ANTI-DISCRIMINATION CENTER, INC.

"ONE COMMUNITY, NO EXCLUSION "

June 13, 2013

VIA EMAIL

Deputy Secretary Maurice Jones
U.S. Department of Housing and Urban Development
451 7th Street, S.W.
Washington, DC 20410

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

Dear Mr. Deputy Secretary:

As the executive director of ADC, the civil rights plaintiff in the above-entitled action, I was the architect of the litigation that led to the Consent Decree.[1] I'm moved to write to you in the face of comments you made in Westchester last week. You said, "I want to congratulate the county for the progress it has made" towards building the minimum of 750 units of housing required by the Consent Decree. "In fact," you continued, "according to my reading of the data, the county is ahead of the benchmarks in respect to this, and we just need to continue…"

That assessment is fundamentally false, ignores the language of the Decree, and gives the public an entirely misleading impression. In the first place, casual references to "the benchmarks" ignore the fact that paragraph 23 of the Consent Decree deemed them *interim* benchmarks. That is because the Decree contemplated the promulgation of more extensive benchmarks in connection with the adoption of a Decree-compliant Implementation Plan (IP). Indeed, paragraph 24 of the Decree allowed *any and all* elements of an IP to be designated as additional benchmarks.[2]

[1] Others who come to read this letter will be puzzled that I would be introducing myself to you at this juncture. They will be unaware of HUD's remarkable posture of having for years refused to communicate or cooperate with ADC, the civil rights plaintiff. Your agency instead pursued the pipedream of achieving "buy-in" from Westchester (the civil rights defendant) and from those who have over the years facilitated or excused Westchester's failure to affirmatively further fair housing.

[2] The only reasons that there aren't additional benchmarks are: (1) Westchester never submitted an IP that was Decree-compliant; and (2) the Monitor (with the agreement or acquiescence of HUD and the U.S. Attorney) never complied with his mandatory obligation under Consent Decree ¶ 20(d) to direct Westchester to incorporate revisions to the IP sufficient to accomplish the affirmatively furthering fair housing (AFFH) objectives of the Decree.

Even were one to leave aside the issue of claiming success because the promulgation of AFFH-promoting benchmarks has successfully been evaded, there is no question that *all* development under the Decree was intended to be carried out pursuant to a Decree-compliant IP.[3] Unfortunately, *no* development has occurred pursuant to a Decree-compliant IP. That has allowed the County — with the acquiescence or collaboration of HUD, the U.S. Attorney, and the Monitor — to proceed on an *ad hoc* basis. Not surprisingly for a civil rights defendant, Westchester's goal has been to develop in a manner that avoids changing the structural status quo; sadly, the County has been allowed to do that.

The units were supposed to AFFH; that is, overcome barriers to fair housing choice. Instead, they reinforce separateness. They are largely located adjacent to highways and railroads and are not within existing, highly White residential neighborhoods. They are not economically integrated (identifying them as separate and foregoing the market-rate housing that would provide cross-subsidy for the affordable housing). Some are located on Census Blocks that already have significant minority population (the City of Rye site, for example, is on a census block that is approximately 50 percent Latino and African-American; to get from the housing to the public street, one has to cross into Port Chester, an area of high Latino concentration).

Perhaps most notably, the bulk of units developed are being placed where barriers to fair housing choice *had already been overcome via litigation that took place prior to the entry of the Consent Decree.* In other words, the sites were selected in order to *avoid* overcoming barriers to fair housing choice that still existed, exactly the opposite of the Decree requirement that units must further the AFFH objective of the Decree. And the result is no net gain in the number of affordable housing units permitted to be constructed. We have instead only an accounting trick create the *appearance* of progress (the window-dressing approach).[4]

The technique of using sites that don't require barriers to be overcome (a stark betrayal of the idea of using each of the 750 units as a catalyst to end barriers to fair housing choice) has not been an isolated phenomenon. Just the Larchmont site (46 units) and the Cortlandt site (83) units — both in the already-opened-up-by-litigation category — together constitute 45 percent of the 284 new units shown on Westchester's 2013 First Quarter Report. If one includes the June Road site (65 units on a block that is 19 percent Latino), a site which I am advised was also opened up to development as a result of old litigation that predated the Consent Decree, the total would be 69 percent of the 284 claimed new units.

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[3] *See* Consent Decree ¶ 18 (IP to be provided within 120 days of entry of the Consent Decree "setting forth with specificity the manner in which the County plans to implement" the requirement to build affordable AFFH units); Consent Decree ¶ 19 (anticipating that the plan would contain "proposed timetables and benchmarks for the first six-month and one-year periods and for each year thereafter).

