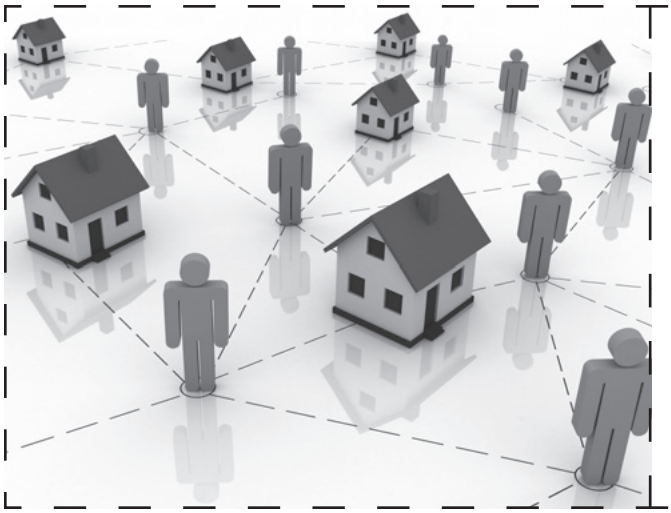

# MAKING REAL THE DESEGREGATING PROMISE OF THE FAIR HOUSING ACT

## *"Affirmatively Furthering Fair Housing" Comes of Age*

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When Congress passed the Fair Housing Act in 1968, the framers explained that the new law was principally informed by two values—prohibiting discrimination on the basis of race (and other protected classes) and promoting racial integration as a positive social good.[1] Each was seen as critical to addressing the dual housing market that existed in most communities and that fomented urban unrest during the mid-1960s.[2] Forty-two years later the United States "still is characterized by substantial racial discrimination with respect to the sale, rental and occupancy of housing and by pervasive racial residential segregation."[3]

Why have the prointegration purposes of the Fair Housing Act never been adequately served? It is not for want of legal or regulatory authority. The Fair Housing Act itself contained a provision requiring the secretary of the U.S. Department of Housing and Urban Development (HUD) and all other executive departments and agencies to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further [fair housing]."[4]

Congress authorized the Community Development Block Grant (CDBG) program in 1974 to fund state and local governments' broad range of programs to serve low- and moderate-income people.[5] In 1983 Congress amended the statute to provide that "any [CDBG] grant … shall be made only if the grantee certifies to the satisfaction of the Secretary [of HUD] that … the grantee will affirmatively further fair housing.[6] HUD promulgated regulations providing that

[1]Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq*. See 114 Cong. Rec. 3421, 3422 (1968) (statement of Sen. Walter Mondale, indicating that the Fair Housing Act was meant to replace segregated ghettos with "truly integrated and balanced living patterns").

[2]See generally U.S. National Advisory Commission on Civil Disorders, Report of the National Advisory Commission on Civil Disorders (1968).

[3]Florence Wagman Roisman, *Living Together: Ending Racial Discrimination and Segregation in Housing*, 41 Indiana Law Review 507, 508 (2008).

[4]42 U.S.C. § 3608(e)(5).

[5]Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301 *et seq.*

[6]Pub. L. No. 98-181, § 104(c)(1), 97 Stat. 1161, 42 U.S.C. § 5304(b)(2). See also 24 C.F.R. §§ 91.425 (consortium certifications); 570.601 (incorporating, inter alia, the requirements of the Fair Housing Act); 570.602 (incorporating nondiscrimination requirements of the Housing and Community Development Act of 1974, as amended). See also 24 C.F.R. § 570.601(a)(2) (enumerating the steps a grantee must take to conduct an analysis of impediments and to take appropriate action to overcome the impediments identified through that analysis).

