

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA <i>ex rel.</i>	:	
ANTI-DISCRIMINATION CENTER OF	:	
METRO NEW YORK, INC.,	:	
	:	
Plaintiff,	:	
	:	No. 06 Civ. 2860 (DLC)
v.	:	
	:	ECF Case
WESTCHESTER COUNTY, NEW YORK,	:	
	:	
Defendant.	:	
-----	X	

**MONITOR’S REPORT REGARDING IMPLEMENTATION OF THE
STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL
FOR THE 2014 CALENDAR YEAR**

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This report of the Monitor (“Report”) is respectfully submitted pursuant to Paragraph 39 of the Settlement and Order of Stipulation and Dismissal (“Settlement”) entered in this matter on August 10, 2009.¹ The Report summarizes significant developments related to Westchester County’s (“County”) compliance with the Settlement for the calendar year 2014. The Report is primarily based on the following sources of information: (i) information contained in the County’s four quarterly compliance reports concerning its implementation of the Settlement in calendar year 2014;² (ii) County responses to the Monitor’s requests for information; (iii) meetings with County and municipal officials; and (iv) site visits with County and municipal officials, developers, and housing advocates. The Report also summarizes the history of the dispute relating to the proposed Chappaqua Station development in the Town of New Castle.

The Report is divided into four sections. Section I assesses the County’s compliance with the Settlement’s affordable housing development benchmarks and identifies particular questions for the parties to answer. As discussed in detail below, a dispute over the proposed Chappaqua Station development in New Castle has called into

¹ In accordance with Paragraph 40 of the Settlement, the Monitor had a conference call on March 13, 2015 with representatives of the County and the Government to discuss compliance issues and other matters included in the Report.

² The County is required to submit quarterly compliance reports pursuant to Paragraph 28 of the Settlement. The County submitted four quarterly reports covering its compliance with the Settlement in calendar year 2014: the report submitted on May 12, 2014 covers the first quarter of 2014 (“2014 Q1 Report”); the report submitted on July 21, 2014 covers the second quarter of 2014 (“2014 Q2 Report”); the report submitted on October 21, 2014 covers the third quarter of 2014 (“2014 Q3 Report”); and the report submitted on February 11, 2015 covers the fourth quarter of 2014 (“2014 Q4 Report”). These reports are attached hereto as Exhibits 1, 2, 3, and 4.

question whether the County has met the year-end 2014 benchmark for units with financing in place. Section II discusses the status of the County's affirmative marketing, public education, and other outreach efforts. The reports submitted by the County, taken together with public statements by County officials, have raised questions about the County's compliance and, as a result, are the subject of an ongoing review by the Monitor; they will be the focus of depositions and other discovery that will be completed over the next few months. Section III discusses zoning and other local regulatory issues, including recent reports on zoning prepared by the Monitor at the request of the United States Department of Housing and Urban Development ("HUD") and the Chairman of the County Board of Legislators ("BOL"). Finally, Section IV summarizes the Monitor's activities in 2014, including his efforts with respect to zoning and the affordable housing design initiative.

I. Developing Units Required by the Settlement

A. County Efforts to Meet Annual Benchmarks

The Settlement provides that there must be at least 750 "Affordable AFFH Units"³ developed in 31 Westchester municipalities that meet specified demographic criteria by August 10, 2016. Settlement ¶ 7. To ensure that this goal is met, the Settlement provided interim benchmarks for financing and for building permits; by the end of 2014, the County was required to ensure that at least 350 Affordable AFFH Units had building permits and 450 Affordable AFFH Units had financing in place. Settlement

³ A more fulsome definition of the term "Affordable AFFH Units" is set forth in Paragraph 7 of the Settlement.

¶ 23. Notably, the Settlement is silent on how the benchmarks should be applied where proposed housing is, at best, placed in jeopardy by litigation between the developer and the municipality *and* apparently opposed by the municipality.

The County represents that, as of December 31, 2014, there were 454 Affordable AFFH Units with financing in place and 406 Affordable AFFH Units with building permits, satisfying both interim benchmarks. *See* Ex. 4, 2014 Q4 Report, at 1. Since year-end 2013, the County's quarterly reports indicate that the number of units with financing in place increased by 55 (13.8%), and the number of units with building permits increased by 26 (6.8%). *Compare id., with* Westchester County Fair And Affordable Housing Quarterly Report For The Period October 1, 2013 Through December 31, 2013 ("2013 Q4 Report"), at 1, attached hereto as Exhibit 5. There are 49 active development sites the County represents will have at least one eligible Affordable AFFH Unit, distributed across 25 of the 31 eligible municipalities. *See* Ex. 4, 2014 Q4 Report, at 1, 4. When completed, the County expects these sites to create 718 of the 750 Affordable AFFH Units mandated by the Settlement, assuming necessary approvals are obtained. *Id.* Almost half of these anticipated units are in census blocks that, in 2000, had the smallest African-American and Hispanic populations. *Id.* at 8. The County further reported that 223 Affordable AFFH Units distributed across eleven developments are completed and occupied. *Id.* at 3-4.

Notwithstanding the County's representations in its quarterly reports, the Monitor lacks sufficient information to determine whether the County is in compliance with the year-end 2014 benchmark of 450 units with financing in place. As described in greater

detail below, continued municipal opposition to the 28-unit Chappaqua Station development raises questions about whether these proposed units should be counted under the Settlement framework, which seeks, above all, to “*ensure* the development of at least [750] new affordable housing units.”⁴ Settlement ¶ 7 (emphasis added). Were Chappaqua Station’s proposed 28 units to be excluded from consideration, the County would be left with 426 Affordable AFFH Units with financing in place by year-end 2014, 24 units short of the benchmark.

In order to determine whether the County is in compliance with the 450-unit benchmark, the Monitor has requested that the parties articulate their respective positions as to whether, under the current posture of litigation between New Castle and the project developer, Conifer Realty (“Conifer”), the proposed Chappaqua Station development should be credited under the Settlement. Following review of these submissions, the Monitor will determine whether the County is in compliance or should be assessed penalties.

The County’s failure to comply with the benchmarks will trigger monetary and potentially other penalties under the Settlement. The Monitor may impose a \$30,000 penalty on the first day of non-compliance with the benchmarks as of January 1, 2015.⁵

⁴ Indeed, as addressed more fully below, it may be inconsistent with the Settlement to award the County credit in a circumstance where the municipality, New Castle, actively “undertakes actions that hinder the objectives” of the 750-unit benchmark and the County fails to “use all available means . . . to address such action,” including “pursuing legal action.” Settlement ¶ 7(j).

⁵ Under the Settlement, monetary penalties are used to fund the development of Additional Affordable AFFH Units. Settlement ¶ 38. The Settlement authorizes the

Settlement ¶ 38. These penalties would increase to \$60,000 per month after thirty calendar days of continued non-compliance. *Id.* In addition, the Monitor may, in light of the failure, increase the number of Affordable AFFH Units the County has a duty to provide beyond 750. *Id.* The parties will, of course, have an opportunity to address what the increase should be.

