UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC.,	:	
Plaintiff,	:	REPORT AND RECOMMENDATION
-v.-	:	06 Civ. 2860 (DLC) (GWG)
WESTCHESTER COUNTY, NEW YORK,	:	
Defendant.	:	

GABRIEL W. GORENSTEIN, United States Magistrate Judge

In 2006, The Anti–Discrimination Center of Metro New York, Inc. brought a qui tam action on behalf of the United States under the False Claims Act alleging that Westchester County ("the County") had made false certifications to the United States Department of Housing and Urban Development regarding its efforts to "affirmatively further fair housing" under 42 U.S.C. §§5304(b)(2), 12705(b)(15). See generally U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cnty., N.Y., 712 F.3d 761, 765-67 (2d Cir. 2013). The Government intervened and the parties simultaneously submitted a settlement resolving the litigation. See Order Granting Application of United States to Intervene, filed August 10, 2009 (Docket # 319); Stipulation and Order of Settlement and Dismissal, filed August 10, 2009 (Docket # 320) ("the Settlement"). In the Settlement, the County agreed to a set of injunctive measures as well as the appointment of a Monitor to oversee the County's compliance.

On May 8, 2015, the Monitor issued a report finding that the County had failed to comply with certain provisions of the Settlement. See Monitor's Supplemental Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the 2014 Calendar

Year, filed May 8, 2015 (Docket # 507) ("the Report"). The County has now objected to portions of the Report.[1]

For the reasons stated below, we conclude that the County's objections should be sustained in part and overruled in part.

I. BACKGROUND

A. The Settlement

The centerpiece of the Settlement is the County's agreement to the construction of 750 new affordable housing units ("AFFH units") within seven years of the agreement. Settlement ¶ 7. To ensure satisfaction of this obligation, the Settlement requires the County to meet certain benchmarks pertaining to the 750-unit goal. Id. ¶ 23. There are two distinct obligations that must occur at the end of each calendar year: first, to have a certain number of AFFH units with "financing in place," and second, to have a certain number of AFFH units "with building permits." This portion of the Settlement provides as follows:

[1] See County's Objections to the Monitor's Report and Recommendation, filed June 16, 2015 (Docket # 518) ("Cnty. Obj."); Memorandum of Law of the United States in Support of the Monitor's Report and Recommendation and in Opposition to the Objections filed by Westchester County and for Contempt, filed July 21, 2015 (Docket # 529) ("Gov. Mem."); County's Reply Memorandum of Law in Further Support of its Objections to the Monitor's Report and Recommendation and in Opposition to the Contempt Application of the United States, filed August 11, 2015 (Docket # 532) ("Cnty. Reply"); Letter to Magistrate Judge Gabriel W. Gorenstein from David J. Kennedy, filed August 14, 2015 (Docket # 542).

By end of calendar year	Sites with financing in place (number of units)	Units with building permits
2010		
2011	100	50
2012	200	125
2013	300	225
2014	450	350
2015	600	525
2016	750	750

Id. ¶ 23.

The Settlement recites that the "nature of real estate development, especially in the context of developing affordable housing, depends on a number of factors that cannot always be predicted or controlled." Id. ¶ 15. Accordingly, paragraph 7 of the Settlement requires that

> (i) The County shall use all available means as appropriate to achieve the objectives set forth in this paragraph, including, but not limited to, developing financial or other incentives for other entities to take steps to promote the objectives of this paragraph, and conditioning or withholding the provision of County funds on actions that promote the objectives of this paragraph . . .
>
> (j) 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.

Id. ¶¶ 7(i)-(j).

B. The Chappaqua Station Development

The current dispute relates to a development known as "Chappaqua Station" in New Castle, New York ("the Town"). The dispute has arisen because in order for the County to meet paragraph 23's requirement that there be 450 units with "financing in place" as of December 31, 2014, 24 of the project's 28 units must be counted. Report at 10.

In February 2012, the County, the Town of New Castle, and Conifer Realty ("Conifer") approached the Monitor about including the Chappaqua Station development as part of the AFFH units under the Settlement. See Monitor's Second Biennial Assessment of Westchester County's Compliance, dated June 26, 2014 (Docket # 478) ("Second Biennial Assessment"), at 60. The County offered significant financing to New Castle to support the building of Chappaqua Station. See id. New Castle had previously approached Conifer to lead the development of Chappaqua Station and, working with County and Town officials, Conifer developed a proposed building plan for submission to the Monitor. See id. at 60-61. In September 2012, the Monitor endorsed Conifer's proposal for Chappaqua Station and approved the 28 units within the development as "further[ing] the goals of the consent decree." See id. at 61; Letter from James E. Johnson to Andrew Bodewes, Vice President Conifer Realty LLC, dated September 7, 2012 (annexed as Ex. 83 to Supplemental Exhibits to the Monitor's Second Biennial Assessment of Westchester County's Compliance Part 6 of 6, filed June 27, 2014 (Docket # 487).