> the certification … shall specifically require the grantee to assume the responsibility of fair housing planning by conducting an analysis to identify impediments to fair housing choice within its jurisdiction, taking appropriate actions to overcome the effects of any impediments identified through that analysis, and maintaining records reflecting the analysis and actions in this regard.[7]

HUD also developed and distributed in 1995 the Fair Housing Planning Guide as additional guidance to recipients of federal funds concerning the analysis of impediments.[8]

Obviously a variety of factors has impeded residential racial integration over time. One of the most important contributing factors on a structural level has been that, for the past four decades, most municipal recipients of federal housing funds—abetted by successive HUD administrations of both political parties—simply ignored their obligations to affirmatively further fair housing without sanction. That federal collaboration subverted Congress' intent that recipients would lose those funds if they did not comply with those obligations. As a consequence, clearly a new approach had to be taken to revitalize the values behind the civil rights certifications. While there have been other litigation victories under Section 3608 of the Fair Housing Act, here we focus on federal court litigation commenced in April 2006 by the Anti-Discrimination Center against Westchester County, New York.[9]

The Anti-Discrimination Center alleged that Westchester County violated the federal False Claims Act when it certified to HUD, as a condition of receiving more than $50 million in federal funds, that it had complied with its obligations to affirmatively further fair housing.[10] In February 2009, after intense litigation, a federal court in Manhattan granted the center's motion for partial summary judgment; the court found that Westchester "utterly failed" to meet its obligations and that each of its certifications had been "false or fraudulent."[11] After a series of additional pretrial rulings in the center's favor, and on the eve of trial, a settlement framework was reached. That framework was embodied in a settlement order entered by the court on August 10, 2009.[12] On that day HUD told the world that in the future it would be vigilant in ensuring that all grant recipients fulfilled their obligations to affirmatively further fair housing.[13]

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[7]24 C.F.R. § 570.601(a)(2). See also 24 C.F.R. § 91.255 (local governments); 24 C.F.R. § 91.3225 (state governments); 24 C.F.R. § 91.425 (consortia).

[8]Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Fair Housing Planning Guide (1996). Volume 1 of the Planning Guide is available online (www.nls.gov/offices/fheo/images/fhpg.pdf). Volume 2 is no longer in print and is not available electronically but is in our files.

[9]For other victories under Section 3608 of the Fair Housing Act, see, e.g., *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002) (Clearinghouse No. 52,920) (local residency preference with disparate racial impact impermissible); *Thompson v. U.S. Department of Housing and Urban Development*, 348 F. Supp. 2d 398 (D. Md. 2005) (by funding housing in racially impacted areas, the U.S. Department of Housing and Urban Development (HUD) violated its obligation to affirmatively further fair housing).

[10]False Claims Act, 31 U.S.C. §§ 3729 *et seq.*; Complaint, *United States ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, Case No. 1:06-cv-2860-DLC, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009), www.antibiaslaw.com/falseclaimscomplaint. The court documents are available on the Anti-Discrimination Center's website, www.antibiaslaw.com/westchester-false-claims-case.

[11]*United States ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, Case No. 1:06-cv-2860-DLC, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009).

[12]Stipulation and Order of Settlement and Dismissal, *United States ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, No. 1:06-cv-2860-DLC (S.D.N.Y. Aug. 10, 2009), www.antibiaslaw.com/settlementorder.

[13]See Peter Appelbome, *Integration Faces a New Test in the Suburbs*, New York Times, Aug. 22, 2009, http://nyti.ms/19PqKc ("This is consistent with the president's desire to see a fully integrated society…. Until now, we tended to lay dormant. This is historic, because we are going to hold people's feet to the fire." (quoting HUD Deputy Secretary Ron Sims on the settlement order)).

## I. Why Westchester?

As recipients of federal housing and community development funds, more than 1,200 state and local jurisdictions must comply with the obligations discussed in this article.[14] Many are characterized by significant segregation on the basis of race or national origin.[15] Many, too, have failed to engage in any serious effort to affirmatively further fair housing and need to be held accountable. While the Anti-Discrimination Center never thought that Westchester was the only possible defendant in a case dealing with the failure to meet these particular responsibilities, it quickly became apparent that Westchester was a strikingly appropriate defendant.

### A. Facts on the Ground

During the 1980s Westchester County's Planning Department recommended the formation of the Westchester Urban County Consortium to maximize the amount of federal housing and community development funds from HUD. Eventually forty cities, towns, and villages within the county's geographic boundaries joined the consortium, with the county government itself as the consortium's lead member and administrator. In that position the county assumed statutory, regulatory, and contractual obligations related to affirmatively furthering fair housing.