B. Distribution of Units Across Municipalities

The County's record of equitably distributing proposed units across the 31 eligible municipalities has steadily improved since the Monitor first raised concerns in his third annual status report to the Court. *See* Monitor's Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the 2012 Calendar Year, at 9-11, February 25, 2013 (ECF No. 429). The Monitor raised concerns after the County's Third Quarter 2012 report showed that 70% of the proposed AFFH units were to be located in just four communities (Cortlandt, New Castle, North Salem, and Somers), and that there were no proposed units in 12 eligible municipalities. *See id.* at 9.

The Monitor noted some progress on this front in a subsequent report. By the end of March 2014, the number of eligible municipalities without proposed units had decreased to eight, and the four municipalities with the highest projected concentration of AFFH units accounted for 55% of the proposed units. *See* Monitor's Second Biennial Assessment of Westchester County's Compliance ("Second Biennial Assessment"), at

Monitor to determine the formula for calculating the number of Additional Affordable AFFH Units required pursuant to Paragraph 7. *Id.*

21, June 26, 2014 (ECF No. 478). Nevertheless, at the time, the Monitor noted that there remained room for the County to strengthen its record. *Id.* at 23.

These numbers have continued to improve. The four municipalities that, by year-end 2014, had the highest projected concentration of AFFH units (Buchanan, Cortlandt, North Salem, and Somers) now account for 347 AFFH units out of a total of 718 AFFH units, or 48.3% of the proposed units. *See* Ex. 4, 2014 Q4 Report, at App'x I-1. The number of eligible municipalities without proposed units has decreased to six. *See* Ex. 4, 2014 Q4 Report, at 1. Seven municipalities (Buchanan, Cortlandt, New Castle, North Salem, Rye City, Somers, and Yorktown), however, account for 515 proposed AFFH units, or 71.7% of the total proposed units, indicating that there continues to be room for improvement. *See* Ex. 4, 2014 Q4 Report, at App'x I-1.

Another indicator of the equitable distribution of affordable housing throughout the County is the size of each proposed development—concentrating affordable housing in a few large developments is, for several reasons, less desirable than distributing affordable housing units throughout several, smaller developments. The County's record on this score has also shown improvement. Of the 49 development sites now built, approved, or proposed, 39 (79.6%) contain one to 25 units in total. *See* Ex. 4, 2014 Q4 Report, at App'x I-1. This is an improvement from the figure reported in the Second Biennial Assessment, when 71% of the developments had 25 units or less. *See* Second Biennial Assessment, at 22. Of the 39 less-concentrated developments, 25 (64%) are within developments made up of only one to five units in total. *See* Ex. 4, 2014 Q4 Report, at App'x I-1.

The Monitor will review new proposals with continued consideration given to increasing the distribution of units among the 31 eligible municipalities and encourages the County to continue to distribute new units more broadly.

C. County Funding Advisories and Responses Thereto

The County has continued to submit funding advisories regarding specific proposed affordable housing developments. They relate to the following developments:

1. Funding Advisory No. 21, 602 Route 22, North Salem, New York.

Advisory No. 21, attached hereto as Exhibit 6, concerns the proposed acquisition and rehabilitation of an existing vacant house to create one affordable three-bedroom ownership unit and one affordable, accessible one-bedroom rental unit. The ownership unit will be affordable to households at or below 80% of AMI and will remain affordable for at least 50 years. The rental unit will be affordable to households at or below 50% of AMI and will remain affordable for at least 50 years. The County has represented that the development is located in the North Salem Central School District and is within two blocks of the Croton Falls Metro-North Railroad station and the Croton Falls business district.

Based on the information the County has provided and our analysis, the proposed two units appear to be eligible to be counted under Paragraph 7(a) of the Settlement. Eligibility is contingent upon the finalization by the County of an acceptable marketing plan.

2. Funding Advisory No. 22, Symphony Knoll Senior Affordable Housing, 15 Mount Airy Road, Croton-on-Hudson, New York.

Advisory No. 22, attached hereto as Exhibit 7, concerns the proposed conversion of an office space in an existing eleven-unit senior housing development into an affordable one-bedroom rental unit available to a senior household aged 55 or older. The unit will be affordable to households at or below 60% of AMI and will remain affordable for at least 50 years. The County has represented that the development is located in the Croton Harmon School District and is adjacent to Bee Line Bus Routes #10 and 14, which provide ready access to shopping and services and connections to the cities of White Plains and Peekskill. The development also is two-tenths of a mile from the downtown area of the Village of Croton.

Based on the information the County has provided and our analysis, the proposed unit appears to be eligible to be counted under Paragraph 7(b) of the Settlement. Eligibility is contingent upon the finalization by the County of an acceptable marketing plan.

3. Funding Advisory No. 23, 2-4 Weaver Street, Scarsdale, New York.

Advisory No. 23, attached hereto as Exhibit 8, concerns a proposed development, 2-4 Weaver Street, that will comprise an eleven-unit cooperative housing development and will include one two-bedroom affordable unit for ownership. The unit will be affordable to households at or below 80% of AMI and will remain affordable for at least 50 years. The unit will include two full bathrooms and on-site parking. The County has

represented that the development will be located within the Scarsdale School District and will be immediately adjacent to a bus stop for Bee Line Bus Routes #63 and 66, which provide access to nearby shopping and services, the cities of White Plains and New Rochelle, and the Scarsdale Metro-North Railroad station, which is located 1.8 miles from the property. The construction of the affordable unit will require no County funds because it will be an inclusionary unit in accordance with the Village of Scarsdale's affordable housing ordinance.

Based on the information the County has provided and our analysis, the proposed unit appears to be eligible to be counted under Paragraph 7(a) of the Settlement.

Eligibility is contingent upon the finalization by the County of an acceptable marketing plan.

4. Funding Advisory No. 24, Briar Commons, 558 North State Road, Briarcliff Manor, New York.

Advisory No. 24, attached hereto as Exhibit 9, concerns a proposed development, Briar Commons, that will consist of twelve two-bedroom townhomes for ownership, three of which will be affordable to households at or below 80% of AMI and will remain affordable for at least 50 years. Each unit will include 1.5 bathrooms and a one-car garage. Despite the Briarcliff Manor address, the site is located in the Town of Ossining. The County has represented that the development will be located in the Ossining Union Free School District and will have ready access to transportation, being located less than one-tenth of a mile from Bee Line Bus Route #15, and less than 1.5 miles from both the Taconic State Parkway and Route 9A. The construction of the three affordable units will

require no County funds. The proposed units are inclusionary in accordance with the Town of Ossining's affordable housing ordinance.

Based on the information the County has provided and our analysis, the proposed three units appear to be eligible to be counted under Paragraph 7(c) of the Settlement. Eligibility is contingent upon the finalization by the County of an acceptable marketing plan.