On September 10, 2013, the Town of New Castle granted Conifer a "Special Permit" to build the Chappaqua Station development. Town of New Castle Town Board, Conifer Special Permit Approval, dated September 10, 2013 (annexed as Ex. E. to Declaration of David J. Kennedy, filed July 21, 2015 (Docket # 528) ("Kennedy Decl.")), at 26. However, the Special

Permit required Conifer to acquire certain variances from the "New York State Department of State Review Board" ("the State Board of Review"). Id. ¶ 2.8.6. It also noted that "[o]ther variances may be required upon further review, upon receipt of a complete Building Permit application, and/or upon final design." Id. ¶ 2.8.6.1. Proceedings then took place before the State Board of Review, in which Conifer requested the necessary variances for Chappaqua Station.

At the initial hearing on December 10, 2013, the State Board of Review adjourned the matter to a later date and requested further information from the parties. Minutes of Hearing, In re Chappaqua Station LLC, Petition No. 2013-0524, dated December 10, 2013 (annexed as Ex. K to Declaration of Norma Drummond, filed June 16, 2015 (Docket # 520) ("Drummond Decl.")) ("State Board of Review December 2013 Hearing"), at 150. Soon after the hearing, on December 16, 2013, the County voted against a funding proposal for Chappaqua Station. See Lohud Westchester Blog, dated December 17, 2013 (annexed as Ex. G to Kennedy Decl.); Gov't Mem. at 7. By this point, some community opposition to the project had developed. See Flyer (annexed as Ex. F to Kennedy Decl.). Indeed, at the December 10 hearing before the State Board of Review, a new Town Supervisor testified against Conifer's request for variances. State Board of Review December 2013 Hearing at 83-86. The Town Building Inspector testified unfavorably as well, at both the December 2013 Hearing and the subsequent meeting on April 18, 2014. State Board of Review December 2013 Hearing at 71-82; Minutes of Hearing, In re Chappaqua Station LLC, Petition No. 2013-0524, dated April 4, 2014 (annexed as Ex. L to Drummond Decl.), at 49-56. On July 2, 2014, the State Board of Review denied many of Conifer's variance requests. Minutes of Hearing, In re Chappaqua Station LLC, Petition No. 2013-0524, dated July 2, 2014 (annexed as Ex. M to Drummond Decl.), at 11-22. On November

17, 2014, Conifer returned to the State Board of Review with a modified proposal for Chappaqua Station and a new petition for variances. See Minutes of Hearing, In re Chappaqua Station, LLC, Petition No. 2014-0573, dated December 9, 2014 (annexed as Ex. N to Drummond Decl.) ("State Board of Review December 2014 Hearing"), at 3. This new proposal soon received the County's financial support. On November 26, 2014, the County enacted four acts to allow construction of the project. These acts (1) acquired the land for the project; (2) authorized the issuance of bonds to finance the acquisition of the land; (3) authorized the issuance of bonds to finance the costs of infrastructure improvements; and (4) authorized the County to enter into an agreement with the Town of New Castle related to the project. See Westchester County N.Y. Act Nos. 212-2014, 213-2014, 214-2014, 215-2014, dated November 24, 2014 (annexed as Ex. U to Drummond Decl.). We will refer to these collectively as the "Chappaqua Development Bond Acts" and to the bonds they authorize as the "County Bonds." The two Chappaqua Development Bond Acts that authorized the issuance of bonds contained the following provision: "[t]he issuance of bonds. . . shall be subject to the approval of all required State and Municipal variances." See Westchester County N.Y., Act Nos. 213-2014 § 1, 214-2014 § 1 (annexed as Ex. U to Drummond Decl.).

On January 22, 2015, the State Board of Review approved Conifer's new request for State variances notwithstanding the opposition from the New Castle Town Supervisor and its Building Inspector. See Chappaqua Daily Voice, State Board Approves Variances for Chappaqua Station, dated January 22, 2015 (annexed as Ex. J to Kennedy Decl.) ("Daily Voice Article"); State Board of Review December 2014 Hearing at 46-54. The State Board of Review's resolution was memorialized in a written decision on April 27, 2015. Decision on Petition No. 2014-0573, dated April 27, 2015 (annexed as Ex. W to Drummond Decl.).

