UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel.
ANTI-DISCRIMINATION CENTER OF
METRO NEW YORK,

Plaintiff,

-against-

WESTCHESTER COUNTY, NEW YORK,

Defendant.

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Case 1:06-cv-02860 (DLC)
ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF ANTI-DISCRIMINATION CENTER'S MOTION TO ENFORCE CONSENT DECREE PURSUANT TO CONSENT DECREE, ¶ 58

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INTRODUCTION

Westchester has persistently and comprehensively violated its Consent Decree obligations, including its obligations to use all of its housing programs to end residential segregation throughout Westchester; to develop a compliant Implementation Plan and Analysis of Impediments; to use *all* means, including litigation as needed, to overcome municipally caused barriers to fair housing choice like exclusionary zoning; and to develop units that actually affirmatively further fair housing (*i.e.*, overcome barriers to fair housing choice).

Instead, as during the false claims period, Westchester denies the existence of segregation and maintains a see-no-evil attitude with respect to municipal conduct. Its housing development efforts focus on housing that, *inter alia,* does not require zoning change to be made, is isolated or otherwise undesirable, and is located to minimize its desegregation potential.

The failure of the Government and its Monitor to seek to vindicate the Consent Decree is discussed in the brief of Anti-Discrimination Center ("ADC") in support of its concurrently filed Motion to Intervene. The instant Motion to Enforce the Consent Decree Pursuant to Consent Decree, ¶ 58 focuses on some key elements of Westchester's Decree-violating conduct, and should be granted, we submit, independent of the Court's resolution of the intervention motion.

In connection with ADC's presentation herewith of substantial evidence of Westchester's Decree-violating conduct, ADC respectfully asks the Court to invoke its broad and unquestioned jurisdiction to remedy violations of its orders, especially in connection with matters, like this one, over which it explicitly retains jurisdiction.[1]

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[1] *See* Point VI, *infra,* for further discussion of the Court's authority and responsibility to vindicate the letter and spirit of the Consent Decree. The Court also has broad authority to grant ADC *amicus* status—*see, e.g., Onondaga Indian Nation v. State of New York,* 1997 WL 369389, *2 (N.D.N.Y. 1997) (reciting cases including those premising grant of *amicus* status on ability of *amicus* to aid court and provide perspective not other available to the court)—and should do so for the reasons set forth in the declaration of Craig Gurian in support of ADC's Motion to Enforce ("Gurian Enforcement Decl.").

POINT I
THE CONSENT DECREE'S EXPRESS PURPOSE REQUIRES WESTCHESTER TO ACT TO OVERCOME BARRIERS TO FAIR HOUSING CHOICE.

When this Court found that, for six years, Westchester had "utterly failed" to meet its obligation to affirmatively further fair housing ("AFFH"), the Court pointed out that HUD's AFFH planning guide had long explained that "pursuing affordable housing is not in and of itself sufficient to affirmatively further fair housing." *U.S. ex rel. Anti-Discrimination Center v. Westchester County ("ADC II"),* 668 F.Supp.2d 548, 563 (S.D.N.Y. 2009).

The Consent Decree takes what the Court had characterized as the "distinction between AFFH actions and affordable housing activities," *id.* at 554, as its point of departure.[2] The purpose of the Decree is not simply the development of affordable housing *per se*, but the taking of actions (both unit-specific development and broader steps) that actually AFFH.

The development of affordable housing "in a way that affirmatively furthers fair housing" is identified as "a matter of significant public interest." Consent Decree, p. 1, ¶ 1. One of the key desired end results is the promotion of "sustainable and integrated residential patterns." Consent Decree, p. 1, ¶ 2. As the Monitor has acknowledged, "building a more integrated Westchester" is an "overarching goal" of the Decree.[3]

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[2] Westchester, by contrast, continues to conflate the concepts of "affordable housing" and "fair housing," continuing to use the term "fair and affordable housing" to gloss over its AFFH obligations. The Monitor, despite his direction to Westchester not to do so (Jul. 7, 2010 Monitor Report, *supra,* pp. 23-24), has failed to seek Court assistance to stop a practice that, as he acknowledges "conflates fair housing with affordable housing and obscures the County's obligations to AFFH," and interferes with the clarity that is "vital to the public's understanding of, and confidence in, the County's efforts to meet its obligations under the [consent decree]." That failure is discussed in ADC's Memorandum in Support of Motion to Intervene ("ADC Intervention Memo"), pp. 6-8.

[3] *See* Jul. 7, 2010 Monitor Report, p. 10 [Doc. 329].

The Decree says plainly that funds deposited by the County with HUD will go back to the County not for the development of *any* affordable housing, but "for the development of new affordable housing units *that will AFFH.*" Consent Decree, ¶ 2, emphasis added.

Under the Decree, the County "shall initiate such legal action as appropriate to accomplish *the purpose of this [Consent Decree] to AFFH.*" Consent Decree, ¶ 7(j) (emphasis added); *see also* Consent Decree ¶ 15(a)(iii) (again referring to "the purpose of the [Consent Decree] to AFFH").

In order to AFFH, every jurisdiction must focus "on 'actions, omissions or decisions' which 'restrict housing choices or the availability of housing choices,' or which have the effect of doing so, based on *'race, color,* religion, sex, disability, familial status, or national origin' including '[p]olicies, practices, or procedures that appear neutral on their face…'" *ADC II, supra,* 668 F.Supp.2d at 563 (emphasis in original). Where impediments to fair housing choice are found to exist, every jurisdiction must take appropriate action to overcome the effects of those impediments. *Id.* at 552.

By definition, actions that *eliminate* an impediment are more effective in "addressing" an impediment[4] or "overcoming the effects of" an impediment than actions that leave the impediment in place, and the County's conduct must be assessed with that distinction in mind. The public health context provides a useful analogy. It is not a "bad" thing for a public health authority to treat people who have been infected with West Nile virus. But only by eliminating the pools of standing water that act as breeding grounds for the mosquitoes that ultimately transmit the virus can that authority insure that fewer people face the risk of future infection.