5. Funding Advisory No. 25, Chappaqua Station, 54 Hunts Place, Chappaqua, New York.

a. Description of Development

With Advisory No. 25, attached hereto as Exhibit 10, the County presents a proposed development known as Chappaqua Station in the Town of New Castle containing twenty-eight (28) rental apartments on a 0.34-acre site. All of the units are affordable to families at or below 50% and 60% of AMI and will remain affordable for at least 50 years. If it goes forward, the development would provide eleven (11) one-bedroom apartments and seventeen (17) two-bedroom units. The building will include common area space, a laundry room, community room, management office, and an outdoor terrace.

The proposed development is transit-oriented, located near several transportation services—the nearest Metro-North Railroad station is adjacent to the site to the south and the development is adjacent to the Saw Mill River Parkway. A walkway and bridge will provide pedestrian access to the station and to Chappaqua's commercial downtown, with

its shops, restaurants, schools, and recreational opportunities. The proposed development is in the Chappaqua Central School District, which serves approximately 4,100 students.

This disputed development has had a complex history that includes vehement public opposition and shifts in municipal positions, and it is currently mired in litigation. The Monitor makes no forecast as to whether the development will ever be completed. The Monitor does, however, have concerns that the development does not meet the conditions necessary to be counted toward the annual benchmarks.

b. Concerns Raised by the Monitor

In 2012, the Monitor raised concerns with Conifer about the site location and configuration—the proposed building would be located on a small parcel of land (0.34 acres) between a major highway (the Saw Mill River Parkway), a bridge, and railway tracks (the Chappaqua Metro-North Railroad station is immediately adjacent to the site). *See* Letter from James E. Johnson to Andrew V. Bodewes, April 12, 2012, attached hereto as Ex. 11; Letter from James E. Johnson to Andrew V. Bodewes, July 12, 2012, attached hereto as Ex. 12. Conifer twice allayed the concerns of the Monitor and consultants he had employed by making significant changes to the proposed development. *See* Letter from James E. Johnson to Andrew V. Bodewes, September 7, 2012, attached hereto as Ex. 13.

The Monitor has continued to follow the progress of the development and has met with municipal officials and Conifer concerning the effort. Over the years, the municipality has changed its posture with respect to the development. Supportive of the

development in February 2012, the municipality now opposes the development and has made public statements that ignore the work Conifer undertook to address the Monitor's concerns. Significantly, the municipality's statements could lead the public to believe that the Monitor continues to harbor concerns about the development.⁶ He doesn't. The Monitor's April 12, 2012 and July 12, 2012 letters do not reflect the Monitor's current position and should not be used to suggest otherwise. The Monitor has no direct evidence of the intention behind the misuse of the letter, but notes that it is inconsistent with any reasonable interpretation of the Monitor's dealings with the municipality and Conifer.

c. Obtaining Municipal, County, and State Approvals

Following a municipal review and approval process, the New Castle Town Board on September 10, 2013 granted Conifer a special permit to develop Chappaqua Station.

⁶ In a letter to the Monitor and County Executive Robert P. Astorino, the Town's counsel noted that the Town Board "shares the concerns expressed by the Monitor about the shortcomings of the project site and the 'risk of significant stigmatization and isolation' that may befall its future residents." Letter from Edward J. Phillips to James E. Johnson and Robert P. Astorino, at 3 (quoting Ex. 12, Letter from J. Johnson to A. Bodewes, July 12, 2012), February 13, 2015, attached hereto as Exhibit 14. While emphasizing the Monitor's earlier concerns about Chappaqua Station and acknowledging that the Monitor "subsequently changed his negative opinion about the site," New Castle's letter ignored the robust process the Monitor and Conifer went through to resolve the very concerns the Town now says it "shares." New Castle's letter also gave short shrift to the Monitor's September 7, 2012 letter, in which the Monitor expressed his view that the development "furthers the goals of the consent decree" and applauded Conifer for the "care that you have taken with this development and your willingness to consider and generate new ideas." Ex. 13, Letter from J. Johnson to A. Bodewes, at 1-2, September 7, 2012; *see also New Castle must act on Chappaqua Proposal, The Journal News*, April 8, 2014 (noting that the Monitor "was won over by changes the developer made, at his request"), attached hereto as Exhibit 15.

See Resolution, Town of New Castle Town Board, Conifer Special Permit Approval, September 10, 2013, attached hereto as Exhibit 16. The special permit identified certain variances that Conifer Reality would need to obtain before the Town Building Inspector could issue a building permit. *Id.*

On November 5, 2013, shortly after the special permit was approved, candidates who opposed the Chappaqua Station development were elected to positions of Town leadership, including Town Supervisor Robert J. Greenstein and Town Board members Lisa S. Katz and Adam M. Brodsky, displacing municipal leaders who had supported the development. *See, e.g.,* Team New Castle 2013 Campaign Flyer (outlining anti-Chappaqua Station campaign position by Greenstein, Katz, and Brodsky), attached hereto as Exhibit 17; Tom Auchterlonie, *Team New Castle Wins Town Board Elections: Unofficial Tally*, Chappaqua-Mount Kisco Patch, November 7, 2013, attached hereto as Exhibit 18. Now in office, these municipal officials have made good on their campaign promises, remaining steadfastly opposed to the very variances that the special permit contemplated being granted.

On January 22, 2015, following a lengthy review process, the New York State Hudson Valley Regional Board of Review approved four building and fire code variances required by the special permit. *See* Tom Auchterlonie, *State Board Approves Variances For Chappaqua Station*, Chappaqua Daily Voice, January 22, 2015, attached hereto as Exhibit 19. The Regional Board of Review granted the variances over the opposition of Town Supervisor Greenstein and Town Building Inspector William J. Maskiell, who

testified against Conifer's petition. *See* Letter from Randolph M. McLaughlin to James E. Johnson, at 4, February 23, 2015, attached hereto as Exhibit 20.

On November 24, 2014, the BOL approved conditional financing for Chappaqua Station. The County funding is expressly "*subject to the approval of all required State and municipal variances.*" *See* Westchester County, N.Y., Act Nos. 2014-213, at § 1; 2014-214, at § 1 (emphasis added), attached hereto as Exhibits 21 & 22. In other words, without municipal approval of the variances, the funding is not available.

d. Municipal Opposition

Despite Conifer receiving State variances required by the special permit, municipal officials, including the Town Supervisor, members of the Town Board, and the Town Building Inspector, have continued to oppose the development based on "fire safety concerns" and "concerns that the project site poses the risk of significant stigmatization and isolation of residents." *See* Robert J. Greenstein, *Town of New Castle Supervisor's Report* (February 24, 2015), attached hereto as Exhibit 23. Town officials also state that they remain concerned about the "project's proximity to the Metro-North railroad tracks." Letter from Edward J. Phillips to Randolph M. McLaughlin, at 3, March 5, 2015, attached hereto as Exhibit 24.