Despite having obtained the necessary variances from the State Board of Review, Conifer faced problems both in maintaining their Special Permit and in acquiring a local building permit. See Declaration of Edward J. Phillips, filed August 11, 2015 (Docket # 536) ("Phillips Decl."), ¶¶ 59-62, 84-89. On February 3, 2015, Conifer contacted New Castle to confirm the length of the Special Permit the Town had previously authorized. Phillips Decl. ¶ 58. The Town took the position that the Special Permit was valid only for a period of 18 months, while Conifer argued that the permit was valid for 25 years. Id. ¶¶ 58-59. Under New Castle's interpretation of the Special Permit, the permit would expire on March 20, 2015. Conifer Realty, LLC v. Town of New Castle, Index No. 5286/2015 (Sup. Ct. Westchester Cty.) (annexed as Ex. L to Kennedy Decl.) ("State Court Decision"), at 3. Because of this looming deadline, the Town advised Conifer to request an extension from the Town Board, which the Town suggested "was likely to be granted." Phillips Decl. ¶¶ 59-62. Instead, on February 19, 2015, Conifer initiated litigation against the Town seeking a judicial declaration regarding the Permit's length. See Verified Complaint, Conifer Realty, LLC, v. Town of New Castle, dated February 19, 2015 (annexed as Ex. J to Phillips Decl.); State Court Decision. The County did not join as a party or participate in the suit. See State Court Decision. On May 6, 2015, the court hearing Conifer's action rejected Conifer's arguments and granted the Town's motion to dismiss. Id. at 8. Nevertheless, on May 26, 2015, the Town Board approved an extension of Conifer's Special Permit until November 2016. Town of New Castle Town Board, Resolution Extending Time to Complete Improvements Pursuant to Town Code § 60-430(M), dated May 26, 2015 (annexed as Ex. M to Kennedy Decl.).

Notwithstanding the acquisition of both the necessary State variances and the extension of the Special Permit, Conifer had yet to acquire a building permit from New Castle's Building

Inspector as of the time of the briefing of the instant Objection. Gov. Mem. at 10; Cnty. Reply at 20. The Town has estimated that the review process of Chappaqua Station will conclude by "the end of September 2015," Philips Decl. ¶ 88, an estimate that has not been updated since the briefing of the Objection. The Government contends that the Town Building Inspector may further delay the progress of Conifer's variance requests because "[he] opposed Chappaqua Station in the past, and spoke out against it at the [State Board of Review] meetings on December 10, 2013, again on April 8, 2014, and again on December 9, 2014." Gov. Mem. at 9-10 (internal citations omitted). Furthermore, the Government notes that New Castle's Building Inspector has suggested he would not begin reviewing Conifer's request until the $152,000 permit fee was paid, and that even then, it "would go . . . to the bottom of the pile." Id. [2]

D. Monitor's 2014 Supplemental Report

On May 8, 2015, the Monitor filed the Report regarding the County's progress toward meeting its 2014 benchmarks under the Settlement.[3] See Report. We will not repeat the full factual description contained in the Report, id. at 1-8, familiarity with which is assumed.

Upon review of the County's progress, the Report found that the County had breached its duty to ensure "financing [was] in place" for the required benchmark of 450 AFFH units as of December 31, 2014. Id. at 11. The Report reached this conclusion because it did not count the 28 AFFH units within the Chappaqua Station development toward the 2014 benchmark. Id. The

[2] It appears that the permit fee was paid on July 1, 2015. Phillips Decl. ¶ 84.

[3] The Monitor had previously filed a status report reviewing the entirety of the County's progress but had requested further information from the parties concerning the status of the Chappaqua Station development. See Monitor's Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the 2014 Calendar Year, filed April 1, 2015 (Docket # 506).

Report noted that the County had financed the project through the use of county bonds that were "subject to the approval of all required State and Municipal variances." See Report at 3; Westchester County N.Y., Act Nos. 213-2014 § 1, 214-2014 § 1 (annexed as Ex. U to Drummond Decl.). The Report found that, as of December 31, 2014, the approval of the outstanding variances had not occurred. Id. at 13-14. The Report therefore concluded that because the Town had reserved the right in Conifer's Special Permit to impose additional local variances, financing could not be deemed "in place" without an official assurance from the Town that no further variances or pre-conditions would be required. Id. at 16.

The Report found that the County's failure to provide "financing in place" triggered an immediate monetary penalty of $30,000 and subsequent penalties of $60,000 for each month of continued non-compliance. Report at 14; Settlement ¶ 38. The Report further found that these penalties accrue "until such time as: (i) the bonds are issued; or (ii) the County presents dispositive evidence, in the form of a final order issued by the State Board of Review and a declaration by New Castle that no further variances are required, that all preconditions to its funding commitment have been met." Report at 16. The Report also determined that the County's breach would require development of AFFH units beyond the 750 already required under the Settlement. Id.

Separately, the Report found that the County had violated paragraph 7 of the Settlement because it had failed to "use all available means as appropriate" to address municipal opposition to the Chappaqua Station development. Id. at 17, 20; Settlement ¶ 7. The Report found that the Town had undertaken actions that hindered the building of AFFH units in violation of paragraph 7(j), including the Town's public criticism of the project, the Town's opposition before the State Board of Review, its litigation with Conifer, and the statement that Conifer's application would

"go all the way to the bottom of the pile." Report at 19. The Report further found that the County had not used "all available means" to address the Town's opposition, characterizing the County's actions as that of a "spectator." Report at 20. Specifically, the Report states that the County had

> refused to consider financial or other incentives to encourage New Castle to modify its stance; failed to undertake efforts to reach out to New Castle to address its opposition; declined to specify any steps it plans to take to address New Castle's opposition; and had not undertaken any steps in connection with the pending litigation between New Castle and Conifer. Rather, the County has offered the hope that the litigation will address New Castle's concerns. Hope, however, is not a strategy.