[4] If there were, prior to the Consent Decree, land permitting (under existing zoning) 50 units of affordable housing with desegregation potential available to be developed, using those same units to "count" under the Consent Decree means that you still have only 50 units available. If, on the other hand, you create the opportunity for 50 new units by overcoming current zoning barriers in the course of Consent Decree implementation, then you have a total of 100 units with desegregation potential. The Consent Decree demanded the latter approach; Westchester has successfully pursued the former.

It gets worse. When you add in developments on census blocks with significant minority population (that is, development that, at best, has no integrative effect, and, at worst, perpetuates segregation), **we're up to about 86 percent of units that clearly should not "count." Westchester is well behind even the interim benchmarks.**[5]

And the development that is occurring is being concentrated in municipalities in a manner contrary to the Consent Decree's intent. Looking at 2010 Census data,[6] only 78 units are in jurisdictions that fit the demographic profile of Consent Decree ¶ (7)(a). That's only 12.4 percent of the minimum 630 units to be built in such jurisdictions.

In contrast, 114 units are located in jurisdictions that fit the demographic profile of Consent Decree ¶ (7)(b). That's fully 190 percent of the *maximum of 60* permitted under the Decree. 92 units are located in jurisdictions that fit the demographic profile of Consent Decree ¶ (7)(c). That's 153 percent of the *maximum of 60* permitted under the Decree. **The units are being concentrated where they are not supposed to be.**

Westchester, of course, has obligations beyond the unit-specific. You said last week that there have been "bumps in the road" in connection with those obligations. The statement was consistent with HUD's policy of trying to pretend that there has been "progress," but altogether inconsistent with reality. In fact, Westchester has violated and continues to violate each and all of its material obligations under the Decree.

I enclose a letter I send yesterday to the Monitor setting out some of those violations. I want to reiterate here the fact that HUD's focus on an AI ignores the fact that the Decree has *both* analysis *and* action requirements.

Paragraph 32, for example, *is* an *analysis* requirement, and one 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.)[7] By contrast, the two obligations of

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[5] This letter is not intended to be a comprehensive review of all sites, and should not been taken as any acknowledgment on the part of ADC that as many as 14 percent of units should count.

[6] The paragraph 7 criteria were able to be changed or sought to be changed by the Monitor or the Government to, among other things, "take into account of 2010 Census Date in the determination of eligible municipalities and census blocks" or "to remedy a concentration or other issue related to the geographic distribution of the Affordable AFFH Units that does not serve the *purpose of the [Consent Decree] to AFFH."* Consent Decree ¶¶ 15(a)(iii). *See also* Consent Decree ¶ 15(c) (contemplating that the Government could recommend modifications or refinements) and Consent Decree ¶ 15(f) allowing the Government to seek Court review where "the County has refused to provide consent or the Monitor has refused to approve a proposal from the Government." The Monitor and the Government did not do so because it is easier to pretend that a site is appropriate using old 2000 Census data.

[7] 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 a years-long violation of the Decree as to which no one has sought to hold the County in contempt.

paragraph (7)(j), dealing with municipalities who have not removed zoning and other barriers to fair housing, required Westchester to take legal *action*.[8]

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Mr. Deputy Secretary: In a letter I sent to the Monitor just two weeks after the entry of the Decree (enclosed), I wrote that "appeasement only emboldens resistance." I continued by saying that, "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."

That advice (which I shared with HUD and the U.S. Attorney) was ignored completely. The idea was to go for "low-hanging" fruit and to try to get "buy-in" from a civil rights defendant. Theoretically, buy-in is fine if it means that the civil rights defendant adapts to its court-ordered obligations. But, as applied in this case, buy-in meant the Government's and the Monitor's adapting to the status quo insisted upon by Westchester and its municipalities. The cost of buy-in has been the abandonment of the requirements of the Decree; the cost of picking low-hanging fruit has been the selection of anti-AFFH sites that serve only to cover up the lack of real progress.

Almost four years after the entry of the Decree, much of its promise is irretrievably gone. But there is a simple and sound method to recover some of the lost ground. Take the Consent Decree and read each provision, asking "what does this intend" and "what does this require" and "has the County been obeying." You'll see very quickly that HUD's duty, like that of the U.S. Attorney and the Monitor, is to bring to Judge Cote's attention the *whole* pattern of the defendant's non-compliance and to ask her both to hold the County in contempt and to order the relief that ADC sought in its 2011 motion to compel compliance.

Very truly yours,

Craig Gurian

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cc: Bryan Greene

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[8] It is impossible to read the first page-and-a-half of the Decree without recognizing that the 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.