Town Building Inspector Maskiell, who may have sole discretion to grant or deny Conifer a building permit, has "expressed serious concerns about the safety" of the Chappaqua Station proposal and submitted testimony to the Regional Board of Review about the developer's "fail[ure] to create an acceptable safety margin for the public, first

responders and the occupants of the proposed building.” Letter from Edward J. Phillips to Department of State, Division of Code Enforcement and Administration, February 17, 2015, attached hereto as Exhibit 25. Drawing on these asserted safety concerns, the Town Board has requested that the Regional Board of Review reconsider its grant of State variances for the project. *See id.*

The Town has told Conifer that development should be undertaken at an alternative site in downtown Chappaqua. *See* Ex. 14, Letter from E. Phillips to J. Johnson and R. Astorino, at 3, February 13, 2015. Conifer has rejected the Town’s proposal given the significant amount of time, energy, and money the developer has sunk into Chappaqua Station. *See* Ex. 20, Letter from R. McLaughlin to J. Johnson, at 5-6, February 23, 2015.

e. Litigation Over Special Permit

New Castle and Conifer also are in litigation over the length of time the special permit provides for construction to be completed on the Chappaqua Station development. New Castle contends that Conifer’s special permit expired on or about March 20, 2015, and that the developer must apply for an extension before commencing construction. *See, e.g.*, Letter from Edward J. Phillips to Randolph M. McLaughlin, February 5, 2015, attached hereto as Exhibit 26. Conifer counters that the special permit is valid for 25 years and that an extension request is unnecessary. *See, e.g.*, Ex. 20, Letter from R. McLaughlin to J. Johnson, February 23, 2015.

Unable to resolve the dispute through informal channels, Conifer sued New Castle on February 20, 2015, seeking a declaratory judgment that the special permit expires in 25 years. *See* Verified Complaint, *Conifer Realty, LLC v. Town of New Castle*, No. 52286/2015 (N.Y. Sup. Ct. Feb. 20, 2015), attached hereto as Exhibit 27. The County has not intervened in the lawsuit. The court has issued a temporary restraining order precluding New Castle from rescinding or modifying the special permit while Conifer's motion for a preliminary injunction is pending. *See* Order to Show Cause, *Conifer Realty, LLC v. Town of New Castle*, No. 52286/2015 (N.Y. Sup. Ct. Feb. 20, 2015), attached hereto as Exhibit 28. Oral argument on Conifer's motion was held on March 6, 2015 and the court is expected to rule soon. On March 12, 2015, New Castle filed a motion to dismiss the lawsuit. *See* Notice of Motion, *Conifer Realty, LLC v. Town of New Castle*, No. 52286/2015 (N.Y. Sup. Ct. Mar. 12, 2015), attached hereto as Exhibit 29.

Even if Conifer prevails in court, however, the municipality could still seek to block the development by withholding, or attaching onerous conditions to, needed building permits. Given that the Town Building Inspector continues to harbor "concern[] about the safety of Conifer's proposed residential building," Conifer may still face a difficult path ahead. *See* Ex. 14, Letter from E. Phillips to J. Johnson and R. Astorino, at 3, February 13, 2015.

In the interests of ensuring the County's compliance with the affordable housing benchmarks mandated under the Settlement, the Monitor supports the development without any reservations and calls upon New Castle to cease and desist from its attempts

to use as a shield concerns that Conifer has worked in good faith to address since April 2012. Conifer has addressed the Monitor's concerns adequately and admirably.

f. Monitor's Requests for Information

In December 2014, the Monitor sought written responses from the County, HUD, and the Department of Justice ("DOJ") about whether—given the setbacks Conifer faced at that time—the Chappaqua Station development should receive credit under the Settlement. *See* Letter from James E. Johnson to Holly M. Leicht, Glenda L. Fussá, and David J. Kennedy, December 15, 2014, attached hereto as Exhibit 30; Letter from James E. Johnson to Robert P. Astorino, December 15, 2014, attached hereto as Exhibit 31.

These questions gained greater salience once the dispute erupted in litigation.

The County maintained that it should receive credit for Chappaqua Station because, in its view, the Settlement permits developments to count towards the funding-in-place benchmark if the BOL has approved funding for the development, even if building permits and necessary variances have not yet issued. Letter from Kevin J. Plunkett to James E. Johnson, December 18, 2014, attached hereto as Exhibit 32.

The DOJ's response, by contrast, was more nuanced, noting that the County could receive credit only if "there is a written commitment for the full amount of funds necessary for the construction of Chappaqua Station," and asserting that the County's response did not "fully answer this question." Letter from David J. Kennedy to James E. Johnson, December 23, 2014, attached hereto as Exhibit 33. Because the County approved financing for Chappaqua Station on the express condition that Conifer obtain

necessary variances, it remains an open question whether the County's commitment has been vitiated by the Town's continued opposition to Conifer receiving State and local variances and the potentially broad discretion the Town has to deny local variances. The contingent nature of the County's financing supports the conclusion that it is inappropriate to credit the proposed development's units, which would put the County in breach of the Paragraph 23 interim benchmark requirement for units with financing in place. Moreover, as set forth below, the County's apparent disengagement from the dispute would counsel against giving the County credit for the proposal in the event of a close call.

Seeking additional information about the recent impasse between Conifer and New Castle, the Monitor requested information from County Executive Astorino about the County's efforts to encourage New Castle to grant final building permit approvals for the Chappaqua Station development. *See* Letter from James E. Johnson to Robert P. Astorino, February 11, 2015, attached hereto as Exhibit 34. The County responded that it "has not considered" offering incentives to New Castle. *See* Letter from Norma V. Drummond to James E. Johnson, February 27, 2015, attached hereto as Exhibit 35. It asserted that it "cannot use its Discretionary [Funding] Policy" to encourage New Castle to approve necessary building permits. *Id.* In fact, the County has not identified any action it has taken to encourage New Castle to permit the project to proceed. Nor has the County intervened in the lawsuit pending between New Castle and Conifer.

The County's apparent inaction in the face of renewed municipal opposition to Chappaqua Station may violate the County's Settlement obligations and could serve as

the basis for a potential contempt action. Paragraph 7(i) mandates that the County “use all available means as appropriate to achieve” the Settlement’s benchmarks, including “developing financial or other incentives for other entities to take steps to promote” the Settlement’s affordable housing development objectives. *See* Settlement ¶ 7(i).

Moreover, when a “municipality does not take actions needed to promote . . . , or undertakes actions to hinder,” the development of Affordable AFFH Units, the County is required to “use all available means as appropriate to address such action or inaction, including . . . pursuing legal action.” Settlement ¶ 7(j). The County, having done little so far to address New Castle’s efforts to hinder the proposed Chappaqua Station development, is urged to consider “all available means” at its disposal to promote the Chappaqua Station development and to report to the Monitor what steps it plans to take to do so.

There has been no indication that Conifer or New Castle will favorably resolve the litigation leading to the construction of the proposed development or of anything substantially similar to it. Accordingly, in correspondence issued simultaneously with this Report, the Monitor has requested that both the Government and the County address the questions of whether and why the Chappaqua Station proposal should count toward the benchmarks. In particular, the Monitor seeks an explanation of how the goal of 750 units would be served by counting the hotly-disputed development.