Report at 20. The Report stated it was referring the County's violation to the Department of Justice "for a determination of whether a contempt motion should be filed." Id. at 21.

C. The County's Objections

The County makes essentially three objections to the Report: (1) that the Monitor failed to comply with a provision of the Settlement prior to his submission of the Report that required him to meet with the parties; (2) that the Report erred in finding that County did not have "financing in place" for the Chappaqua Station development as of December 31, 2014; and (3) that the Report incorrectly found that the County failed to use "all available means as appropriate" to address any opposition to Chappaqua Station by the Town of New Castle. Cnty Obj. at 13-29.

II. APPLICABLE LAW

A. Standard of Review

Review of both the Monitor's factual findings and legal conclusions are de novo. See Fed. R. Civ. P. 53(f)(3),(4) (review of factual findings and legal conclusions of a master

appointed by a court are "de novo").[4]

B. Interpretation of the Settlement

Interpretation of the Settlement here is in accordance with the law that governs the interpretation of consent decrees. See U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cnty., N.Y., 712 F.3d 761, 767 (2d Cir. 2013). As the Second Circuit stated in the course of its review of previous objections to a report from the Monitor in this case:

> Consent decrees "reflect a contract between the parties (as well as a judicial pronouncement), and ordinary rules of contract interpretation are generally applicable." Doe v. Pataki, 481 F.3d 69, 75 (2d Cir.2007). This requires that " 'deference ... be paid to the plain meaning of the language of a decree and the normal usage of the terms selected.' " United States v. Broad. Music, Inc., 275 F.3d 168, 175 (2d Cir.2001) (quoting Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir.1985)). The rules of contract interpretation, however, do not contemplate considering any provision of the contract in isolation "but in the light of the obligation as a whole and the intention of the parties as manifested thereby." JA Apparel Corp. v. Abboud, 568 F.3d 390, 397 (2d Cir.2009) (citation and internal quotation marks omitted).

Id.

Upon reviewing the meaning of a contract's terms, a court's initial question is "whether the contract terms are ambiguous." Revson v. Cinque & Cinque, P.C., 221 F.3d 59, 66 (2d Cir.

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[4] In ruling on a previous objection to a report from the Monitor, this Court issued an Opinion and Order regarding the dispute. See Opinion and Order, filed March 16, 2012 (Docket # 396). We did so based on our conclusion that paragraph 14(d) of the Settlement reflected the parties' consent to disposition of such disputes by the magistrate judge assigned to the case pursuant to 28 U.S.C. § 636(c)(1), and that the references in paragraph 14(d) to the standard of review referred to review of the Monitor's decision, not review by the district court of the magistrate judge's decision. See id. at 2-3. The district judge rejected this view, however, see Opinion and Order, filed May 3, 2012 (Docket # 402), at 10-11, a conclusion that was affirmed by the Second Circuit. Accordingly, we interpret paragraph 14(d) as referring all objections to a Monitor's report to the magistrate judge for purposes of providing a report and recommendation to the district judge pursuant to 28 U.S.C. §636(b). We thus also conclude that the reference in paragraph 14(d) to review "governing reports and recommendations from a magistrate judge" does not refer to review of the Monitor's reports. As a result, the citation above is to the standard governing review of reports from special masters.

2000). The meaning of an unambiguous settlement agreement "is a question of law for the court to decide," id., and should be "discerned within [the agreement's] 'four corners, and not by reference to what might satisfy the purposes of one of the parties to it.'" United States v. Apple, Inc., 791 F.3d 290, 337 (2d Cir. 2015) (citing United States v. Armour & Co., 402 U.S. 673, 682 (1971)).

As with any contract, a court construing a consent decree "also may consider . . . normal aids to construction such as the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree." United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, 998 F.2d 1101, 1106 (2d Cir. 1993) (citation and internal quotation marks omitted). Ultimately, a reviewing court remains bound to the "express terms of a consent decree and may not impose supplementary obligations on the parties even to fulfill the purposes of the decree more effectively." Perez v. Danbury Hosp., 347 F.3d 419, 424 (2d Cir. 2003).

III. DISCUSSION

A. Paragraph 40 Meeting Requirement

The Report arose from the Settlement's requirement that the Monitor file periodic reports addressing the "observed or substantiated lapses in the County's compliance . . . [and] the adequacy of the County's implementation plan and efforts." Settlement ¶ 39. The Settlement provides that, prior to any such submission, the Monitor "shall meet with representatives of the County and the Government to discuss compliance issues, recommendations for corrective action, and other matters." Id. ¶ 40. The text of the Settlement does not address the consequences of any failure on the part of the Monitor to engage in the required meeting and

discussion.