[4] The Decree, expanding on the regulatory language, obliges the County to take all appropriate actions to "address and overcome the effects of [fair housing] impediments. Consent Decree, ¶¶ 32, 32(b)(ii).

Because of the history of the County's indulgence of exclusionary zoning and other forms of municipal resistance to fair housing choice, and because what even Westchester's own Housing Opportunity Commission long ago recognized as the central role that municipalities play in stymieing the development of affordable housing,[5] the Consent Decree specifically directed Westchester to focus on "impediments based on race or municipal resistance to affordable housing development." Consent Decree, ¶ 32(b)(i).

POINT II
WESTCHESTER CONTINUES TO DENY THE DEMOGRAPHIC REALITY THAT IT IS CHARCTERIZED BY RESIDENTIAL SEGREGATION.

In its latest quarterly report, for example, Westchester highlights what it describes as the "remarkable" trend of "increasing population diversity."[6] The County Executive has repeatedly declined to acknowledge that the County is characterized by residential segregation.[7] In fact, an analysis of 2010 Census data makes "clear that Westchester County continues to be highly segregated."[8] On the municipal level, 25 towns and villages have non-Latino, African-American

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[5] *See, e.g.,* Housing Opportunities for Westchester: A Guide to Affordable Housing Development (1997), p. 14 (municipalities in Westchester are "especially vulnerable" to *Berenson* challenges), and Affordable Housing Action Plan, pp. 10, 14 (2004) (progress in removing barriers to affordable housing development "has been minimal in most municipalities," and, "[u]ltimately, it is the municipalities who will determine whether the affordable housing crisis will be eased or whether it will continue to worsen for another decade"), Exs. 1 and 2 to Gurian Enforcement Decl.

[6] Westchester's Quarterly Report for First Quarter 2011, p. 4, Ex. 3 to Gurian Enforcement Decl.

[7] *See, e.g.,* Jul. 22, 2010 interview of County Executive Astorino on Good Day New York *available at* http://www.myfoxny.com/dpp/good_day_ny/weschester-executive-astorino-on-county-budget-crisis-20100722 (Astorino doesn't agree that there are exclusionary zoning or segregation problems); Jul. 28, 2010 interview of County Executive Astorino by Westchester Journal News, *available at* http://www.lohud.com/videonetwork/292403451001/Astorino-s-views-on-housing (interviewer points to Astorino having said on Fox that he didn't believe the County was segregated, Astorino evades demographic reality, replying, "Well, purposely segregated, and I said 'no, I don't think so,' and I don't").

[8] May 30, 2011 Declaration of Andrew A. Beveridge ("Beveridge Decl."), ¶ 4. The "dissimilarity index," for example, is 73.0 for non-Latino, African-Americans and 60.7 for Latinos. *Id.,* at ¶¶ 5-7.

populations of less than 3.0 percent when adjusting for "group quarters" population.[9] Within the Consent Decree's "eligible municipalities," there are 75.97 percent of populated census block groups with non-Latino, African-American population of less than 3.0 percent; 51.24 percent of populated census block groups had *both* African-American population of less than 3.0 percent *and* Latino population of less than 7.0 percent.[10]

In denying the reality of segregation, the County makes clear that it won't try to change that reality; the denial operates to undercut public and municipal support for the Decree.

POINT III
WESTCHESTER HAS VIOLATED THE CONSENT DECREE BY IGNORING ITS OBLIGATION TO OPERATE *ALL* ITS HOUSING PROGRAMS WITH THE GOAL OF ENDING *DE FACTO* RESIDENTIAL SEGREGATION THROUGHOUT THE COUNTY.

The AFFH certification "was not a mere boilerplate formality, but rather was a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations" that required both analysis and action. ADC II, *supra,* 668 F.Supp.2d at 569.

In the Consent Decree, Westchester was required to embrace a new series of substantive obligations applicable to all its housing policies. The County was first required to acknowledge "the importance of AFFH," Consent Decree, ¶ 31, and then, to give that acknowledgment force, was required to establish as "official goals of the County's housing policies and programs" the "elimination of discrimination, including the present effects of past discrimination, *and the elimination of de facto residential segregation.*" Consent Decree, ¶ 31(a). These goals—and

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Another widely used measure of segregation—the isolation index—also reflects high levels of segregation in Westchester. *Id.* at ¶¶ 6-9.

[9] *Id.* at ¶ 22. The exclusion of "group quarters" population is prescribed for classifying municipalities pursuant to Consent Decree, ¶ 7.

[10] *Id.* at ¶¶ 20 *See* Beveridge Decl. ¶¶ 10-18 for further information on how few census block groups in Westchester "look like" the County as a whole (*e.g.,* only 9.86 percent of those census block groups have non-Latino, African-American populations similar to the Countywide level).

other important principles established in Phase I of the litigation[11]—were required to be memorialized in a policy statement adopted by the County. Consent Decree, ¶ 31.

These Consent Decree obligations—especially in the context of a highly-segregated county of almost one million people—are far broader than having a goal "to get to 750" units built.[12] Directing Westchester to harness all its housing policies and programs towards the "elimination of de facto residential segregation" creates an obligation independent of the unit-building requirements of Consent Decree, ¶ 7: it is satisfied only with the ending of *de facto* residential segregation. Until then, and regardless of how much "progress" Westchester has or has not made in respect to the minimum 750 units, the Consent Decree requires that each and all of the County's housing programs be operated with that segregation-ending goal.

Consent Decree, ¶ 31 does not provide for any "deferred start date" to the obligations it contained beyond the fact that Westchester was given 90 days from the entry of the Consent Decree to promulgate the new set of policies. Westchester, however, has treated its Consent Decree, ¶ 31 obligations in the same way it treated its express and implied certification of AFFH compliance: as mere boilerplate. Beyond noting the formal adoption of the required policies, the County has taken no actions to give substance or effect to the segregation-ending obligation. Consistent with ignoring that obligation, neither of Westchester's inadequate Analysis of Impediments ("AI") submissions addresses the elimination of *de facto* residential segregation.[13]

Westchester's failure to comply with its obligation to end segregation is reflected in its

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[11] Namely, that "AFFH significantly advances the public interest of the County and the municipalities therein" and "the location of affordable housing is central to fulfilling the commitment to AFFH because it determines whether such housing will reduce or perpetuate residential segregation."