As the Anti-Discrimination Center began its investigation in 2005, Westchester was deeply residentially segregated. The pattern was unmistakable. As part of what the Census 2000 denoted as the eight-county New York "primary metropolitan statistical area" or "PMSA," Westchester was situated in what the Census Bureau found to be one of the most segregated major metropolitan areas in the United States.[16] Within Westchester the continuing pattern of residential segregation was stark. A few municipalities had disproportionately high concentrations of minority residents (e.g., Mt. Vernon and Peekskill, with African American populations of 59 percent and 25 percent, respectively; and Port Chester and Sleepy Hollow, with Latino populations of 47 percent and 45 percent, respectively).[17] By contrast, approximately half of Westchester's forty-five municipalities had staggeringly small African American populations: indeed, the African American population of twelve municipalities was less than 1 percent each; that of ten others was under 2 percent each.[18] In short, to look at a demographic map of Westchester County and honestly reach any conclusion but that a significant level of residential segregation characterized the county would have been impossible.[19]

To ignore the crucial roles played by the municipalities and by Westchester itself in perpetuating a segregated status quo would have been equally impossible. Westchester County's own Housing Opportunity Commission had repeatedly pointed to municipal resistance as being a key cause of the failure to develop affordable housing units in any significant number throughout the county.[20] Whether that municipal resistance was fueled by race-based or class-based animus—or both—the reality is that the absence of affordable housing disproportionately limited housing opportunities for racial

[14]U.S. Department of Housing and Urban Development, Community Development Block Grant Program—CDBG (2009), http://bit.ly/dMws3.

[15]John Iceland et al., U.S. Census Bureau, Economics and Statistics Administration, U.S. Department of Commerce, Census 2000 Special Reports, Report No. Censr–3, Racial and Ethnic Residential Segregation in the United States: 1980–2000 ch. 5 (2002) (documenting extent of residential segregation of African Americans in 330 metropolitan areas in 1980, 1990, and 2000).

[16]*Id.* ch. 5 at 68 (African Americans), ch. 6 at 85 (Latinos).

[17]Westchester County's Planning Department maintains demographic information in the form of a clickable format on its website, which can be found at www.westchestergov.com/planning/research/Census2000/MunicipalProfiles/mun.htm.

[18]*Id.*

[19]Such a map is available at www.antibiaslaw.com/WestchesterSegregation. This information is searchable on the U.S. Census Bureau's website, www.census.gov/.

[20]Westchester County Housing Opportunity Commission, Affordable Housing Action Plan (2004) (in our files).

and ethnic minorities in Westchester's whitest towns and villages.[21]

Westchester County was not an innocent bystander. It ran its housing programs in a way that appeared to concentrate affordable housing in neighborhoods populated by relatively high percentages of African Americans or Latinos, thereby perpetuating patterns of segregation. And there was no visible evidence that the county was doing anything to affirmatively further fair housing.

### B. Testing a Hypothesis

Based on what the Anti-Discrimination Center observed, the center developed a working hypothesis that, as a matter of policy, Westchester had not and would not examine or confront issues of race or municipal resistance. Westchester County's Analysis of Impediments to fair housing choice, submitted to HUD as a chapter of its 2000 and 2004 Consolidated Plans, did not even mention "racial discrimination" or "racial segregation" and failed as well to identify either municipal resistance or the county's own policy of concentrating affordable housing in disadvantaged neighborhoods as barriers to choice.

The Anti-Discrimination Center realized that the key evidence that would determine the validity of its hypothesis lay as much in what documents did *not* exist as in what documents did exist. If Westchester County were fulfilling its obligations to affirmatively further fair housing, it would have been in regular contact with its municipalities: demanding that those municipalities identify their own fair housing impediments and take action to overcome them; specifying land appropriate for affordable housing development; and explaining to the municipalities that the county was compelled to withhold funds from municipalities that did not comply with federal requirements or interfered with the county's efforts to comply with its own obligations. Such a record would have generated an extensive paper trail. If, however, Westchester was just *pretending* to comply with its obligations, the crucial evidence would be the *absence* of any documentation.

