Consent Decree ¶¶ 18-20), mixed-income development would, of course, have been part of the mix. In the absence of such an IP, all or nearly all development has *not* included market-rate units, thereby maximizing the per-unit cost of affordable units and defeating, *inter alia*, the obligation to explore all possible means of leveraging Consent Decree funds (*see* Consent Decree ¶ 15).

² It is inaccurate to describe the Plan as “unadopted.” The goals in that plan (which were conservative for a variety of reasons, including the fact that regional need was not taken into account) were the product of an official County body charged with making such recommendations. Critically, at the time of the entry of the Consent Decree, the then-serving County Executive treated those goals as County policy.

substantial number of Westchester municipalities (see further discussion of the Allocation Plan at Point Six on page 3).

Third, in the context of discussing barriers to fair housing choice (including barriers created by exclusionary zoning) it is deeply misleading to use the phrase “no restrictive zoning practices have been identified” in relation to a municipality such as Scarsdale. You write that, of 4,278 acres comprising Scarsdale, there are only 15.6 acres (or 0.4 percent of total acreage) where the Village allows multifamily housing as-of-right. To say that is not a limitation on multifamily housing development would surprise every civil rights attorney who has worked on exclusionary zoning litigation.

Fourth, while the “report cards” do refer to “mapping additional areas for multifamily housing,” they are curiously silent about the potential for substantial affordable housing development that would be unlocked in each municipality were excessive zoning limitations relaxed (including in what are currently districts zoned only for single-family use).

Fifth, your data point unmistakably to what has long been known: most of Westchester’s municipalities (at least) have had substantial barriers to fair housing choice. The municipalities have failed to take the needed steps to remove these barriers, including zoning barriers. In these circumstances, Westchester had two obligations under the Consent Decree. One, arising pursuant to paragraph (7)(j) required the County to use all available means, including pursuing legal action, to deal with a municipality that fails to “take actions needed to promote” the building of AFFH units. The other requirement, also arising pursuant to paragraph (7)(j), required the County to “initiate such legal action as appropriate to accomplish the purpose of this [Consent Decree] to AFFH.” This second requirement is different from and supplemental to the first.³ It is not specific to the minimum 750 units of AFFH housing, but rather a broad obligation to act against barriers to fair housing choice (what it means to have a purpose to AFFH).

I shouldn’t have to say so, but given the political decisions that you and our colleagues at the U.S. Attorney’s office and HUD have made over the years to ignore entirely some Decree obligations, I’m obliged to point out once more that the Decree has *both* analysis *and* action requirements. Paragraph 32, for example, is an *analysis* requirement with which Westchester has not complied. (The provision required, with an initial due date of December 2009, an Analysis of Impediments (AI) acceptable to HUD.)⁴ The two obligations of paragraph (7)(j), by contrast, required Westchester to take action.⁵

³ ADC made this clear in our 2011 motion to enforce the Consent Decree that you and your colleagues at the U.S. Attorney’s Office opposed.

⁴ While Westchester continues to argue that HUD *should have* accepted some or all iterations of its AI, even the County doesn’t suggest that HUD *has* found any AI acceptable. And the language of the Decree is very clear that the obligation is to produce an AI that *is* acceptable to HUD. This is another years-long violation of the Decree as to which no one has sought to hold the County in contempt.

⁵ It is impossible to read the first page-and-a-half of the Decree without recognizing that the

The County has not only failed to fulfill either of its paragraph (7)(j) obligations, it has made clear that, *across-the-board*, it will not act. It has been and remains your responsibility to bring these long-term and continuing violations of the Consent Decree to the attention of Judge Cote and to urge that the County be held in contempt for these and other violations.⁶

Sixth, allow me to return for a moment to the County's Housing Allocation Plan. The fate of that Plan under the current County administration is directly relevant to the County's violation of Consent Decree ¶ 31(a). That provision required the County to adopt a policy statement that established the ending of *de facto* residential segregation as an "official goal" of *all* of its housing policies and programs (without a time limit and independent of its specific unit-building obligations).

Is it possible to interpret that provision as saying, "We don't care if you *actually* have the ending of *de facto* residential segregation as a policy or goal, we only want the goal to be *on paper* as 'official' so as to create the *appearance* of a policy or goal"? Yes, but only if one is being as disingenuous as equating the vetoing of source-of-income legislation with "promoting" it. The clear and natural import of the paragraph 31(a) requirement is, in plain terms, "We're not only going to require the County to marshal all its housing policies and programs towards the goal of ending *de facto* residential segregation, this Consent Decree objective is so fundamental that we're going to require the County to embed that objective as part of its own laws."

In short, the obligation is for the County to have as a *real* goal in all its housing policies and programs the ending *de facto* residential segregation. That is something that is judged by the County's conduct, not by whether it *nominally* has set forth something "official." It is clear that the building of the Housing Allocation Plan units would (in conjunction with appropriate affirmative marketing) make a contribution in that direction. The County could have taken a step forward and made that voluntary allocation plan mandatory. Instead, it has abandoned a policy that had AFFH potential altogether. That, along with the County's continued hands-off posture towards municipalities, fundamentally contradicts its paragraph (31)(a) obligations, and demands that you seek to have the Court hold Westchester accountable for this violation as well.

* * *

Turning now to exclusionary zoning, we know from 2010 Census data that there are still 25 municipalities in Westchester where the non-Latino, African-American population is under 3 percent (19 of those municipalities have non-Latino, African-American populations of under 2 percent).

Decree contemplated Westchester's acquiring appropriate interests in property with AFFH-potential and to then litigate against municipalities that retained exclusionary zoning and other barriers to fair housing choice.

⁶ In saying this, I do not mean to suggest that it hasn't been the responsibility of the U.S. Attorney and of HUD to do so as well.

Does current zoning really perpetuate segregation? Absolutely. We took a look at only those households in Westchester and in New York City where household income was *at least* \$75,000 per year⁷ and asked, “What percentage of those households are non-Latino, African-American?”

The results:

Westchester, 9.11 percent (from 479 percent to 1,301 percent greater than the 19 under-2-percent-non-Latino-African-American municipalities)

New York City, 17.7 percent (from 932 percent to 2,529 percent greater than the 19 under-2 percent-non-Latino-African-American municipalities)

Westchester and New York City combined, 16.4 percent (from 863 percent to 2,342 percent greater than the 19 under-2-percent-non-Latino-African-American municipalities)

The gap between current demographics in the 19 Westchester municipalities and how many more African-Americans would be able to afford to live there if excessive zoning barriers and (even modestly) affordable housing were thereby developed is, to put it mildly, substantial. The argument that there is no exclusionary zoning in Westchester is preposterous.

Very truly yours,

Craig Gurian

⁷ We recognize, of course, that affordable housing planning should include families lower on the income scale than \$75,000, but wanted to run a modest (and conservative) exercise.