[12] Jul. 28, 2010 interview with County Executive Robert Astorino by Westchester Journal News, *supra.*

[13] The County's Planning Department does have a webpage that sets forth Departmental "initiatives." *See* Ex. 4 to Gurian Enforcement Decl. There is no trace there either of the County's having as a program or policy goal the elimination of *de facto* residential segregation.

conduct in connection with one of the County's housing policies and programs of longest standing: the Affordable Housing Allocation Plan first adopted in the early 1990s by the County's Housing Opportunity Commission. The Commission estimated affordable housing need, and made conservative voluntary allocations on a municipality-by-municipality basis. In November 2005, the Commission established revised allocations, taking into account the fact that so many municipalities had performed so poorly (many not even producing a single unit).[14]

The aggregate "unmet allocation" for the towns and villages that are the "eligible communities" for development under Consent Decree, ¶ 7 was *over 6,500 units,* or more than eight times the minimum number of Consent Decree, ¶ 7 units.[15]

In light of its Consent Decree obligations, Westchester should have embarked upon a strengthening of the program to enhance its effectiveness. Instead, these last 21 months have marked a clear shift to treating 750 units as the *maximum* number to be developed, and ignoring the unmet allocation of 6,500 altogether.

It would be bizarrely ironic if Westchester were able to use the Consent Decree implementation period as a time in which to *reduce* its commitment to housing with desegregation potential by more than 85 percent.[16]

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[14] *See* "Affordable Housing Allocation Plan, 2000-2015" (2005), Ex. 5 to Gurian Enforcement Decl.

[15] *Id. See* Table C therein.

[16] The County's disregard for its Consent Decree, ¶ 31(a) obligations is illustrated in connection with its Section 8 program, a housing program that would hereafter have had to be run with the goal of ending de facto residential segregation. Instead, Westchester withdrew: "In October, the county notified the state that it was no longer interested in running the Section 8 program." *See* statement of County Executive Astorino, Dec. 23, 2010, Ex. 6 to Gurian Enforcement Decl.

POINT IV
WESTCHESTER PERSISTS IN ITS ACROSS-THE-BOARD, SEE-NO-EVIL ATTITUDE REGARDING THE BARRIERS TO AFFH THAT MUNICIPALITIES CREATE OR MAINTAIN, THEREBY VIOLATING MULTIPLE CORE OBLIGATIONS OF THE CONSENT DECREE.

A key premise of ADC's False Claims Act action was the disjunction between Westchester's "hands off" attitude towards municipalities—most or all of whom had exclusionary zoning in place—and its AFFH obligation to take actions appropriate to the circumstances to overcome municipal resistance to affordable housing development that, by design or by effect, perpetuated existing patterns of residential segregation and failed to create opportunities to remedy that segregation.[17] The Consent Decree was built as a firm and unmistakable rejection of that failed "all carrot, no stick" approach.

A. The Consent Decree requires that Westchester confront municipal resistance

The County acknowledged and agreed in the Consent Decree 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." Consent Decree, page 2, para. 1, subpara. i. The provision derived from the longstanding *County of Monroe* doctrine,[18] which, ironically, Westchester itself once deployed to overcome a locally

[17] *See, e.g.,* Plaintiff/Relator's Brief in Support of its Motion for Partial Summary Judgment [Doc. 90], pp. 2-3.

[18] Under New York State law, a County may challenge a municipality's restrictive zoning on the grounds that the County's public interests in proceeding with development outweigh the municipality's interests in restricting such development. *Matter of County of Monroe (City of Rochester)*, 72 N.Y.2d 338, 341, 343; 533 N.Y.S.2d 702, 703-04 (N.Y. 1988); *see also Matter of Crown Communication, N.Y., Inc. v. DOT,* 4 N.Y.3d 159, 791 N.Y.S.2d 494 (N.Y. 2005) (applying *County of Monroe* to hold that even a project that provided some benefit to private parties was exempt from a municipality's zoning because the project's public benefits to New York State outweighed the municipality's interests).

imposed barrier to County-desired zoning.[19] In the Decree, the County acknowledged its authority under New York's *Berenson* doctrine as well.[20]

The Consent Decree identified the "broad and equitable distribution of affordable housing" as among Westchester's duties "for the benefit of the health and welfare of the residents of the County," Consent Decree, page 1, para. 2, and also identified "the development of affordable housing in a way that affirmatively furthers fair housing [as] a matter of significant public interest." Consent Decree, page 1, para. 1.

The County also agreed that "it is incumbent upon municipalities to abide by such law" (*i.e.,* the law that 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). Consent Decree, page 2, para. 1, subpara. ii, and 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" (*i.e.,* duties for the health and welfare of the residents of the County like the development of affordable housing in a way that affirmatively furthers fair housing). Consent Decree, page 2, para. 1, subpara. ii.

The Consent Decree obliged the County to push municipalities to "actively further implementation" of the Consent Decree "through their land use regulations and other affirmative measures to assist development of affordable housing." Consent Decree, ¶ 25(d)(iii).[21]

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[19] *See Westhab, Inc. v. Village of Elmsford*, 574 N.Y.S. 2d 888, 891 (N.Y. Sup. Ct., Westchester County 1991), where the County had argued successfully that the *County of Monroe* test was applicable to its interest in creating a family shelter and that the interests of the County and its developer agent in performing such an essential governmental function outweighed those of the Village. *See also* Point II of Westchester's brief in the *Westhab* case, Ex. 7 to Gurian Enforcement Decl.

[20] Under the *Berenson* doctrine, any party that owns or controls land may challenge a municipality's restrictive zoning on the grounds that such zoning does not take sufficient account of regional housing needs for multi-family housing. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672 (N.Y. 1975).