The Anti-Discrimination Center decided to make a series of New York Freedom of Information Law requests designed to see what, if anything, Westchester was requiring of its municipalities with respect to their obligations to affirmatively further fair housing, to promote affordable housing, and to consider housing needs in a regional context.

The results were stunning: Westchester required nothing, did nothing, considered nothing. Beyond the absence of records of the county's compliance with its obligation, the deputy commissioner of Westchester's Planning Department confirmed to the Anti-Discrimination Center's director that the county had a "hands-off" policy with respect to the municipal members of the consortium and did not require those members to comply with their own obligations to affirmatively further fair housing.[22] The deputy commissioner also admitted that the county's Analysis of Impediments had no reference to housing discrimination "because we don't include Yonkers" (as though discrimination or segregation only exists where African Americans are, not where they are not) and that the county did not look at discrimination as "racial" but only as a phenomenon related to "income."[23]

### C. Proceeding Under the False Claims Act

The Anti-Discrimination Center recognized that Westchester's conduct constituted a disparate-impact violation of the

[21]In the wake of the announcement of the resolution of the case, there was certainly an explosion of criticism of the requirement to affirmatively further fair housing, much of it cast in explicitly racial terms (e.g., "No white family should be compelled to live amongst people who do not behave in a civilized manner.... Voluntary segregation is a form of freedom.") (see Anti-Discrimination Center Letter to Monitor, August 24, 2009, Exhibit 2 (sampling of online comments in response, inter alia, to published articles on settlement order) (in our files)).

[22]See Complaint, *supra* note 10, ¶ 51.

[23]*Id.* ¶¶ 37–38.

Fair Housing Act.[24] The center also recognized that Westchester's municipalities were deeply vulnerable to New York State law doctrines that give rise to claims against municipalities that practice exclusionary zoning.[25] But the problem in 2005 remained what it had been for many years: the difficulty in finding plaintiffs. Many a developer (both for-profit and not-for-profit) had yearned to build in Westchester County in those areas that were subject to exclusionary zoning, but, not surprisingly, most developers are reluctant to deal with the additional costs, direct and indirect, that are generated by suing the municipality within whose boundaries that developer wants to build.

The False Claims Act, by contrast, was designed as a pure private attorney general statute. In order to help protect the United States against fraud perpetrated by its contractors, that law permits a "relator" (i.e., a person or entity having knowledge of fraud) to step into the shoes of the government and attempt to vindicate the government's interests. So long as the relator can show that the government has been harmed, the relator will have standing to pursue the claim.[26]

The Anti-Discrimination Center saw that the proscriptions of the False Claims Act cleanly fit Westchester County's misconduct. The county had made two kinds of repeated certifications to HUD. The first type—express certifications—represented promises that Westchester *would* analyze, identify, and act to overcome barriers to fair housing choice. The second type—implied certifications—was made each time Westchester requested payment or "drawdown" of federal funds for grants that Westchester could have received only by promising to affirmatively further fair housing. By seeking payment, Westchester was saying, in essence, "We have performed our obligations; we *have* analyzed, identified, and acted to overcome the barriers to fair housing choice." All of Westchester's certifications—both express and implied—were, the center believed, false and fraudulent.

Westchester was aware of the intense racial segregation and municipal resistance in many municipalities. Westchester was aware of its own obligations to affirmatively further fair housing and to withhold funding from those municipalities which had not done so and had to know that its certifications both express and implied were false.[27] Yet the county made the certifications and requests for payment nonetheless.

## II. The Litigation

The Anti-Discrimination Center filed suit under seal (as required by the False Claims Act) in April 2006; the complaint was unsealed in December 2006 and served on Westchester County in January 2007. While characterizing the center's lawsuit as "garbage," the county did hire high-priced outside counsel to defend the claims, ultimately paying it some $3 million in fees.[28] In its motion to dismiss,

[24]The long-standing controlling case within the Second Circuit regarding disparate-impact violations of the Fair Housing Act is *Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926 (2d Cir. 1988) (policy and specific land-use decisions that prevented development of affordable housing, to the extent that they perpetuated racial segregation, could violate the Fair Housing Act).