6. Funding Advisory No. 26, Saw Mill Lofts, 425 Saw Mill River Road, Hastings-on-Hudson, New York.

In Advisory No. 26, attached hereto as Exhibit 36, the County proposes a development known as Saw Mill Lofts in the Village of Hastings-on-Hudson consisting of sixty-six (66) mixed-income rental units distributed across three elevator buildings on a 7.45-acre site. Twelve (12) units are affordable to families at or below 50% and 60% of AMI and will remain affordable for at least 50 years. The twelve affordable homes will be located in one of the three buildings and will include one studio apartment, four one-bedroom apartments, five two-bedroom apartments, and two three-bedroom apartments. The County maintains that the building containing the AFFH units will be indistinguishable from the market-rate buildings.

The proposed development includes a 1.8-acre open recreational space dedicated to the Village and is located near other recreational areas, as well as retail and entertainment options—the developer is constructing a pedestrian bridge over the Saw Mill River that will permit residents easy access to the South County trailway and to shopping in the Village of Dobbs Ferry. The proposed development is located near several transportation options—there is a Bee Line Bus Route near the site entrance, additional bus stops are less than one-half mile from the property, the nearest Metro-North Railroad station is an approximate four mile drive, and the Saw Mill River Parkway is less than one-half mile from the site.

The proposed units are within the Hastings-on-Hudson Union Free School District, which, according to U.S. News & World Report, is one of the top 150 high

schools in the country. *See* Best High Schools Rankings 2014, U.S. NEWS & WORLD REPORT, available at: <http://www.usnews.com/education/best-high-schools/new-york/districts/hastings-on-hudson-union-free-school-district/hastings-high-school-13743>.

Based on information the County has provided and our analysis, the homes described in Advisory No. 26 appear to be eligible to be counted under Paragraph 7(a) of the Settlement. Eligibility is contingent upon the finalization by the County of an acceptable marketing plan.

7. Funding Advisory No. 27, 184 Farragut Avenue, Hastings-on-Hudson, New York.

In Advisory No. 27, attached hereto as Exhibit 37, the County proposes a two-unit development, 184 Farragut Avenue in the Village of Hastings-on-Hudson, consisting of a new-construction single-family home with an accessory apartment. The units will be affordable to households at or below 50% of AMI and will remain affordable for at least 50 years. The development will be located in the Hastings-on-Hudson Union Free School District and will have ready access to Bee Line Bus Route #6, which provides access to White Plains and Yonkers.

Based on the information the County has provided and our analysis, both units appear to be eligible to be counted under Paragraph 7(a) of the Settlement. Eligibility is contingent upon the finalization by the County of an acceptable marketing plan.

8. Funding Advisory No. 28, 2 Spruce Road, South Salem, New York.

Advisory No. 28, attached hereto as Exhibit 38, proposes the acquisition and rehabilitation of a vacant single-family house with an accessory one-bedroom apartment in the Town of Lewisboro to create one three-bedroom home ownership unit and a one-bedroom accessory rental apartment unit. The home ownership unit would be affordable to families earning up to 80% of AMI and the rental unit would be affordable to families at or below 60% of AMI. Both units would remain affordable for 50 years. The County has represented that the property is located in the Katonah-Lewisboro School District. The property is approximately seven miles from the nearest bus stop and Metro-North Railroad station. Although the lack of ready access to public transportation is not ideal, that alone does not exclude the site from consideration. *See* Settlement ¶ 7(g).

Both units appear to be eligible to be counted under Paragraph 7(a) of the Settlement. Eligibility is contingent upon the finalization by the County of an acceptable marketing plan.

D. Occupants of Completed Affordable AFFH Units

The Monitor analyzed data reported by the County for the 223 completed and occupied affordable AFFH homes to assess the demographic characteristics of the new residents. *See* Ex. 4, 2014 Q4 Report, at App'x I-3. Approximately 30% of these occupied units report having a head of household who is Black or African American, and, with respect to ethnicity, approximately 21% report a Hispanic head of household. Ex. 4, 2014 Q4 Report, at 5. These figures are comparable to figures reported in the Second

Biennial Assessment, where, of the 173 AFFH homes then occupied, 35% reported having a head of household who was Black or African American, and with regard to ethnicity, 21% identified themselves as Hispanic. Second Biennial Assessment, at 33.

The 65-unit Bridleside development in the Town of North Salem is a representative example of the demographic makeup of housing developments created pursuant to the Settlement. Among the heads of household, 16.9% (11) identified as Black or African American and 24.6% (16) identified themselves as Hispanic, as compared to North Salem's overall population, which, according to 2010 Census data, was 1.2% Black or African American and 7.5% Hispanic. *See* Ex. 4, 2014 Q4 Report, at App'x I-3. The Monitor will continue to review demographic trends as more developments are completed and occupied.

E. County Efforts to Identify Sites

In its 2014 quarterly reports, the County reported holding meetings with municipal officials, landowners, and developers to discuss the development or redevelopment potential of sites for the creation of Affordable AFFH Units. The County also described its own efforts to identify sites. *See* Ex. 4, 2014 Q4 Report, at 7; Ex. 3, 2014 Q3 Report, at 8; Ex. 2, 2014 Q2 Report, at 8; Ex. 1, 2014 Q1 Report, at 8-9. In total, from January 1, 2014 through December 31, 2014, the County reported holding 31 meetings with municipal officials and 38 meetings with landowners and developers. *Id.*

The County also described the ways in which it evaluated sites, including consideration of proximity to schools and other community resources, the developer's

qualifications, and an underwriting analysis. *See, e.g.*, Ex. 4, 2014 Q4 Report, at 8. The County should continue to focus on the site selection criteria discussed in the Monitor's April 2011 report when evaluating potential developments. *See* Monitor's Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the Period of October 25, 2010 through April 25, 2011, at 11-12, April 25, 2011 (ECF No. 336).