Crucially, Consent Decree, ¶ 7(j) placed the County under *two* concurrent obligations to bring legal action against municipalities. The first obligation—set out in the subparagraph's first sentence—was specific to the unit-specific obligations of Consent Decree ¶ 7, and stated:

> 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.

Consent Decree, ¶ 7(j). The provision clearly means that *each* municipality's actions and failures to act must be examined. *Each* municipality should be taking action to promote the unit-specific objectives of the paragraph, and *each* municipality should be refraining from taking actions that hinder the unit-specific objectives of the paragraph. There is not, for example, any "hold harmless" clause that would exempt any *one* municipality from the required conduct if some *other* municipalities were performing as required.

The second obligation of Consent Decree, ¶ 7(j), set forth in the subparagraph's second and last sentence, is notably *not* specific to the obligations of Consent Decree, ¶ 7. It states that:

> The County shall initiate such legal action as appropriate to accomplish the purpose of this [Consent Decree] to AFFH.

Consent Decree ¶ 7(j). Juxtaposing the two sentences permits only one conclusion: the Consent Decree contemplates that there are Consent Decree objectives *beyond the obligations set forth by the specific terms of Consent Decree, ¶ 7* that are sufficiently important to impose a separate and additional obligation on the County to litigate. Those objectives are the need to accomplish the purpose of the Consent Decree to AFFH.

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[21] When Consent Decree, ¶ 25(d)(iii) identifies the active implementation of the Decree through land use regulations and other affirmative measures as municipal conduct that Westchester must insist on, it does so separately from and in addition to obligations relating to the "Model Ordinance" referred in Consent Decree, ¶ 25(a).

If all this focus on overcoming municipal resistance weren't enough, the Consent Decree, *separately* requires Westchester to take appropriate action to overcome such municipal resistance to affordable housing as it finds to exist via the provisions relating to the production of a compliant-AI. Consent Decree, ¶¶ 32, 32(b)(1), 32(b)(2).[22]

B. Exclusionary zoning by municipalities is a core impediment to fair housing choice

That the Consent Decree placed so many requirements on Westchester to identify and overcome municipal resistance to affordable housing development with desegregation potential reflects a very basic reality, and can be summarized in a set of propositions about AFFH in the Westchester context that is incontrovertible:

(a) "Exclusionary zoning"—for example, zoning that limits the as-of-right development of multiple dwellings, or, through limitations like those on minimum lot size and maximum units-per-acre, significantly reduces permissible density—has long been ubiquitous;

(b) Exclusionary zoning operates as a significant barrier to the development of affordable housing and, because of the disproportionate need for such housing among African-Americans and Latinos, operates as an impediment to fair housing choice;

(c) Both the erection of exclusionary zoning barriers and the failure to remove them represent a failure to AFFH on the part of municipalities that have exclusionary zoning;

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[22] Westchester has not completed a satisfactory AI. *See* letter from HUD to Westchester dated Dec. 21, 2010 (rejecting the County's first AI submission), and letter from HUD to Westchester dated Apr. 28, 2011 (rejecting Westchester's second AI submission), Exhs. 8 and 9 to Gurian Enforcement Decl. As the Court has held, "Without a targeted analysis of race as a potential impediment to fair housing, the County was unprepared to grapple with the second component of its AFFH duty to take appropriate action to overcome the effects of any racial discrimination or segregation it might identify as an impediment." *ADC II, supra,* 668 F.Supp.2d 562. The County replicated that failure to have a targeted analysis of race, and the holding is precisely applicable to its failure to have a targeted analysis of municipal resistance, including that expressed via exclusionary zoning. The incongruity of the Government's longstanding knowledge of the County's violations of Consent Decree, ¶¶ 32, 32(b)(1), 32(b)(2) and the Government's failure to ask the Court for assistance to remedy those violations is discussed in ADC's Intervention Memo at pp. 4-6.

(d) Both the erection of exclusionary zoning barriers and the failure to remove them would represent interference with Westchester's efforts to AFFH (if Westchester were making such efforts); and

(e) The existence of exclusionary zoning hinders the achievement of both the unit-specific and broader segregation-ending and other AFFH goals of the Consent Decree.

The foregoing is not intended to suggest that there are not *other* methods that municipalities use to deter the development of affordable housing with desegregation potential. But what is clear is that exclusionary zoning has been and continues to be open and obvious.

C. Westchester's across-the-board refusal to comply

Despite the Consent Decree's multiple command to Westchester to overcome municipal resistance, Westchester simply refuses to comply with the Decree. On the most basic level, Westchester won't analyze and report on—either in its reports to the Government's Monitor or in its deficient AIs—which municipalities have been hindering efforts to AFFH or failing to engage in efforts to AFFH, let alone specifying the nature of the municipalities' behavior.

If Westchester were at all serious about meeting *either* of its Consent Decree, ¶ 7(j) obligations, it necessarily would have engaged in a municipality-by-municipality assessment: using all available means "as appropriate" to address municipal action or inaction, including, pursuing legal action of necessity means distinguishing between and among municipalities to determine which (if any) are removing barriers and which are not. In other words, "appropriate" is a dynamic concept, and demands an assessment of circumstances.[23] Westchester's *a priori* refusal to act in *all* circumstances is altogether inconsistent with this obligation. Yet, as noted,

[23] The same is true in connection with the obligation to initiate such legal action "as appropriate" to accomplish the Consent Decree's AFFH purpose.

Westchester refuses to analyze or report on any of the municipalities who are standing in the way of accomplishing the purposes of the Decree.[24]

Westchester has neither identified the action or inaction that would trigger legal action against even a single municipality, nor taken the initial development steps prerequisite to taking legal action against even a single municipality (including identifying and acquiring, directly or indirectly, interests in parcels the development of which have maximum desegregation potential), nor actually taken legal action against even a single municipality.