[25]See, e.g., *Berenson v. Town of New Castle,* 38 N.Y.2d 102 (N.Y. 1975) (any party that owns or controls land may challenge municipality's restrictive zoning on grounds that such zoning does not take sufficient account of regional housing needs for multifamily housing); *In re County of Monroe,* 72 N.Y.2d 338 (N.Y. 1988) (county may challenge municipality's restrictive zoning on grounds that county's public interest in proceeding with development outweighs municipality's interest in restricting such development).

[26]The relator, however, does need to give evidence that acts as a catalyst for uncovering the fraud, evidence that is not already available to the federal government pursuant to statutorily delineated categories (31 U.S.C. § 3730(e)(4)). As such, both the procedural and substantive requirements of the False Claims Act must be examined closely prior to commencing suit.

[27]"Knowing" is defined very broadly under the False Claims Act. It includes actual knowledge that a certification is false, reckless disregard of whether a certification is false, and deliberate ignorance of whether a certification is true or false (the last being the "head buried in the sand" prong of the statute") (31 U.S.C. § 3729(b)).

[28]Ford Fessenden, *County Sued over Lack of Affordable Homes*, New York Times, Feb. 4, 2007, http://nyti.ms/9zj1AM (chief advisor to county executive characterized lawsuit as "garbage"); Zach Lowe, *Epstein Becker on Landmark Westchester Housing Settlement*, AmLaw Daily, Aug. 10, 2009, http://bit.ly/3KAbFV (county's outside counsel receives $3 million in fees).

the county suggested that it had no obligation to consider race discrimination or racial segregation in its Analysis of Impediments to fair housing choice because the county did not believe them to be "the most challenging impediments."[29] The county also suggested that it could fulfill its own obligations to affirmatively further fair housing by addressing the need for affordable housing even as it ignored nonaffordability impediments and concentrated affordable housing units in minority communities.[30]

Judge Denise Cote's order denying the county's motion to dismiss made it clear that the obligations to affirmatively further fair housing, as described in the Fair Housing Act, the Housing and Community Development Act of 1974, HUD regulations, and HUD's Fair Housing Planning Guide were enforceable and that the center had stated a cause of action under the False Claims Act concerning the county's decision to close its eyes to race-based impediments:

> In the face of the clear legislative purpose of the Fair Housing Act, enacted pursuant to Congress's power under the Thirteenth Amendment as Title VIII of the Civil Rights Act of 1968, to combat racial segregation and discrimination in housing, an interpretation of "affirmatively further fair housing" that excludes consideration of race would be an absurd result.... [A]n analysis of impediments that purposefully and explicitly, "as a matter of policy," avoids consideration of race in analyzing fair housing needs fails to satisfy the duty affirmatively to further fair housing.[31]

During the ensuing sixteen months of discovery, Westchester produced more than a half-million pages of documents, but not a single one contained any support for its claims that it had identified and analyzed all impediments to fair housing choice, or that it had taken appropriate actions to overcome those impediments. Instead the documents showed that the county had focused exclusively on affordable housing, with no consideration at all of impediments based on race, and no consideration of how the location of the affordable housing had an impact on segregation patterns. This malfeasance occurred notwithstanding that Westchester County Planning Department personnel had cautioned *as early as 1996* that an "analysis of impediments" was not intended to be an *affordable housing* analysis but rather a *fair housing* analysis.

Depositions and requests for admissions established additional damning facts. The county admitted that it was aware of the racial composition of each of its constituent municipalities, but it never undertook a thorough assessment of race-based impediments to fair housing choice and never adopted an objective of reducing the great disparities in racial composition among municipalities.

Further, the county took no steps to hold the municipalities accountable with respect to their own obligations to affirmatively further fair housing, even though the county signed, with each municipality, cooperation agreements requiring the county to do so.[32] In his deposition the county executive admitted that he had developed no policies for terminating federal funds to municipalities that did not comply with these obligations and that the county had never even threatened to terminate funds on such grounds.

The county did not require municipalities to consider how their zoning laws and practices affected fair housing

[29]Defendant's Reply Memorandum of Law in Further Support of Its Motion to Dismiss the Complaint at 3, n.4, *United States ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, 495 F. Supp. 2d 375 (2007).