The County alleges that the Monitor did not fulfill his obligation to meet with representatives from both sides prior to issuing the Report and to discuss with them the issues raised in the Report. The County asserts that the Monitor's failure to adhere to the terms of the Settlement has denied it "the opportunity to have the discussion that is expressly mandated by Paragraph 40." Cnty. Obj. at 14. In the County's view, the discussion should have addressed both compliance issues and the Monitor's "recommendations for corrective action." Cnty. Reply at 3. In response, the Government notes that there were "three rounds of letters and a telephonic meet and confer," between the County and the Monitor prior to the submission of the Report. Gov. Mem. at 16. The County argues that the letters and phone call did not match the issues ultimately raised in the Report. Cnty. Reply at 3-4. After the Report was submitted, the Monitor requested a meeting with both parties and the Court, to which the County failed to respond. Id. at 4; Gov. Mem. at 16.

The Court does not believe it is necessary to decide whether there has been a violation of paragraph 40 of the Settlement. Even if the County is correct that the meeting required by that paragraph did not occur, its objection must be overruled because there is nothing in the language or structure of the Settlement to suggest that any failure to comply with the meeting requirement renders a Report issued pursuant to the Settlement invalid. The paragraph of the Settlement describing the process for objecting to a Report, paragraph 14(d), makes no reference to the meeting requirement. Nor is there any other indication in the Settlement text that a failure to comply with the meeting requirement has any bearing on the validity of a Report from the Monitor.

Moreover, the County has not shown any prejudice that has resulted from any failure to

meet. While the County suggests that it might have convinced the Monitor of the merits of its position had there been a meeting, Cnty. Reply at 3, this does not qualify as prejudice inasmuch as the County has not been constrained in any objections it wishes to make to the substance of the Monitor's Report.

In the end, any failure to meet could not detract from the Court's obligation to determine whether there has been a breach of the County's obligation to comply with the Settlement. This is best understood by examining contract law principles which, as already noted, govern the interpretation of the Settlement. See U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc., 712 F.3d at 767. Under principles of contract law, only a "material" breach of the Settlement would have excused the County's performance of its obligations. See, e.g., Frank Felix Assocs., Ltd. v. Austin Drugs, Inc., 111 F.3d 284, 289 (2d Cir. 1997). To qualify as a material breach, the breach must be "so substantial that it defeats the object of the parties in making the contract." Id. Any failure to meet plainly did not defeat the main purpose of the Settlement, which was to construct 750 fair housing units. Accordingly, the County's objection to the Report on the basis that there was a failure to meet should be overruled.

B. Paragraph 23

The Monitor found that the 28 units of the Chappaqua Station development did not have "financing in place" as of December 31, 2014. Settlement ¶ 23; Report at 13-14. Because the Monitor did not include these units in the County's yearly benchmark total, the Monitor found the County had not satisfied its obligation under paragraph 23. See Report at 13-14.

The question of whether the County violated the Settlement on December 31, 2014, turns on the meaning of the words "financing in place." As already noted, a court interpreting a consent decree must read the language selected for its "plain meaning" and according to the

chosen words' "normal usage." Mastrovincenzo v. City of New York, 435 F.3d 78, 103 (2d Cir. 2006) (citations and internal quotation marks omitted). Additionally, where possible, a consent decree's terms should be read so as not to render any provision superfluous or meaningless. See Galli v. Metz, 973 F.2d 145, 149 (2d Cir. 1992).

The parties provide no evidence that the term "financing in place" has an established trade usage. The cases that the Government has pointed to that use the term, Gov. Mem. at 17-19, do not suggest that it has a meaning in common parlance, let alone a fixed legal meaning that is relevant to the issue before the Court. See, e.g., Irving Capital Corp. v. Serologicals Acquisition, Inc., 1986 WL 2763, at *2 (S.D.N.Y. Feb. 27, 1986) (quoting a party's letter describing their belief that an underlying contract required "a binding written commitment for all financing in place"); Internet Homes, Inc. v. Vitulli, 778 N.Y.S.2d 534, 535 (2d Dep't 2004) (finding unsubstantiated assertions of credit and the allegation that a party was ready, willing, and able to perform insufficient to show financial capacity to purchase property). Nonetheless, we agree with the Government that the term "financing in place" would ordinarily be understood to mean that a party has "secur[ed] the funds necessary to meet the obligation." Gov. Mem. at 18.

The Government further argues that "financing in place" means that there is an "absence of contingencies or preconditions." Gov. Mem. at 18. But the cases the Government cites do not say this directly. At best, they refer to the financing involved in those cases as being "binding" or "firm." See, e.g., Payer ex rel. Transition Metals Technology, Inc. v. The SGL Carbon, LLC, 2006 WL 2714190, at *8 (W.D.N.Y. Sept. 22, 2006) ("financing in place" requires more than mere "attempts and efforts" to secure financing); In re Ralph C. Tyler, P.E., P.S., Inc., 156 B.R. 995, 997 (Bankr. N.D. Ohio 1993) (Chapter 11 plan did not have "firm

financing in place" because petitioner had produced absolutely "no evidence of any commitment to such financing"). We certainly do not glean from these cases that there is any common understanding of the term "financing in place" that excludes a condition of any kind.