Westchester's failure to comply with these Consent Decree obligations is intentional, a function—as in the false claims period—of an *a priori* policy decision. Strikingly, Westchester has been open and brazen about its intent to violate the Decree's obligation, saying that it will not litigate to make *any* municipalities alter their exclusionary zoning. The County Executive, for example, has said openly and publicly in connection with the possibility of taking municipalities to court: "I won't do that. I will not do that."[25]

Westchester has communicated its refusal to comply with the Decree to town and village officials. Last October, Scarsdale Mayor Carolyn Stevens said that she "has taken a four-day course at Pace University about the settlement and several other shorter classes for elected officials, where county officials and representatives of the federal monitor were available to answer questions for the first time. 'It was continuously reiterated that the county doesn't intend to sue communities over their zoning codes,'" and would instead be content with municipalities

[24] This includes the refusal to do so in its IP and AI submissions.

[25] Westchester Journal News interview with County Executive Rob Astorino, Jan. 27, 2010, *available at* http://www.lohud.com/videonetwork/63709673001/Interview-with-Astorino (slightly over 32 minutes into the video). Astorino adds that "we don't want to use...a stick...the approach that we're going to be using...is the carrot."

adopting a so-called "model" ordinance[26]—one that would allow municipalities to keep their exclusionary zoning fully in place.[27]

In violation of Consent Decree, ¶ 25(d)(iii), the County— as during the false claims period—has not withheld funding from *any* of the municipalities that have failed to "actively further implementation" of the Consent Decree through their land use regulations and other affirmative measures to assist development of affordable housing."[28]

D. Westchester's approach violates the terms and purpose of the Consent Decree

Westchester's approach is precisely the same across-the-board failure to confront municipalities that the Court found to have existed during the false claims period.[29] It has been 21 months since the entry of the Consent Decree, and the widespread existence of exclusionary zoning has made it more difficult than it would otherwise have been to develop affordable housing with an AFFH impact.

So long as those barriers exist, Westchester cannot accomplish its mandated goal of ending de facto residential segregation, and so long as Westchester refuses to take legal action

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[26] "Housing Plan Still in Limbo," Scarsdale Inquirer, Oct. 17, 2010, Ex. 10 to Gurian Enforcement Decl.

[27] If every municipality adopted the model, not a single multiple dwelling not permitted as-of-right under current zoning would be able to be developed as-of-right post-adoption.

[28] The failure also is also violative of the HUD-mandated restrictions found in the language of agreements Westchester has with Consortium Municipalities. As the Court has previously found: "Westchester entered into Cooperation Agreements with municipalities participating in the Consortium. The agreements pertained to, *inter alia,* CDBG grants, and provided that the County is prohibited from expending community development block grant funds for activities in or in support of any local government that does not affirmatively further fair housing within its jurisdiction or that impedes the County's action to comply with its fair housing certifications." *ADC II, supra,* at 551-52.

[29] "Throughout the false claims period that was the subject of Phase I of the litigation, the County has not deemed any municipalities to be failing to AFFH, nor has it deemed any municipalities to be impeding the County's ability to AFFH. As such, the County has not withheld any funds or imposed any sanctions on any participating municipalities for failure to AFFH. When the County considers where to acquire land for affordable housing, it seeks the concurrence of the municipality where the land is situated, and during the false claims period the County would not acquire any such land without the municipality's agreement." *ADC II, supra,* 668 F.Supp.2d at 559.

against municipalities with exclusionary zoning, the County will be violating its Consent Decree, ¶ 7j obligation to take legal action to accomplish the AFFH purposes of the Consent Decree.

So long as those barriers exist and Westchester fails to act, the County will also be violating its other Consent Decree, ¶ 7(j) obligation to take legal action when "a municipality does not take actions needed to promote the objectives" of creating the Affordable AFFH Units required by the Decree.

By letting everyone in Westchester know by word and by deed that maintaining the status quo remains a viable option, the County has fatally undermined the incentive for municipalities to make real change, thus doing exactly the opposite of what the Consent Decree contemplates.

POINT V
WESTCHESTER HAS VIOLATED THE CONSENT DECREE BY FAILING TO PRODUCE AN IMPLEMENTATION PLAN SUFFICIENT TO ACCOMPLISH THE OBJECTIVES AND TERMS OF THE DECREE.

An essential piece of the architecture of the Consent Decree is an effective Implementation Plan ("IP"), Consent Decree, ¶¶ 18-21, but, in three separate attempts, Westchester has failed to produce one that complies with "the objectives and terms set forth" in the Consent Decree. *See* Consent Decree, ¶ 20(d) (setting that standard).

The various IP iterations are not literally identical, but are largely so, and, most importantly, represent fundamentally the same rejectionist approach to the principles, objectives, and requirements of the Decree.[30] After rejecting the County's first IP, the Monitor described the second IP as "still fall[ing] short of a true plan to comply with either the [Consent Decree's]

[30] *See, e.g.*, ADC's "Prescription for Failure" report (Feb. 2010), Ex. 11 to Gurian Enforcement Decl., *also available at* http://www.antibiaslaw.com/sites/default/files/files/Prescription_for_Failure.pdf, and ADC's comments on the third IP entitled "August 2010 Implementation Plan: Still Just Window-Dressing," *available at* http://www.antibiaslaw.com/westchester-false-claims-case/august-2010-implementation-plan-still-just-windowdressing.

specific terms or its overarching goal of building a more integrated Westchester";[31] and, last October, the Monitor couldn't find that the County's third IP was sufficient to accomplish the Decree's objectives and terms.[32]

In each IP, Westchester ignored the existence of racial segregation; pretended that municipal resistance is not a central problem (and had no concrete plan to overcome that resistance); failed to plan to create affordable housing units in a way to AFFH (*i.e.*, to overcome barriers to fair housing choice); failed to deal seriously with the obligation to site housing in the municipalities and on the census blocks with the lowest percentages of African-American and Latinos (*and* in settings that integrated that housing into the overall residential fabric of neighborhoods); continued to conflate "fair housing" with "affordable housing"; and entirely ignored the interrelationship between its broader obligation to use all its housing programs to end de facto residential segregation and the development of specific units that "count" for Consent Decree, ¶ 7 purposes.