[30]*Id.*

[31]*United States ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, 495 F. Supp. 2d 375, 387–88 (S.D.N.Y. 2007).

[32]See 24 C.F.R. § 570.503 (requiring that urban county consortium enter into cooperation agreement with each participating municipality, and prohibiting disbursement of funds to any municipality that failed to enter into same).

choice, and the county admitted that it would not, as a matter of policy, put affordable housing in a municipality that did not want it. As a consequence, nearly three-quarters of the affordable units developed between 1992 and 2006 went into neighborhoods that had very high concentrations of African Americans and Latinos.[33]

The reality of what the county had done was perhaps best summed up by the county executive at his deposition. When asked about his signature on multiple certifications to HUD that the county would affirmatively further fair housing, the county executive admitted that he had not read or taken the certifications seriously: "I signed whatever I have to sign in order to get the money from HUD."[34]

Having established how Westchester County failed in its obligations to affirmatively further fair housing, the Anti-Discrimination Center filed an affirmative motion for partial summary judgment, arguing that the county knew what its obligations were and failed to comply with them but submitted certifications of compliance anyway. Further, the center urged Judge Cote to hold that each monthly "drawdown" request was a separate, implied certification of compliance. The county, by contrast, again urged the court to dismiss the case; the county asserted that the regulations pertaining to the obligation to affirmatively further fair housing were vague and required recipients only to step over a low bar in order to be compliant.[35] In other words, the county wanted the court's imprimatur for the position that essentially anything labeled an "analysis of impediments" satisfied a grant recipient's obligations.

In her opinion and order of February 29, 2009, Judge Cote rejected the county's position decisively:

> [T]he grant funds at issue in this case were expressly conditioned on the AFFH [(obligation to affirmatively further fair housing)] certification requirement. The AFFH [(obligation to affirmatively further fair housing)] 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, requiring the County to conduct an [Analysis of Impediments], take appropriate actions in response, and to document its analysis and actions.[36]

This declaration has the potential to force all jurisdictions to begin to take their civil rights obligations seriously, or face False Claims Act liability in addition to whatever administrative and other actions HUD may elect to impose.

In noting that an analysis of impediments must not be confined to the question of how much affordable housing is produced but must, among other things, examine the location of such housing and its proximity to greater opportunities, the court seemed particularly troubled by the county not having analyzed "whether the production of affordable housing … had the effect of increasing or decreas-

[33]Declaration of Michael Allen in Support of Plaintiff/Relator's Motion for Partial Summary Judgment, Appendix II, Tab 21, Initial Report of Andrew A. Beveridge, Report Regarding Analysis of Impediments to Fair Housing in Westchester County and the Need for Appropriate Actions in Relation Thereto, *United States ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, Case No. 1:06-civ-2860-DLC, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009) (Professor Beveridge served as one of the Anti-Discrimination Center's experts in Westchester County litigation), www.antibiaslaw.com/BeveridgeReport.pdf.

[34]Plaintiff/Relator Anti-Discrimination Center of Metro New York Inc.'s Memorandum in Support of Motion for Partial Summary Judgment at 3, *United States ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, Case No. 1:06-civ-2860-DLC, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009), www.antibiaslaw.com/SJbrief.pdf.

[35]Defendant Westchester County New York's Memorandum of Law in Support of Its Motion for Summary Judgment at 2, *United States ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, Case No. 1:06-civ-2860-DLC, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009), www.antibiaslaw.com/sites/default/files/files/WSJmemo.pdf.

[36]*United States ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, Case No. 1:06-civ-2860-DLC, 2009 WL 455269, at *20 (S.D.N.Y. Feb. 24, 2009).

ing racial diversity in the neighborhood in which the housing was built."[37]

Moreover, because Westchester County had not conducted a "targeted analysis of race as a potential impediment to fair housing, the County was unprepared to grapple with … its … duty to take appropriate action to overcome the effects of any racial discrimination or segregation it might identify as an impediment."[38] The county had, the court held, "utterly failed to comply with the regulatory requirement that the County perform and maintain a record of its analysis of the impediments to fair housing choice in terms of race."[39]

The court went on to hold that requests for payment do constitute implied certifications of compliance. As such, the court held that each of the county's more than one thousand certifications to HUD—whether express or implied—was false or fraudulent.