To assist us in understanding the meaning of "financing in place," we first turn to the dictionary definition of the phrase "in place." See, e.g., CBS Corp. v. Eaton Corp., 2009 WL 4756436, at *4 (S.D.N.Y. Dec.7, 2009) ("A sound method for determining the plain meaning of words is to look at their dictionary definitions.") (citation and internal quotation marks omitted). The dictionary definition closest to the meaning intended here is "set up, ready for action; (fig.) in force, operative" — a meaning that is related to an original meaning of "in place" as being in "proper position."[5] Thus, in the context of financing, the term "in place" is best understood to be financing that is ready or in force — that is, in existence and available to be accessed as a practical matter without restriction.

The purpose of the Settlement confirms the phrase's meaning. As noted, the main purpose of the settlement was to construct the 750 AFFH units. Paragraph 23's creation of a benchmark for units with "financing in place" was obviously intended to further that goal and to ensure that it would be timely achieved. Thus, the phrase must be construed to refer to units that have "financing in place" as a practical matter.

The Report's only concern about the financing of the Chappaqua development is that the acts allowing issuance of the County Bonds make reference to the fact that "[t]he issuance of bonds . . . shall be subject to the approval of all required State and Municipal variances."

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[5] In Place, Oxford English Dictionary, definition P2.a.(c), http://www.oed.com/view/Entry/144864?rskey=2mPRGT&result=1#eid29910380 (last visited Nov. 18, 2015).

Westchester County N.Y., Act Nos. 213-2014 § 1, 214-2014 § 1 (annexed as Ex. U to Drummond Decl.). Read in isolation, the use of the word "subject to" would understandably raise concerns that it operated as a restriction on the availability of financing. But this reading does not consider the practicalities of the situation. The record is devoid of evidence that the inclusion of this provision makes the financing any less available for the Chappaqua Station development as a practical matter than would be the case if the bond acts omitted the "subject to" language. The Government does not dispute the County's argument, Cnty. Obj. at 17-18, that even without this phrase, the project would still require approval of any required state and municipal variances. See also Phillips Decl. ¶ 22 ("By operation of law, Conifer has always had the legal obligation to fulfill the conditions attached to the Special Permit, including but not limited to the issuance of all required building and fire code variances.").[6]

Moreover, uncontested testimony reflects that the provision has no practical effect on the availability of financing from the County. According to Ann Marie Berg, the Commissioner of the Westchester County Department of Finance and the Chief Financial Officer for the County, the County uses its available funds to pay for the expenses relating to a capital project and only afterwards issues bonds to reimburse the money spent on the project. Declaration of Ann Marie Berg, filed June 16, 2015 (Docket # 521) ("Berg Decl."), ¶ 3. Thus, after a bond act has been adopted to authorize the issuance of bonds for an AFFH project, the County can spend its own funds for the project, which are then reimbursed by the bonds issued at a later date. Id. ¶ 3. This

[6] The Government contends that any argument that the phrase in the County Bond acts does not affect the availability of financing violates the canon of construction that a court should "give effect to every word of a statute wherever possible." Gov. Mem. at 22 (citation omitted). But we seek to give full effect to phrase as written. That is, we accept that the bonds cannot be issued until the variances have been obtained. However, as described above, giving this phrase full effect has no practical effect on the availability of financing for the project.

system is described in both of the acts authorizing the County Bonds, which state that

> prior to issuance of the bonds authorized herein . . . [t]he County intends to finance, on an interim basis, the costs or a portion of the costs of said objects or purposes for which bonds are herein authorized, which costs are reasonably expected to be reimbursed with the proceeds of debt to be incurred by the County, pursuant to this Bond Act . . .This Act is a declaration of official intent adopted pursuant to the requirements of Treasury Regulation Section 1.150-2.

Westchester County N.Y., Act Nos. 213-2014 § 3, 214-2014 § 3 (annexed as Ex. U to Drummond Decl.). Indeed, throughout the implementation of the Settlement, the County has funded other projects in this manner. Drummond Decl. ¶ 35. Under this system of financing, the variance condition in the acts authorizing the County Bonds — even if it was not already irrelevant because of Conifer's inability to build without any required variances — could only delay the County's ability to reimburse itself for earlier disbursements of funds. It would not have any effect on the funding of the project. Notably, the Government does not dispute the County's ability to provide the necessary funding prior to the issuance of the applicable bonds. See also Letter to Darryl C. Towns, Commissioner NYS Homes and Community Renewal, from Edward Buroughs, Commissioner Westchester Department of Planning, dated May 21, 2014 (annexed as Ex. S. to Drummond Decl.) (stating that the County has a "capital project budget totaling $51.6 million to be used to assist in financing AFFH housing units").