A. The absence of fundamental planning and benchmarks

It is no accident that Westchester's IPs are marked by a striking lack of benchmarks, despite the fact that Consent Decree, ¶ 19, states unequivocally that, "The implementation plan shall include, *inter alia*, proposed timetables and benchmarks for the first six-month and one-year periods and for each year thereafter." Were Westchester to have complied, its undertakings

[31] Jul. 7, 2010 Monitor report, *supra,* p. 10. By the terms of Consent Decree, ¶ 20(d), the Monitor had no option at that point but to specify the additions and modifications that Westchester needed to incorporate into the IP, yet, as discussed in the ADC's Intervention Memo, Point IA, he has failed to do so.

[32] Oct. 25, 2010 Monitor report to the Court [Doc. 334]. The Monitor only purported to accept one element of Westchester's third IP last October—the so-called "Model Ordinance"—and did so on the rationale that municipal intransigence must be accommodated—precisely the opposite approach of that demanded by the Consent Decree. *See* discussion in ADC's Intervention Memo, p. 14-15, and the text of the "model" ordinance attached as Ex. 6 to Gurian Intervention Memo. Remarkably, that model does not compel any municipality to eliminate any exclusionary zoning. If every one adopted the model, not a single multiple dwelling not allowed under current zoning would be able to be developed as-of-right.

would have become—by virtue of two separate provisions of the Consent Decree—directly enforceable by the Court just like every other provision of the Decree.[33] Very clearly, that was a prospect that Westchester sought to avoid—and still seeks to avoid.

While Westchester nominally acknowledges in quarterly reports what it describes as "its responsibility to maximize development in the census blocks with the lowest populations of African Americans and Hispanics,"[34] its proposed IPs failed to establish *any* benchmark to assure that result. It wouldn't have been difficult to do: there is a lot of Westchester with the requisite demographic characteristics. ADC's analysis of 2010 Census Bureau data shows that, in "Consortium Municipalities," the populated census blocks that have non-Latino, African-American population of less than three percent and Latino population of less than seven percent consist in the aggregate of almost 200,000 people living on over 100,000 acres.

But Westchester refuses to simply specify that all development must occur in such blocks, let alone make finer specifications to assure, for example, that development on the many populated census blocks with non-Latino, African-American populations of less than three percent and Latino population of less than seven percent is not ignored.

And Westchester has no benchmark to set forth a minimum of development that must occur on census blocks that are populated. Doing so is crucial first of all because one does not

[33] An approved IP is supposed to be incorporated into Westchester's AI, Consent Decree, ¶ 21, and, in turn, the County "shall take all actions identified in the AI." Consent Decree, ¶ 32. Moreover, the Monitor may "designate any elements of the [implementation] plan as benchmarks that shall be incorporated into this [Consent Decree] and shall be enforceable in the same fashion as the other terms" of the Consent Decree. Consent Decree, ¶ 24.

[34] *See, e.g.*, Westchester Quarterly Report for Fourth Quarter 2010 [Doc. 336, Ex. 1]. Consent Decree, ¶ 22(f) actually speaks to "lowest concentrations" of African-Americans and Latinos.

confront residential segregation if one avoids building on precisely the residential blocks on which lots of White people are living.[35]

Westchester has failed to report on which municipalities maintain the greatest barriers to fair housing choice, and has no plan to acquire interests in land so as to be armed to confront municipal resistance. The County continues to plan with reference to *existing* zoning, and won't recognize that strategies that most comprehensively attack exclusionary zoning facilitates both the Consent Decree's, unit-specific requirements *and* segregation-ending requirements, found respectively in ¶¶ 7 and 31.

Westchester is not simply indifferent to whether zoning change occurs; rather, Westchester's actions assure that change will *not* occur. Its projections from its rejected third IP show that it plans to *maximize* the percentage of units that represent existing buildings made affordable (no zoning change) and the percentage of units devoted to seniors-only housing (less controversial to local residents),[36] and that it anticipates only five percent of units (*i.e.*, fewer than 40) would be created with the single "inclusionary zoning" tool it is willing to promote (10 percent affordable where development is already permitted). And the percentage of units

[35] Moreover, in many municipalities the selection of unpopulated blocks for development is more likely to mean that the housing will not be fully integrated into residential fabric of the town or village. Also, the purpose of the Consent Decree, ¶ 22(f) requirement of maximizing development in the municipalities and on the census blocks with the lowest "concentrations" of African-Americans and Latinos, is to foster development with desegregation potential, *i.e.*, create housing that can *counterbalance* an *existing* overwhelming concentration of non-Latino Whites. Finally, all development, as discussed in Point I, *supra,* is supposed to overcome barriers to fair housing choice (AFFH).

[36] As Westchester's Deputy Planning Commissioner acknowledged at her deposition, housing for seniors was perceived as less controversial by "the NIMBYs out there" because "it's not families with children." Drummond Deposition, 334:21 – 335:20, Ex. 12 to Gurian Enforcement Decl.

anticipated to be constructed by virtue of overcoming exclusionary zoning barriers is zero—developing via that means is not even contemplated.[37]

B. The Decree-destroying consequences of proceeding *ad hoc*

In public statements, Westchester has consistently sought to play down the importance of its IP obligations (and its AI obligations as well), saying that the IP was "simply a framework,"[38] that, "We've been more like, 'Let's get out there and start this and document the process as we go,'"[39] and that, "The county is balancing these planning tools (an implementation plan and analysis of impediments) with actual progress on buildings."[40]

The failure to develop an IP is not harmless. When, contrary to the Consent Decree, development proceeds independent of and inconsistent with what a proper IP would demand, the County creates facts on the ground—or *faits accomplis*—that permanently reduce the potential catalytic impact of the Consent Decree. Risks include overspending on a per unit basis, thereby making it more difficult to develop the minimum number of units; concentrating units in municipalities and on census blocks that do not meet the goal of maximizing development where there are the lowest concentrations of African-Americans and Latinos; wasting units on development that does not overcome zoning and other barriers to fair housing choice; and losing valuable time in identifying and acquiring interests in property necessary for the County to use its legal tools to challenge local zoning barriers.