II. Marketing and Outreach

A. Central Intake System

The County's Central Intake System is an important component of the County's efforts to spread information about new affordable housing opportunities and the communities where such housing is located. *See* Second Biennial Assessment, at 17-19. The County reports that there are 6,190 active registered accounts on the Central Intake System. *See* Ex. 4, 2014 Q4 Report, at App'x IV-2. Of these active registrants, 69% (4,302) identified their race and 31% (1,888) did not. Among those who identified their race, 40% (2,485) identified themselves as African American; 22% (1,351) as white; 2% (99) as Other Pacific Islander; 1% (79) as white and African American; 1% (49) as Asian Indian; 1% (43) as American Indian or Alaskan Native; and 1% (40) as American Indian or Alaskan Native and African American. Additionally, 32% (1,998) of registrants indicated that they were Hispanic. *See id.*

B. Marketing

Paragraph 33(e) requires the County to “affirmatively market affordable housing within the County and in geographic areas with large non-white populations outside, but contiguous or within close proximity to, the County.” Of the 6,190 active participants in the Central Intake System, 60% (3,717) were from Westchester County; 22% (1,360) were from Bronx County; 6% (372) were from New York County (Manhattan); 3% (180) were from Kings County (Brooklyn); 3% (171) were from locations outside of New York State and Fairfield County, Connecticut; 1% (59) were from Putnam County; 1% (40) were from Dutchess County; and 1% (35) were from Orange County. Ex. 4, 2014 Q4 Report, at App’x IV-2. However, just 2% (112) of registrants were from Queens County, and just 1% were from Rockland (36), Fairfield (36), and Richmond (16) counties, *see id.*, which are among the nine counties in the Marketing Area for Affirmative Fair Housing Marketing (“AFH Marketing Area”) identified in the Affirmative Fair Housing Marketing Plan approved by the Monitor (“Affirmative Marketing Plan”). *See* Westchester County Affirmative Fair Housing Marketing Plan, at 3, December 29, 2011, attached hereto as Exhibit 39. There are many reasons why people from other counties might elect not to move to Westchester. That said, as discussed below, the marketing strategies employed by the County would not, in any event, appear likely to produce more robust results.⁷

⁷ To better analyze the County’s affirmative marketing efforts outside of Westchester, the County should collect data from Central Intake System registrants regarding how they discovered the website, much as it already does with respect to applicants to select affordable housing developments. *See, e.g.*, Ex. 4, 2014 Q4 Report, at App’x

The County also analyzed the geographic distribution of individuals who submitted applications to two Affordable AFFH developments. The Bridleside development in the Town of North Salem attracted 943 applicants. Ex. 3, 2014 Q3 Report, at App'x IV-4. Of these applicants, 51% (483) were from Westchester County; 17% (161) were from Bronx County; 8% (80) were from Putnam County; 6% (54) were from New York County; 4% (40) were from Kings County; 2% (22) were from Fairfield County, Connecticut; 1% (9) were from Rockland County; 1% (8) were from Queens County; and less than 1% (1) were from Richmond County. *Id.* The Comstock Heights home-ownership development drew 178 applications. *See* Ex. 4, 2014 Q4 Report, at 15. Of these applicants, 55% (98) were from Westchester County; 19% (33) were from Bronx County; 12% (21) were from New York County; 4% (7) were from Kings County; 4% (7) were from Queens County; 2% (3) were from Putnam County; and 0% were from Rockland County, Richmond County, and Fairfield County, Connecticut. *See id.* at App'x IV-4.

The County indicates that its affirmative marketing activities include “outreach on the County’s website, outreach to community agencies in the nine-county area, notices sent to the households signed up for Homeseeker information, e-mail through the County’s List Serve, distribution of press releases and postings on the County’s Twitter feed and on the County’s Facebook page.” *See* Ex. 3, 2014 Q3 Report, at 16. Of these six marketing methods, four—“outreach on the County’s website,” “notices sent to the

IV-4 (reflecting data about how Comstock Heights applicants learned of the development). The collected data should be included in the County’s future quarterly compliance reports.

households signed up for Homeseeker information,” “email through the County’s List Serve,” and “postings on the County’s Twitter feed and on the County’s Facebook page”—are not designed to reach potential applicants without existing ties to Westchester. Because the County does not affirmatively advertise its website, social media pages, or List Serve to those who do not reside in Westchester, these marketing efforts do not appear reasonably calculated to target such potential applicants.

The County’s *affirmative* marketing efforts have been limited at best. The two marketing strategies identified by the County that appear designed to increase awareness of Westchester’s affordable housing opportunities among those without ties to the County are the County’s “outreach to community agencies in the nine-county area” and “distribution of press releases.” The County does not describe what its “outreach to community agencies in the nine-county area” entails; the County has not identified the agencies with which it has communicated or detailed the information provided to such agencies.⁸ Fewer than 10% of applicants for the Bridleside and Comstock Heights developments discovered the opportunity through a community agency, however, indicating that this marketing approach either has not cast a very wide net or is simply not the most effective tool. *See* Ex. 3, 2014 Q3 Report, at App’x IV-4; Ex. 4, 2014 Q4 Report, at App’x IV-4. Instead, applicants appear far more likely to learn of potential developments through friends or the Internet. *See id.* Although outreach to community agencies in the AFH Marketing Area is an important marketing effort and should

⁸ The Monitor will issue an information request to the County to determine the scope of the County’s outreach to community agencies.

continue, this strategy alone does not reach meaningful numbers of potential new applicants outside of Westchester.

Distributing press releases is an effective way to market affordable housing opportunities, particularly if the press releases are distributed to news media websites serving the AFH Marketing Area. The County issued *one* press release in 2014 regarding the “Homeseeker” website and there is no evidence that this press release—or any other—was distributed outside of Westchester, much less to any of the numerous publications serving the AFH Marketing Area explicitly identified in the Affirmative Marketing Plan. By contrast, the County issued *five* press releases critical of the Settlement, HUD, or the Monitor in that same timeframe. *See* Ex. 1, 2014 Q1 Report, at App’x VII-1; Ex. 2, 2014 Q2 Report, at App’x VII-1; Ex. 3, 2014 Q3 Report, at App’x VII-1; Ex. 4, 2014 Q4 Report, at App’x VII-1. Given the effectiveness of this marketing tool, the Monitor recommends that the County distribute press releases more frequently—such as once per month.

The County has not engaged in affirmative steps to market affordable housing opportunities to potential applicants in the AFH Marketing Area outside of Westchester, despite its unambiguous obligation under the Settlement to do so. *See* Declaration of Robert F. Meehan, Ex. C-1, at 3-5, July 14, 2014 (ECF No. 496-3) (transcription of Monitor’s September 26, 2012 interview with County Executive Astorino; the County Executive was not able to identify any steps the County had taken to affirmatively market affordable housing to potential applicants outside of Westchester). Concerns regarding the County’s compliance with its Paragraph 33(e) obligation prompted the Monitor to file

a motion requesting authority from the Court to explore this issue through sworn depositions of County officials and employees. *See* Motion For Authority Pursuant To Settlement ¶¶ 13(g) And 58 To Compel And Take Sworn Oral Depositions Of Certain Officials And Employees Of The Office Of The County Executive Of Westchester County (“Motion to Compel”), June 26, 2014 (ECF No. 480). These depositions will occur in the coming months, at which time the Monitor will elicit testimony sufficient to fully assess and report on the County’s compliance with its Paragraph 33(e) obligations.

C. Public Outreach

Paragraph 33(c) of the Settlement requires the County to “create and fund campaigns to broaden support for fair housing and to promote the fair and equitable distribution of affordable housing in all communities, including public outreach specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities.” This obligation requires the County to take *active steps* to increase support for fair housing and facilitate an equitable distribution of affordable housing in eligible municipalities.