Subsequent court rulings rejected the county's position that its false certifications were not material and the county's attempt to value the damages to the federal government for the county's failure to affirmatively further fair housing as—literally—zero dollars.[40]

## III. Settlement

After additional pretrial rulings in the Anti-Discrimination Center's favor made Westchester County's impending defeat at trial even more certain, the county finally recognized that it had to settle the case. Because no False Claims Act case can be settled without the government's approval, the discussions that ensued involved the center, Westchester, and HUD.[41] Ultimately, in August 2009, the case was settled with the entry of a settlement order, and remains under the jurisdiction of Judge Cote so that Westchester's obligations under that order can be enforced.[42]

Under the settlement order, Westchester is required to spend $51.6 million to develop at least 750 units of affordable housing for working families, and at least 84 percent of those units must be in municipalities with an African American population of less than 3 percent and a Latino population of less than 7 percent. That will begin to remediate the vast underconcentration of housing in Westchester's whitest towns and villages. Beyond the requirement to place units in the whitest municipalities, Westchester is required to assess the means by which it can maximize the development of affordable housing that affirmatively furthers fair housing "in the eligible municipalities *and census blocks* with the lowest concentrations of African American and Hispanic residents."[43] A schedule of penalties is in place should the county fail to comply.[44]

Moreover, Westchester is required to see that the units are affirmatively marketed

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[37]*Id.* at *10.

[38]*Id.* at *13.

[39]*Id.* at *14.

[40]The county claimed that its performance of the duties other than its obligation to affirmatively further fair housing meant that the federal government got full value on its contract with Westchester. The court disagreed: "Accepting Westchester's proffered argument that because the grants may have been administered in accordance with *other* program requirements, the damages to the government are mitigated, would essentially write the requirement to AFFH [(affirmatively further fair housing)] out of the statutes and regulations." *United States ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, Case No. 1:06-civ-2860-DLC, 2009 WL 1108517, at *3 (S.D.N.Y. April 24, 2009).

[41]The litigation itself was handled from beginning to end by Relman & Dane PLLC, a civil rights law firm, and Craig Gurian, the executive director of the Anti-Discrimination Center. The complaint was filed on April 12, 2006, and the United States did not secure leave to intervene until August 10, 2009, the same day the settlement order was entered.

[42]Stipulation and Order of Settlement and Dismissal, *supra*, note 12.

[43]*Id.* ¶¶ 7, 22(f) (emphasis added).

[44]The settlement order requires the county to develop an implementation plan to describe how it will achieve the integrative housing objectives of the order. If the plan is rejected by the monitor, and the next iteration from the county remains inadequate, the monitor has the responsibility and authority to direct the county to make whatever changes and additions the monitor believes are appropriate, and the county is mandated to incorporate such changes and additions (see *id.* ¶¶ 18–33, especially ¶ 20).

not simply in the town or village built, not simply in Westchester, but throughout the region, including New York City. The settlement order thereby recognizes that Westchester and New York City are part of a single housing market and that it is incumbent on Westchester to identify and overcome any inhibitions that those currently underrepresented in the county might feel about moving into the county.

Of course, 750 units are a mere drop in the bucket for a county of almost one million people. The real key to the settlement order is what is contemplated about how those units can be leveraged to fulfill the county's broader obligations to affirmatively further fair housing. It is widely recognized that zoning barriers are crucial impediments to fair housing choice. And, despite some wishful thinking by some, no one actually believes that municipal resistance to affordable housing development is going to disappear. Especially if the obligation in the settlement order to have housing developed on the census blocks with the lowest concentrations of African Americans and Latinos is taken seriously, existing zoning barriers will have to be confronted.

Doing so will not only facilitate the development of 750 units of housing but also unleash for-profit and not-for-profit developers to proceed with the kind of responsible, context-sensitive housing that most Westchester towns and villages have continued to thwart for decades. In other words, building in a way to accommodate existing zoning barriers yields one unit of housing; building in a way to overcome zoning barriers yields many units of housing.