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[37] Westchester wants to reduce still further the number of units to be constructed. The County Executive has said there should be "flexibility" in *doubling* number of existing units that can be counted. *See* Jul. 28, 2010 interview of County Executive Astorino by Westchester Journal News, *supra.*

[38] "Monitor rejects housing-settlement plan," Westchester Journal News, Feb. 2, 2010, quoting Neil McCormack, communications director and senior advisor to County Executive Astorino.

[39] "Housing monitor faults Westchester plan as needing specifics," Westchester Journal News, Jul. 9, 2010, quoting Neil McCormack.

[40] "HUD rejects Westchester again on housing," Westchester Journal News, Dec. 22, 2010, reporting statement of Neil McCormack.

Risks of an unplanned and unguided process also include developing units on parcels associated with undesirable features, like proximity to railroad tracks and highways; developing units in locations isolated from the residential community of which the units are supposed to be a part, or on non-populated census blocks; and "saving" the "less controversial" units—like seniors-only units and existing units—for the Whitest towns and villages

The risks are not theoretical; as discussed in Point VI, *infra,* development to date has highlighted each of these problems.

POINT VI
THE COUNTY HAS MADE NO PROGRESS IN DEVELOPING UNITS THAT AFFH BY *OVERCOMING* BARRIERS TO FAIR HOUSING CHOICE, FOCUSING ITS DEVELOPMENT EFFORTS ON THE NEED TO *AVOID* OVERCOMING SUCH BARRIERS

Westchester's development to date shows its striking disregard for Consent Decree obligations: the County has sited a far lower percentage of units than intended in the Whitest jurisdictions, and it has focused on properties where development was already permitted to be built prior to the Consent Decree; are not on census blocks with the "lowest concentrations of African-American and Hispanic residents"; are located in close proximity to undesirable features like major highways and railroad tracks; or are designed to appeal especially to seniors.

Of 153 units for which Westchester reports all financing approvals are in place, only 41.8 percent of the units (those in Larchmont and Rye) are in "Tier A" municipalities, as opposed to the Consent Decree's proviso that *at least* 84 percent of units ultimately developed must be in such towns and villages.[41]

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[41] *See* Westchester Quarterly Report for First Quarter 2011, *supra,* at p. 17 and Appendix I-1, for approval data. Consent Decree, ¶ 7(a)(i) provides that at least 630 units are to be in municipalities with non-Latino African American population of less than 3.0 percent and Latino population of less than 7.0 percent (when excluding population in group quarters). *See* Beveridge Declaration, *supra,* ¶ 27, for correlation between municipal "tier" levels and estimated composition excluding group quarters population for Larchmongt, Rye, Cortlandt, Pelham, and Yorktown, based on 2010 Census data. Note that the Consent

In contrast, the remaining developments (in Cortlandt, Pelham, and Yorktown) are "Tier B" and Tier C" municipalites.[42] They constitute almost 60 percent of the total units with financing, even though *no more than* 16 percent of the units ultimately to be built are supposed to be in "Tier B" and "Tier C".[43] Indeed, those Tier B and Tier C developments constitute 74.2 percent of *all* the Tiers B and C development that is permitted throughout the life of the Consent Decree, whereas the Tier A developments constitute only 10.2 percent of the *minimum* Tier A units required. Just the Cortlandt development *itself*—located in what is now a Tier C municipality—exceeds that maximum of 60 units in Tier C over the life of the Decree, and thus 23 of its 83 units should not be counted.

Even more problematic are the County's results viewed from the perspectives of site desirability and whether a development is or is not overcoming barriers to fair housing choice.

The Cortlandt development was already permitted prior to the entry of the Consent Decree,[44] so its development under the Decree represents no zoning barrier being overcome.[45] It abuts a major Veterans Administration psychiatric and substance abuse facility, a major road,

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Decree, ¶ 22(f) obligation to maximize development in municipalities with the lowest concentrations of African-Americans and Latinos does not exclude group quarters population.

[42] *Id.*

[43] Consent Decree, ¶ 7(b)(i), provides that no more than 60 units are to be in municipalities with non-Latino African American population of less than 7.0 percent and Latino population of less than 10.0 percent (when excluding population in group quarters). No more than 60 units are to be in municipalities where those percentages are less than 14 percent and 16 percent, respectively. Consent Decree, ¶ 7(c)(i).

[44] "Roundtop Development to Offer Affordable Housing in Montrose," Peekskill-Cortlandt Patch, Mar. 30, 2011, Ex. 13 to Gurian Enforcement Decl. *See also* Affordable Housing: A Case for State Legislative Action," New York Law Journal, Sept. 30, 2006.

[45] In addition to the development being one that does not AFFH (does not overcome a barrier), the Consent Decree, ¶ 8 provides that affordable units "in housing developments that have received preliminary or final land use or financing approval at the time of the Court's entry of this [Consent Decree] shall be excluded from the Affordable AFFH Units described in paragraph 7."

and railroad tracks.[46] Other than VA facility residents, Census data shows, the census block is unpopulated[47] (*i.e.*, there are no White residents not in group quarters to object).

The Larchmont development was already permitted prior to the entry of the Consent Decree,[48] so its development under the Consent Decree represents no zoning barrier being overcome. The development is on the site of a former moving company; its census block is separated from I-95 only by the railroad tracks that directly abut the block, and extends to within 500 feet of the New Rochelle line.[49]

Neither the Cortlandt nor the Larchmont development is mixed-income; as such, no cross-subsidy is available. That means that Westchester's initial per-unit cost for the affordable units was *higher* than necessary.[50] Why not use cross-subsidy even though Westchester, per Consent Decree, ¶ 15, is expected to explore "all opportunities to leverage funds"? Stuffing the maximum number of affordable units onto each site means that *fewer* sites need to be developed, and fewer zoning barriers confronted and overcome.[51]

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[46] *See* Ex. 14 to Gurian Enforcement Decl. for site map/photo.