The County has achieved limited progress in implementing a public education campaign to raise awareness about the benefits of diverse and integrated housing in Westchester. The County launched a poster campaign in 2012 and 2013, distributing 11”-x-17” fair housing and anti-discrimination posters, created by the National Fair Housing Alliance, HUD, and the Leadership Conference on Civil Rights Education Fund, to municipalities to be posted in public locations and to housing agencies and developers

to be posted at sites developed pursuant to the Settlement. *See* Second Biennial Assessment, at 12-13. The County's ongoing efforts with respect to the poster campaign are limited to ensuring that the posters remain posted and making additional posters available as needed. Ex. 2, 2014 Q2 Report, at 16. The County appears to have abandoned a separate marketing campaign by its graphics professionals to raise awareness about the benefits of diverse communities. *See* Second Biennial Assessment, at 13.

The County's Human Rights Commission has conducted several fair housing training sessions for members of cooperative boards, realtors, students, senior citizens, and affordable housing developers. *See* Ex. 1, 2014 Q1 Report, at 15; Ex. 2, 2014 Q2 Report, at 15; Ex. 3, 2014 Q3 Report, at 15; Ex. 4, 2014 Q4 Report, at 13. The County's quarterly reports do not describe the precise content of these training sessions. While the training sessions address fair housing issues, it is unclear whether they include the specific topics necessary to satisfy the County's Paragraph 33(c) obligations. The Monitor requests that representative fair housing training materials be submitted in the County's future quarterly reports.

The County is reminded that although the training sessions are an important part of a public education campaign, Paragraph 33(c) of the Settlement contemplates a public education campaign capable of reaching all Westchester residents, not just the self-selecting group of training participants. More effective options to broaden public support for fair housing include using the County website, press releases, and social media pages, or launching a series of public service announcements. If these options have been

pursued, they are not reflected in the quarterly reports. The County should also consider the influence that its public statements have on the Westchester community's support for fair housing and develop public education campaigns designed to broaden support for fair housing that are at least equal in scope to its very public criticism of the Settlement and its implementation. The County's public outreach efforts will be examined during the upcoming depositions, after which the Monitor will provide a detailed report to the Court on the County's compliance with its Paragraph 33(c) obligations.

D. Public Statements by the County Executive

The Monitor raised concerns in the Second Biennial Assessment about public statements by the County Executive that were critical of the Settlement's objectives and implementation, *see* Second Biennial Assessment, at 17, and filed a Motion to Compel on June 26, 2014 seeking authority to depose County officials, including the County Executive, about these public statements. On August 27, 2014, the Court granted the Monitor authority to take sworn, videotaped depositions of Deputy Commissioner of Planning Norma Drummond, Commissioner of Planning Edward Buroughs, Communications Director for the County Executive Ned McCormack, and County Executive Robert Astorino. *See* Order, August 27, 2014 (ECF No. 504); Transcript of July 24, 2014 Proceedings, August 1, 2014 (ECF No. 500). The Monitor is currently working with the County to schedule these depositions. Once these depositions are complete, the Monitor will assess whether further depositions are necessary.

After protracted negotiations regarding search terms and production deadlines, the County made its first production of documents in connection with the depositions on December 5, 2014. The County's second production was made on February 27, 2015. *See* Letter from James E. Johnson to Robert F. Meehan, January 9, 2015, attached hereto as Exhibit 40. The Monitor is in the process of reviewing the County's second production of documents.

III. Zoning and Analysis of Impediments

The Settlement requires the County to examine whether the municipal zoning regulations, among other things, in each of the 31 eligible communities imposed “impediments to fair housing within its jurisdiction, including impediments based on race or municipal resistance to the development of affordable housing.” Settlement ¶ 32(b)(i). This requirement carried with it the duty to conduct an analysis of impediments (“AI”) “that complies with the guidance in HUD’s Fair Housing Planning Guide” and is “deemed acceptable by HUD.” *Id.* at ¶ 32. As noted in the Second Biennial Assessment, the “Fair Housing Planning Guide specifically discusses the necessity of conducting a review of local zoning codes as part of an acceptable AI, due to the potential for certain provisions of a zoning code to serve as impediments to fair housing.” Second Biennial Assessment, at 40-41. In 2013, the County completed its eighth and apparently last attempt at such an analysis, which found no impediments on the basis of race. The County’s AI was not accepted by HUD. The County undertook no direct activities to address zoning impediments in 2014. This inaction, in light of the Monitor’s 2013

findings described below, may support a finding that the County is in breach of certain duties under the Settlement, including its duty under Paragraph 7(j) to “use all available means” to address “actions that hinder” the Settlement’s affordable housing objectives.

In each of the last two years, the Monitor issued zoning reports applying the standards set forth in *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975) and *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988). The Monitor’s reports sought to assess the caliber of zoning information the County provided to the Monitor and to conduct an independent evaluation of impediments to fair housing. The *Berenson* report followed a ruling by Magistrate Judge Gabriel W. Gorenstein that the Monitor had power to compel the production of information about the County’s strategy for overcoming exclusionary zoning practices and “could properly require the County to identify the types of municipal zoning practices that would, if not remedied by the municipality, cause the County to pursue legal action.” Opinion & Order, at 16-17, March 16, 2012 (ECF No. 396). The *Huntington* report was undertaken at the request of HUD and several BOL members, including Chairman Michael B. Kaplowitz. The two reports found that a total of 10 communities have some form of exclusionary zoning. Municipal responses to the reports have varied; some municipalities have taken remedial steps to address the deficiencies highlighted in the reports, others have engaged in a dialogue with the Monitor, and still others have objected to the reports’ contents. As a result of efforts by the Monitor and municipal leadership, three of the 10 communities have adopted the model zoning ordinance or taken other steps to remove impediments to

fair housing. The steps taken to remove the barriers to fair housing in some of these 10 communities are summarized below.

Released in 2013, the *Berenson* report explored the question whether any of the eligible communities had zoning ordinances that acted as impediments to the development of affordable housing. Working with a team of housing consultants, the Monitor identified seven eligible municipalities—Croton-on-Hudson, Harrison, Lewisboro, Mamaroneck, Ossining, Pelham Manor, and Pound Ridge—that had zoning ordinances that limited affordable housing or made the development of affordable housing practically infeasible. Representatives of all of these municipalities have since met with the Monitor and discussed reforms to their zoning codes that would provide improved access to affordable housing. After Mamaroneck revised its land use regulations in 2013, the Monitor in February 2014 determined that the revised regulations provided adequate opportunities for the development of affordable housing that will affirmatively further fair housing in the County. Ossining and Pound Ridge also enacted revised zoning codes in a way that conformed to the model zoning ordinance and removed impediments to affordable housing. The changes in the relevant zoning codes are detailed below.