Commissioner Berg similarly explains that this method accords with how the County ordinarily pays an entity such as Conifer for the construction of an AFFH project: that is, the bonds are issued only after the builder has submitted its claim for construction costs. Berg. Decl. ¶ 4. There is no suggestion that a claim for construction costs could even be made without any required State and Municipal variances having been approved sometime beforehand. To the contrary, there is uncontested evidence in the record that funds are not released until after the

"closing" occurs; that the "closing" cannot occur until building permits are obtained; and that building permits cannot be obtained until "all necessary variances have been obtained." Drummond Decl. ¶¶ 36-39. Thus, as a practical matter, this provision in the County Bonds regarding the approval of variances has no effect on the availability of financing for the Chappaqua Station development.

The Government notes that the variance language in Bond Act No. 212-2014 is absent from the County acts relating to an earlier AFFH project known as the Waterwheel Development Project. Gov. Mem. at 20-21. But the absence of the variance language in the bonds for that project has not been shown to have had any bearing on the availability of its financing. As the County notes, Cnty. Reply at 13-14, the Waterwheel project was funded in the exact same manner as Chappaqua Station — that is, by the County using its funds to finance the project on an interim basis and then seeking reimbursement of these funds from the proceeds of a bond, see Westchester County N.Y., Act No. 152-2012, dated October 15, 2012 (annexed as Ex. B to Supplemental Declaration of Anne Marie Berg, dated August 11, 2015 (Docket # 533) ("Supp. Berg. Decl."); see also Supplemental Declaration of Norma Drummond, dated August 11, 2015 (Docket # 534) ("Supp. Drummond Decl."), ¶ 2; Supp. Berg Decl. ¶ 3, 4. There is no evidence that funds for the Waterwheel project were or could have been released in the absence of any required variances.

The conclusion we reach here should not be construed as suggesting that a bond act with conditions of any sort would qualify a project to be counted toward the "financing in place" benchmark. See generally Report at 13 (noting that it is insufficient to meet the benchmark to enact funding legislation where the financing could be "terminated in the event that a precondition is not satisfied"). What is important is that the particular "condition" at issue here

does not operate to affect the availability of money to build the project.

For these reasons, we conclude that the 28 units of the Chappaqua Station development should be counted toward the paragraph 23 "financing in place" benchmark. As a result, there has not been a violation of paragraph 23.

C. The Paragraph 7(i) and 7(j) Requirements

1. Background

Paragraph 7 of the Settlement requires the County to construct 750 new AFFH units. Paragraph 7(i) instructs the County to "use all available means as appropriate . . . including, but not limited to, developing financial or other incentives for other entities to take steps to promote the objectives of this paragraph." Settlement ¶ 7(i). Paragraph 7(j) provides that "[i]n the event that a municipality does not take actions needed to promote [these objectives], . . [t]he County shall use all available means as appropriate to address such action or inaction, including, but not limited to, pursuing legal action." Id. ¶ 7(j).

The Report concluded that New Castle presented opposition to Chappaqua Station development and that the County failed to "use[] all available means as appropriate" to help resolve this opposition. Report at 19-21. The Report highlights that

> New Castle officials ha[d] publically criticized Chappaqua Station . . . testified against Conifer's variance petition . . . and, after Conifer apparently secured the variances, asked the State Board of Review to reconsider . . . engaged in litigation against Conifer; continued to push for the project to be relocated . . . and indicated that Conifer's building permit application 'would go all the way to the bottom of the pile.'

Report at 19. The Report noted that these actions had already caused the County to "miss the financing benchmark for 2014" and also "hinder[ed] the County's ability to achieve Paragraph 7's objective[s]." Id. at 20. In response to this opposition, the Report found the County had acted merely as a "spectator" to the success or failure of Chappaqua Station. Id. The Monitor faulted

the County for

> refus[ing] to consider financial or other incentives to encourage New Castle to modify its stance; fail[ing] to undertake efforts to reach out to New Castle to address its opposition; declin[ing] to specify any steps it plans to take to address New Castle's opposition; and [] not undertak[ing] any steps in connection with the pending litigation between New Castle and Conifer.

Id. In light of these findings, the Report stated that it was referring the County's violations to the Department of Justice "for a determination of whether a contempt motion should be filed." Report at 21.

2. Analysis

We agree that New Castle both "[did] not take actions needed to promote" the building of the AFFH units contemplated in paragraph 7 of the Settlement and also "under[took] actions that hinder[ed] the objectives" of paragraph 7." See Report at 19; Settlement ¶ 7(j). Both New Castle's Town Supervisor and Building Inspector expressed public opposition to Chappaqua Station's development. Daily Voice Article; State Board of Review December 2013 Hearing at 71-82; Minutes of Hearing, In re Chappaqua Station LLC, Petition No. 2013-0524, dated April 4, 2014 (annexed as Ex. L to Drummond Decl.), at 49-56. As the project progressed, the Town Building Inspector is reported to have stated that Conifer's building permit request "would go all the way to the bottom of the pile." Letter from Andrew V. Bodewes, Senior Vice President at Conifer, to William J. Maskiel, New Castle Building Inspector, dated April 2, 2015 (annexed to Report as Ex. 12), at 1. These actions, among others, threatened the ability to construct the AFFH units. Thus the County was obligated to use "all available means as appropriate" to counter this opposition. See Settlement ¶ 7(j).