To overcome zoning barriers, Westchester County will have to be ready to use its authority to overcome local resistance, and the settlement order was designed specifically with that in mind. The settlement order included the county's acknowledgment that affirmatively furthering fair housing "significantly advances the public interest of the County and the municipalities therein."[45] Westchester finally was forced to acknowledge its authority to develop affordable housing despite local zoning restrictions and other municipally created barriers and is obligated to take legal action against resistant municipalities as needed to fulfill the settlement order's purpose to affirmatively further fair housing (the settlement order specifically contains Westchester County's acknowledgment that "it is appropriate to compel compliance if municipalities hinder or impede the County in the performance" of duties such as the development of segregation-reducing affordable housing).[46]

Ranging far beyond what 750 units may or may not do, Westchester County was required to adopt as its policy the elimination of *de facto* residential segregation in the county (the existence of which the county had steadfastly denied throughout the litigation) and was required to adopt as its policy as well the recognition that "the location of affordable housing is central to fulfilling the commitment to AFFH [(affirmatively further fair housing)] because it determines whether such housing will reduce or perpetuate residential segregation."[47]

Effective implementation of the settlement order depends in the first instance on the HUD-nominated and court-appointed monitor to make certain that Westchester is complying with all of the terms of the order. If Westchester or its municipalities are permitted to believe that they can simply choose to maintain the status quo, then implementation will fail. If Westchester and its municipalities know that evasion and resistance will not be countenanced, then implementation will succeed—not only because affordable housing units will be built but also because a new reality on the ground will begin to change power relations, attitudes, and expectations.

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[45] *Id.* ¶ 31(b).

[46] *Id.* at 2 (first clause).

[47] *Id.* ¶ 31(c).

The Westchester litigation gave new hope to those who believe that our deeply segregated housing patterns can and must change. The case stimulated HUD to begin developing enhanced regulations governing recipients' obligations to affirmatively further fair housing. In the seven months since entry of the settlement order, HUD has begun to show more interest in enforcement of these obligations. In early November 2009 HUD threatened to cut off more than $10 million in CDBG-Recovery funds to St. Bernard Parish, Louisiana, because of a series of racially discriminatory multifamily housing restrictions.[48] Later that month, in response to a complaint by low-income housing advocates, HUD rejected Texas's plan for distributing $1.7 billion in CDBG-Recovery funds, in part because of grave deficiencies in the state's performance with respect to its civil rights obligations.[49] And, as widely reported, HUD will publish a new "affirmatively furthering" proposed regulation in the first half of 2010.[50]

But the story of the Westchester case is really just beginning. Throughout the country last summer the case and its settlement captured the attention of just about every other jurisdiction that receives federal housing and community development funding. Those jurisdictions have not made any irrevocable decision to change their ways from past noncompliance. Even if HUD's new draft regulations emerge as powerful tools on paper, everyone will still be asking, Will the structural changes contemplated by the settlement order be carried out, or will those responsible for implementation, monitoring, and compliance be satisfied with surface compliance? At this writing, we know only that history tells the repeated lesson that appeasement invariably leads to more intense resistance and noncompliance. We do not know if that lesson has been learned.

### *Author Acknowledgment*

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**COMMENTS?**

We invite you to fill out the comment form at www.povertylaw.org/reviewsurvey. Thank you.

—The Editors

[48]See Chris Kirkham, *St. Bernard Parish Council Backs Off on Vote on Apartments*, Times-Picayune, Nov. 3, 2009, http://bit.ly/30s7vV.

[49]See Rhiannon Meyers, *State Plan for Ike Money Draws 2nd Complaint*, Galveston County Daily News, Dec. 9, 2009, http://bit.ly/8DuWh6.

[50]HUD conducted an affirmatively furthering fair housing "listening session" on July 13, 2009, and indicated its intention to publish a proposed rule on the topic (see National Low-Income Housing Coalition, Memo to Members: HUD Holds Affirmatively Furthering Fair Housing Listening Session (July 24, 2009), www.nlihc.org/detail/article.cfm?article_id=6302&id=19.