[47] *See* Beveridge Decl., *supra,* ¶ 25.

[48] "County to Build Affordable Housing on Palmer," Larchmont Patch, Nov. 16, 2010, Ex. 15 to Gurian Enforcement Decl. (According to Larchmont's Mayor, "Applications for development on this property came before Larchmont's land use boards, initially in 2005, and final site plan approval for a project comprised of fifty-one (51) units was granted by the Planning Board in 2008").

[49] *See* Exh. 16 to Gurian Enforcement Decl. for Larchmont site map/photo. New Rochelle, of course, is not an eligible municipality, having combined African-American and Latino population of 45.9 percent. *See* Beveridge Decl., *supra,* ¶¶ 24.

[50] To develop at least 750 AFFH units with the $51.6 million available under the Decree, average unit cost cannot exceed $68,000. *Cf.* Westchester Quarterly Report for First Quarter 2011, *supra,* Appendix I-1 ($5,673,000 in Consent Decree funds slated for 46 units is a per-unit cost of $123,326).

[51] The County Executive has said that it is unrealistic to expect that Consent Decree funds are sufficient to fund 750 units. *See* Jul. 28, 2010 interview of County Executive Astorino by Westchester Journal News, *supra.* The County's own decisions to date, made without benefit of an IP, increase the likelihood of that prediction coming true.

The City of Rye development—also in the works *prior* to the entry of the Consent Decree—is located next to *two* major highways (I-95 and I-287).[52] The property abuts Port Chester, a non-eligible municipality that has a Latino population alone of 59.4 percent.[53] While walking from the property to the nearest street, residents will first cross into Port Chester.[54] The property is on a census block that has a combined African-American and Latino population of 50.8 percent.[55] Affirmatively marketing these units to minorities, therefore, would not be a matter of *reducing* segregation, but of *perpetuating* segregation.

The development was designed to be housing for seniors-only, and, as such, is not permitted to be "counted" for Consent Decree purposes at this stage.[56] So, at the County's instance, the *labeling* of the housing was changed (*i.e.*, the "seniors-only" designation was removed), but the *reality* of the units—designed as studios and one-bedrooms—remained the same.[57] As the Mayor of Rye pointed out, "Seniors can still apply for this…*If they are all single bedrooms, that lends itself to seniors.*"[58] Despite the fact that, as a practical matter, the units remained more desirable to seniors than to families with children, and despite the site features and demographic characteristics, Westchester sought to "count" the units and the Monitor purported to approve the units.

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[52] *See* Ex. 17 to Gurian Enforcement Decl. for map/photo.

[53] Beveridge Decl., *supra,* ¶ 23.

[54] *Id.*; *see also* Ex. 18 to Gurian Enforcement Decl. for ma/photo.

[55] *See* Beveridge Decl., *supra* ¶¶ 23.

[56] The Consent Decree intended to forestall the development of the "easier" senior units (those subject to less community resistance) early on. Consent Decree, ¶ 7(f).

[57] "City alters affordable housing project, pulls plug on senior restriction," Rye Sound Shore Report, March 4, 2010, Ex. 18 to Gurian Enforcement Decl.

[58] *Id.* (emphasis added).

Westchester has not turned a new page in its development book. Another property it has put forward—in Armonk—is isolated, located on an island of land between Route 22 and Old Route 22 surrounded by commercial and other non-residential development.[59] Developing here doesn't represent the overcoming of a barrier: the parcel was previously approved for affordable housing as the off-site middle-income component of an otherwise market-rate development.[60] And it is not populated.[61]

Far from making progress, the County has been counterproductive: 21 months have been lost, no challenges to resistant municipalities have been readied, a material percentage of units meant to have confronted barriers have been wasted, and precious monies—58 percent of the $21.6 million in Consent Decree, ¶ 2 funds—has been frittered away.[62]

POINT VII
THE COURT HAS THE AUTHORITY AND THE RESPONSIBILITY TO REMEDY WESTHESTER'S VIOLATIONS OF THE DECREE.

The Consent Decree entered in this case provides: "Notwithstanding any other provisions of this Stipulation and Order, this Court shall retain exclusive jurisdiction over this Stipulation and Order, including, but not limited to, *any application* to enforce or interpret its provisions, and over each party to the extent its obligations herein remain unsatisfied." Consent Decree, ¶ 58 (emphasis added).

It is well established that federal courts have broad authority and responsibility to order the relief necessary to vindicate the letter and spirit of their orders. *See, e.g., EEOC v. Local*

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[59] *See* Ex. 19 to Gurian Enforcement Decl. for map/photo.

[60] Mar. 24, 2011 Westchester Funding Advisory No. 5 to Monitor, pp. 1, 3, contained in Apr. 25, 2011 Monitor report, *supra,* at Ex. 3. At best, the units could be described as the conversion of existing housing to the Consent Decree's definition of affordable (the income limits were modified), but Westchester seeks to have the units counted for new construction purposes.

[61] *See* Beveridge Decl., *supra,* ¶ 26.

[62] Westchester Quarterly Report for First Quarter 2011, *supra,* p. 14.

580, International Association of Bridge, Structural & Ornamental Ironworkers, 925 F.2d 588, 593 (2d Cir.1991) ("Until parties to [a Consent Decree] have fulfilled their express obligations, the court has continuing authority and discretion—pursuant to its independent, juridical interests—to ensure compliance."); *U.S. v. Local 359, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir. 1995) ("The court's interest in protecting the integrity of such a decree 'justifies any reasonable action taken by the court to secure compliance.' [quoting] *Berger v. Heckler,* 771 F.2d 1556, 1568 (2d Cir.1985)." Here, Westchester's pattern of Decree-violating conduct makes clear the necessity for the Court to act.

CONCLUSION

In view of Westchester's consistent effort to evade, defy, and undermine the letter and spirit of the Consent Decree, the Court should order both the remedial action sought in ADC's enforcement motion and such other and further relief as to the Court deems appropriate to vindicate the objectives and terms of the Consent Decree.

Dated: New York, New York
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