The County has provided the Court with a list of actions it took to promote the development of Chappaqua Station. See Cnty. Reply at 21. They include, among other things,

review of zoning amendments, testimony from Deputy Commissioner Drummond in favor of the project before the Board of Review, letters requesting further funding for the project, a letter sent to the New York State Department of State in support of Conifer's variance request, and a letter sent to New Castle supporting Conifer's bid for an extension of their Special Permit. Id. However, the issue before this Court is not whether the County took any steps to promote the development of Chappaqua Station, but rather whether the County used "all available means as appropriate" to counter municipal opposition.

Importantly, the significance of this phrase for purposes of the matter before the Court is whether the County should be held in contempt based on its conduct. See Report at 21. As the Second Circuit has noted, to obtain an order of contempt

> [a] movant must establish that (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.

Latino Officers Ass'n City of New York, Inc. v. City of New York, 558 F.3d 159, 164 (2d Cir. 2009) (citation and internal quotation marks omitted). The Second Circuit has further emphasized that a contempt sanction must not be imposed if "there is a fair ground of doubt as to the wrongfulness of the defendant's conduct." Id. (citation and internal quotation marks omitted). In the context of an effort to obtain sanctions for contempt, the Second Circuit has emphasized that the language of a consent decree "must dictate what a party is required to do and what it must refrain from doing." Perez v. Danbury Hosp., 347 F.3d 419, 424 (2d Cir. 2003).

In this instance, there is insufficient evidence to allow the Court to find that the County's conduct met this rigorous test. The obligation to use "all available means as appropriate" is not "clear and unambiguous" with respect to the specific failures to act noted in the Report. While

we can certainly imagine actions or nonactions of the County that would "clearly" constitute a violation of this obligation, the broad language of this provision makes the identifications of such violations a more difficult task than would be the case if the Settlement identified specific actions required of the County. Cf. Perez, 347 F.3d at 424 (court considering contempt must "evaluate whether the order was 'clear and unambiguous' with reference to the conduct in question") (emphasis added).

Turning to the specific matters raised in the Report, the Report states that the County could have offered "financial or other incentives" to encourage New Castle to modify its stance against the project. Report at 20. But the record does not allow us to identify what financial or other incentives should have been offered and why they would be appropriate. The County makes a reasonable argument that it could not properly offer direct financial incentives to overcome the most obvious area in which the Town has frustrated or may frustrate the project — the failure to issue any required variances or permits. Cnty. Reply at 22. While there may be incentives that the County could have (and still might) offer that are not directly tied to the process for granting variances or permits, this is certainly an area where there is "fair ground of doubt," Latino Officers Ass'n City of New York, Inc. 558 F.3d at 164, as to the wrongfulness of the County's conduct and where its obligation to offer such incentives under the Settlement was not clear and unambiguous.

As to the County's failure to intervene or file an amicus brief in Conifer's litigation with the town regarding the duration of the Special Permit, Report at 18, 20, we would view this failure as significant if there were evidence before us that Conifer's efforts in instituting litigation could have been ameliorated by the County's presence. Notably, the judge deciding Conifer's central contention — that its Special Permit issued by the Town had a duration of 25 years —

found that Conifer's argument on this point was "absurd on its face." State Court Decision at 6. We have been presented with no evidence by the Government as to why this conclusion was incorrect, let alone why the County should have become involved in advancing it. Additionally, even if we accept, arguendo, that intervention in Conifer's court action might have been an act that the County could have undertaken, we cannot find that the obligation to do so was "clear and unambiguous." Rather this is an area where, once again, there is "fair ground of doubt" as to the wrongfulness of the County's conduct in choosing not to involve itself with Conifer's court case against the Town.

The same is true of the remaining failings identified in the Report: namely, that as of the date of the Report the County had not made greater efforts to "reach out to New Castle to address its opposition" or specify steps to do so, and that it did not "submit[] testimony at public hearings in support of the development." Report at 18, 20. The County has described a number of steps that it has taken. See Cnty. Reply at 21-23. To find that taking these steps without more violated the settlement, it must be clear what additional steps the County should have taken. While we agree that there were additional steps that the County could have taken that were "available" and "appropriate," we cannot conclude on the current record that the Settlement language was clear and unambiguous "with reference to the conduct in question" such that the County could be held in contempt for not taking the additional actions stated in the Report. Perez, 347 F.3d at 424.

IV. CONCLUSION

For the forgoing reasons, the County's objections should be overruled in part (as to its complaint regarding the alleged failure to meet prior to the issuance of the Report) and sustained as to the remaining objections.

PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days including weekends and holidays from service of this Report and Recommendation to serve and file any objections. See also Fed. R. Civ. P. 6(a), (b), (d). Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with copies sent to the Hon. Denise Cote at 500 Pearl Street, New York, New York 10007. Any request for an extension of time to file objections must be directed to Judge Cote. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See Thomas v. Arn, 474 U.S. 140 (1985); Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010).

Dated: November 19, 2015
New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge