

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, INC., :
: :
Plaintiff, :
: :
v. : No. 06 Civ. 2860 (DLC)
: :
WESTCHESTER COUNTY, NEW YORK, :
: :
Defendant. :
----- X

**MONITOR'S REPORT REGARDING IMPLEMENTATION OF THE
STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL
FOR THE PERIOD OF JULY 7, 2010 THROUGH OCTOBER 25, 2010**

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I. Background on Lawsuit and Settlement

In April 2006, the Anti-Discrimination Center of Metro New York, Inc. (“ADC”) filed a federal lawsuit alleging that Westchester County (“County”) had violated the False Claims Act by making certain certifications in its applications to the U.S. Department of Housing and Urban Development (“HUD”) regarding its compliance with the Civil Rights Act of 1964 and the Fair Housing Act. Additionally, the County was required to certify that it would affirmatively further fair housing (“AFFH”), which requires conducting an analysis of impediments to fair housing choice (“AI”) that specifically addresses impediments based on racial discrimination or segregation.

After this Court ruled that the County had made misrepresentations in its applications, the County and HUD reached a settlement, the terms of which are laid out in the Stipulation and Order of Settlement and Dismissal (“Stipulation”) approved by this Court on August 10, 2009. The County Board of Legislators (“BOL”) approved the Stipulation on September 22, 2009. Under the Stipulation, the County agreed to spend \$51.6 million over seven years to develop at least 750 “Affordable AFFH Units” (*see* ¶ 7¹), primarily in municipalities with overwhelmingly white populations, without setting any racial or ethnic quotas for the eventual residents of the units. The County also agreed to affirmatively market these units in Westchester and nearby communities with large non-white populations. The County also committed itself to develop an Implementation Plan (“IP”) “setting forth with specificity the manner in which the County plans to implement the provisions of this Stipulation and Order, set forth in paragraph 7, concerning the development of Affordable AFFH Units.” ¶ 18; *see*

¹ Unless indicated otherwise, all paragraph citations refer to the Stipulation.

also ¶ 22 (specifying activities the County must undertake in developing the IP); ¶ 24 (requirement that the IP include benchmarks); ¶ 25 (listing components that the IP must include). Among other obligations, the County has undertaken to develop an AI that is deemed acceptable by HUD, ¶ 32, and to promote legislation to ban “source of income” housing discrimination. ¶ 33(g).

The Court appointed me to serve as a Monitor to oversee and facilitate the implementation of the Stipulation’s terms. This report is submitted to provide the Court with an update on what has taken place since the filing of the Monitor’s second report in July 2010.

II. Quarterly Report

On October 4, 2010, the County submitted its third Quarterly Report (“2010 3Q Report”), which covers the County’s activities from July 1, 2010 through September 30, 2010, in accordance with paragraph 28 of the Stipulation. This report, which is attached as Exhibit 1, responds to the Monitor’s standing directive that the County report on the following on a quarterly basis: (1) Affordable AFFH units, including the total approved, in progress or completed; (2) census analysis; (3) the County’s efforts to identify sites; (4) outreach and advertising; (5) local approval processes; (6) financing and expenditures; and (7) overall progress. *See* Template for Quarterly Reporting, attached to the Monitor’s July 7, 2010 report as Exhibit 7. Among other things, these activities are directed toward enabling the County to meet the requirement, by December 31, 2011, that it have both financing in place for 100 Affordable AFFH units and building permits in place for 50 Affordable AFFH units. *See* ¶ 23.

A. AFFH Units

According to the 2010 3Q Report, twenty-one units have received County funding and three of those units have received all necessary funding. The remaining eighteen units await funding from the NYS Affordable Housing Corporation for down payment assistance. No units have received approval for building permits. 2010 3Q Report at 11. This is up from eighteen units with partial County funding at the end of the second quarter. *See* Second 2010 Quarterly Report at 9, attached as Exhibit 9 to the Monitor's July 7, 2010 Report.

B. Census Analysis

The County has not provided an updated census analysis. The Monitor assumes that is because the analysis does not change from quarter to quarter and requests that the County make clear its basis for not providing such data.

C. Land / County's Efforts to Identify Sites

This portion of the 2010 3Q Report consists largely of identification of meetings held with municipal officials and developers to identify sites. *See* 2010 3Q Report at 3-4. This information is inadequate for the Monitor to make a determination concerning the quality of such meetings and whether they are likely to lead to the County's fulfillment of the benchmarks it is required to meet by the end of 2011. More significantly, the information is not responsive to the specific requirements set forth in the Monitor's directive of February 1, 2010. The 2010 3Q Report indicates neither how sites are being investigated nor the total number of lots already under the control of either the County or the Municipalities. The County is directed to follow the format set forth in the February 1, 2010 template. The

information requested is vital to the Monitor's ability to determine whether all steps are being taken to achieve full compliance with the Stipulation.

D. Outreach and Advertising

The 2010 3Q Report summarizes the County's outreach activities, and the County has provided a detailed description of its internal assets to support those efforts. That said, the touchstones for outreach and advertising should be found in the IP. This issue will be addressed in a subsequent report to the Court.

E. Local Approval Process

The County notes that it has deferred action on the approval of the model ordinance required by paragraph 25(a) pending approval by the Monitor. 2010 3Q Report at 7. *See* Section V.B.1 below for an expanded discussion of the model ordinance.

F. Financing and Expenditures

The County reports limited spending during the quarter in light of the efforts to identify potential sites. None of the \$51.6 million was spend on housing development. Nearly \$1.4 million of CDBG funding was approved for a development that will yield eighteen units. *See* 2010 3Q Report at 8.

III. Central Intake Tool

Pursuant to its obligation under paragraph 33(f) of the Stipulation, on September 30, 2010, the County launched a centralized intake tool for potential home buyers. The tool is available via the County's website, at <http://homes.westchestergov.com/index.php?option=>

com_content&view=article&id=2595&Itemid=100134. The Monitor looks forward to reports of the County's experience with the intake tool.

IV. Revolving Loan Fund

As noted in the Monitor's July 2010 report, the Monitor has engaged a team of attorneys from Orrick Herrington & Sutcliffe LLP with expertise in public finance to provide legal advice on issues related to the creation of a revolving fund to finance the development of Affordable AFFH units. On August 2, 2010, the Monitor provided the County with a memorandum authored by the Orrick team, which the County is reviewing. *See* 2010 3Q Report at 9. The Monitor has asked the County to state its position with respect to a specific proposal contained in that report, which suggests that a court order directing the County to establish an affordable housing revolving loan program would make such a fund viable.

V. Implementation Plan

A. Previous IP Submissions

On January 29, 2010, in compliance with an extended deadline, the County submitted the first iteration of its IP to the Monitor, as well as to HUD. The Monitor did not accept that plan, and in accordance with paragraph 20(b) of the Stipulation, provided the County with specific comments about its deficiencies. Those comments were also provided to the Court in February 2010 as part of the Monitor's first report to the Court.

After a series of discussions in which the Monitor, the County, and HUD participated, the County submitted a revised IP on March 12, 2010. Although the IP showed progress in a number of areas, the Monitor found significant deficiencies and directed the County to submit

a further revised plan by August 9, 2010. The Monitor's comments are detailed in the July 7, 2010 report to the Court.

B. August 2010 IP

The County submitted a third iteration of its IP on August 9, 2010 (the "August 2010 IP," attached hereto as Exhibit 2), in accordance with the deadline provided in the Monitor's July 2010 report. In evaluating the IP, the Monitor is taking into account comments submitted by members of the BOL.² As discussed below, there are aspects of the IP that continue to require work. In the interest of resolving certain aspects of the IP that are particularly crucial to the County's compliance with its obligations under the Stipulation, the Monitor will approve certain aspects of the August 2010 IP and will continue to work with the County and outside experts on other components. This approach reflects input from the County and municipal leaders about which items are of the highest priority and urgency, as well as the Monitor's assessment of those areas in which the County has made sufficient progress to warrant approval. Future reports will contain additional comments, approvals, and directed revisions as appropriate. In particular, the Monitor will work further with the County to develop the Affirmative Marketing Plan and will report on issues related to "tone at the top" in a separate report; both sets of issues bear on the question of whether Westchester is broadly providing opportunities for black and Hispanic potential residents.

² The Monitor recently received written comments on the August 2010 IP from several members of the BOL. These comments are attached as Exhibit 3.

1. Model Ordinance

The model ordinance is the linchpin of efforts to evaluate and streamline the local approval process. The model ordinance was submitted in connection with the revised implementation plan and, for the reasons that follow, is approved.

The County's model ordinance, as revised, no longer includes impermissible preferences for local seniors, employees, and volunteers. This change represents a major improvement over the previous draft ordinances submitted with the earlier IPs. Although the resulting model ordinance could be refined to set an even higher standard for municipalities, such aspirations must be tempered by the recognition that a model ordinance will advance the goals of the Stipulation only if it actually is adopted, in whole or in part, by municipalities. The model ordinance proposed by the County, in its current form, offers a template to municipalities that both meets the requirements of the Stipulation and is likely to be used by municipalities in Westchester County as a model for actual local ordinances. The Monitor therefore deems acceptable the model ordinance included as Appendix D-1(i) to the August 2010 IP.

In doing so, the Monitor notes that the discussion of how the County plans to promote the model ordinance in the IP (August 2010 IP at 12-13) remains inadequate for the task, as previously discussed in the Monitor's July 2010 report. The County should also expand its suggestions for expediting the project review process beyond the continued focus on a pre-application meeting. *See* August 2010 IP Appendix D-1(i), § 14.

VI. County Inquiries and Responses Thereto: 99 Units Proposed by the County

As noted in the Monitor's July 2010 report, on June 7, 2010, the County submitted a series of inquiries regarding several specific developments and questions of interpretation as

to the meaning and application of Stipulation provisions. The inquiries are attached as Exhibit 4. Of the inquiries regarding specific developments, which relate to 99 units in total, the Monitor has indicated that all may count toward the County's 750-unit obligation, although two developments (67 units in total) raise issues regarding existing tenants. The Monitor is currently in the process of responding to the County's follow-up questions regarding the 67 units, and has solicited input from HUD on this issue. The following developments were the subject of the inquiries to the Monitor:

- Eighteen one-bedroom ownership units at the proposed Edgar Place/Rye Cottage Town Homes in the City of Rye;
- A proposed development in the Town of Cortlandt where the entire existing population of both the census block and tract (which are coterminous) resides in group quarters: two homeless shelters, a U.S. Department of Veterans Affairs hospital, and a state-run nursing home;
- Three housing units for persons with disabilities at Freedom Gardens, an existing development in Yorktown;
- The rehabilitation of an existing structure in Katonah that would contain six one-bedroom units and one studio;
- Eight units of "shared housing" and one two-bedroom apartment in a former parish house and garage in Briarcliff Manor;³
- The acquisition and conversion of an existing structure in Mount Pleasant to a an ownership unit and accessory apartment; and
- An existing 60-unit property in an unnamed municipality which currently is part of the HUD 236 program, but will go to market-rate rent in approximately two years. The County subsequently advised the Monitor that the building contains 19 one-bedroom units, 31 two-bedroom units, and 10 three-bedroom units.

³ This inquiry is discussed in more detail in Section VII below.

Also, the County sought the Monitor's views on the use of County program funds for developments outside the eligible municipalities, and whether sites eligible under paragraph 7(b) would be eligible under paragraph 7(c).

On October 7, the County submitted two funding advisories to the Monitor, which are currently under review. These advisories, which are attached as Exhibit 5, relate to (1) the Cortlandt development described above, which , and (2) a proposed three-family home with one homeownership unit and two rental units in Pelham.

VII. Shared Housing Issue: Definition of Unit

While ambitious and comprehensive in scope, the Stipulation does not give precise guidance on all issues that could come up during the course of implementation. One such issue is the definition of "unit." The absence of a clear definition was brought into high relief by a proposed development in Briarcliff Manor made up of single room occupancy ("SRO") units. The Stipulation contemplates more than the simple building of units, but has as a key goal the promotion of sustainable affordable housing that helps build more inclusive and integrated communities—a goal that is best served by housing types that can accommodate families.⁴ Including any SROs within the term "unit" would appear to run counter to this intent, and including large numbers of SRO units would clearly be counter to the intent of the Stipulation.⁵

⁴ The second whereas clause of the Stipulation highlights the benefits of "sustainable and integrated residential patterns" and "fair and equal access to economic, educational and other opportunities."

⁵ It is well-settled that the intent of the parties is key to interpreting the meaning of a settlement agreement. *See, e.g., Goldman v. White Plains Ctr. for Nursing Care, LLC*, 896 N.E.2d 662, 664 (N.Y. 2008) ("A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract." (citing *Innopho, Inc. v. Rhodia, S.A.*, 882 N.E.2d 389 (N.Y. 2008))).

The Monitor has received submissions on this issue from the County, HUD, and the Westchester Not-for-Profit Housing Coalition, which are attached as Exhibit 6. HUD expressed particular concern about the potential use of SROs to fulfill the County's obligations.

In an effort to address this lack of clarity, the Monitor asked the parties to sign a stipulation adopting a broad, flexible definition of the term "unit," but placing a cap on the use of SROs to fulfill the County's obligations. Placing a limit on the use of SROs is a reasonable construction of the settlement taken as a whole. The Monitor's proposed cap was 2%, or approximately 15 units of the total 750-unit obligation. In a letter dated October 15, 2010 (attached hereto as Exhibit 7), the County rejected the proffered stipulation, urging the Monitor not to modify an agreement that had been fully negotiated by the parties. The County's argument falls short of the mark, however, since the issue is the meaning of a term that the parties did not define. Instead, the County offered the assurance that it would not develop a significant number of SRO units to meet its obligations, without providing a firm upper limit. Municipal leaders, developers, and the community would find such a limit helpful.

The County's rejection of the Monitor's proposed limit does not relieve the Monitor of his duty to look to the intent of the agreement and examine carefully the number of additional SRO units proposed by the County and developers. The Monitor hereby directs the County to define the scope of its plans to develop SRO units to fulfill its settlement obligations.

VIII. Monitor's Outreach Activities

Since the filing of the Monitor's second report in July 2010, the Monitor's activities have included review and assessment of the County's IP submitted August 9, 2010 and

meetings with the public, including municipal officials and leaders of not-for-profit organizations.

1. Municipal Leaders

On September 24, 2010, members of the Monitor's team spoke at a roundtable of municipal leaders hosted by Pace University Law School's Land Use Law Center. Representatives of the County Executive's office also participated in this event, which included an extensive question-and-answer period.

2. Not-for-Profit Organizations

The Monitor has continued to meet with not-for-profit groups, including developers and others focused on the development of affordable housing in Westchester County. On September 8, 2010, the Monitor and his team met with the Westchester Not-for-Profit Housing Coalition. This group later submitted written comments regarding the definition of "unit" in the context of the Stipulation, as discussed in Section VII above.

On September 13, 2010, the Monitor participated in a panel discussion at the annual meeting of A-HOME, a leading local non-profit developer of affordable housing. The panel also included members of the BOL and local land use lawyers, and municipal officials had an opportunity to ask questions of the panelists regarding the settlement.

3. Media

On August 4, 2010, the Monitor participated in an “Editorial Spotlight” hosted by *The Journal News* and streamed live via the newspaper’s website (<http://www.lohud.com>). Members of the newspaper’s editorial board asked the Monitor questions relating to the settlement, including questions submitted by readers.

Dated: October 25, 2010
New York, New York

Respectfully submitted,

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