The County never filed an objection to the *Berenson* report's findings with the Court.⁹ Indeed, no party raised questions with the Court about the adequacy of the

⁹ Rather than appeal to the Court, the County sent the Monitor a letter seven days after the report's release objecting to certain aspects of the report; issued a press release opposing the findings; and lodged an objection with the BOL. *See* Letter from Kevin J. Plunkett to James E. Johnson, September 20, 2013, attached hereto as Exhibit 41;

findings. These findings clearly may be used in assessing whether the County is addressing “actions that hinder” the Settlement’s fair housing goals. Given the County’s inaction with respect to New Castle’s opposition to a proposed affordable housing development, these findings are particularly probative.

The Monitor’s preliminary *Huntington* analysis was completed in September 2014. It identified six municipalities that had evidence of a *prima facie* violation of *Huntington*: Harrison, Larchmont, North Castle, Rye Brook, Lewisboro, and Pelham Manor. Several of the municipalities listed in the *Huntington* report have met with the Monitor and expressed a willingness to explore improvements to their zoning codes. The Monitor is currently working to revise the analysis to address certain concerns about the report raised by HUD and the DOJ.

As a result of the longstanding impasse over the County’s AI, in February 2015, HUD officially terminated the County’s status as an “urban county,” rendering the County ineligible to receive certain grants of federal aid. As detailed below, HUD is currently in talks with New York State to allocate \$22 million of federal aid to the County that HUD had been blocking since 2011. If a resolution is reached, New York State will then allocate the funds directly to the recipient municipalities.

Press Release, Westchester County, *Astorino Stands By Local Communities*, September 30, 2014, attached hereto as Exhibit 42; Letter from Robert P. Astorino to Michael B. Kaplowitz, September 10, 2014, attached hereto as Exhibit 43.

A. The Settlement’s Requirement that the County Complete an AI

Paragraph 32 of the Settlement requires the County to complete an AI “within its jurisdiction that complies with the guidance in HUD’s Fair Housing Planning Guide,” and is “deemed acceptable by HUD.” In addition to incorporating HUD guidelines in its AI, Paragraph 32 provides that the County must:

- (a) commit to collecting data and undertaking other actions necessary to facilitate the implementation of this Stipulation and Order; and
- (b) identify and analyze, *inter alia*:
 - (i) the impediments to fair housing within its jurisdiction, including impediments based on race or municipal resistance to the development of affordable housing;

HUD and the County were not able to resolve their differences during 2014. Rather, on July 18, 2014, HUD sent the County a notice of rejection of the County’s 2014 Fiscal Year (“FY”) Action Plan—and referenced its previous rejection of the 2012 and 2013 FY Action Plans. *See* Letter from Vincent Hom to Robert P. Astorino, July 18, 2014, attached hereto as Ex. 44.

B. Berenson Report and Municipal Progress

1. *Berenson* Report

The County and HUD continue to dispute the adequacy of the County’s zoning analyses. In connection with the AI, HUD has rejected the County’s analyses of zoning impediments to fair housing, and the County, in court papers and the media, has repeatedly opposed what it characterizes as HUD’s attempt to dismantle local zoning.

When the Monitor stepped in to assess the adequacy of the County's zoning analyses, the County objected and Judge Gorenstein affirmed the Monitor's authority to make such findings. The Settlement provides the County with at least two avenues for seeking a review of the Monitor's actions and findings and twice during the period of the Settlement the County did so.

The Monitor's Report on Westchester County's Analysis of Municipal Zoning was issued to the County and HUD on July 31, 2013 and the substance of that report, together with the County's response and the Monitor's reply thereto, was incorporated into the Monitor's Final Report on Westchester County's Analysis of Municipal Zoning ("*Berenson* Report") (ECF No. 452), filed with the Court on September 13, 2013. Applying the two-prong analysis in *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975), the *Berenson* Report reflected the conclusion that seven of the 31 eligible municipalities—Croton-on-Hudson, Harrison, Lewisboro, Mamaroneck, Ossining, Pelham Manor, and Pound Ridge—had zoning ordinances that limited affordable housing or made the development of affordable housing practically infeasible.

2. Municipal Progress Following the *Berenson* Report

As noted above, after the release of the *Berenson* Report, the County avoided the Court and effectively took a seat on the sidelines. The seven municipalities, by contrast, stepped forward. The Monitor met with each of the seven municipalities cited in the report and made site visits as requested. Subsequent to the *Berenson* Report, Mamaroneck, among other things, adopted the model zoning ordinance, expanded the

allowance of multifamily housing, and approved the construction of ten affordable housing units. As a result, the town was removed from the list of communities found to have exclusionary zoning. *See First Zoning Analysis Progress Report*, February 10, 2014 (ECF No. 463).

Ossining and Pound Ridge have also made considerable progress in reforming their zoning codes to expand opportunities for the development of affordable housing, as analyzed in greater detail below. They, too, have been removed from the list of communities found to have exclusionary zoning.

a. Progress of the Town of Ossining

The Monitor met with representatives of the Town of Ossining for the first time on August 19, 2013, and then again a week later on August 26, 2013, to discuss issues raised by the *Berenson* Report. Town Supervisor Susanne Donnelly also spoke with the Monitor on July 25, 2014. Ossining continuously engaged with the Monitor both before and after the *Berenson* Report was filed, in meetings, phone calls, and written correspondence.

Based on publicly accessible data figures as well as information supplied by the Town of Ossining regarding zoning code changes, the Monitor and his housing consultant team have determined that the Town of Ossining should no longer be

characterized as having exclusionary zoning.¹⁰ The Town's progress is a direct result of legislative amendments to its ordinance.

Ossining first enacted affordable housing zoning provisions in 2007, well before the Settlement. An amendment in 2011 added the provisions of the model zoning ordinance, including affordable housing mandates and incentives. Among these are that within developments of 10 or more units, 10% of the units must be affordable. *See* Amended Housing Consultant Report for the Town of Ossining ("Amended Ossining Zoning Report"), at 2, attached hereto as Exhibit 45. Density bonuses are awarded in residential districts and the General Business ("GB") District, so long as half of the density awarded is made up of below-market-rate units. *Id.*

At the time of the *Berenson* Report, Ossining permitted neither multifamily nor mixed-use housing as-of-right anywhere in town. This was the primary reason the zoning ordinance was found to pose impediments to affordable housing.¹¹

¹⁰ In conducting this analysis, the Monitor engaged John Shapiro and Brian Kintish (the "Housing Consultants"), experts from the Pratt Graduate Center for Planning and the Environment.

¹¹ While always cooperative, municipal leadership of the Town of Ossining have occasionally raised the question whether the Town should have been included among the eligible communities in the first place. The Town of Ossining contains two villages—the Village of Ossining and part of the Village of Briarcliff Manor—and an "Unincorporated Area," which is the entity that is eligible under the Settlement. The Village of Ossining, which has a relatively high minority household population percentage and greater diversity of housing types, is not eligible under the Settlement. The Unincorporated Area of Ossining shares a school district and other municipal services with the Village of Ossining and the two municipalities effectively function as one. Municipal officials have argued that the Town of Ossining, considered in its entirety, would likely not be eligible under the Settlement. That is not a question before the Court and is not an issue to be revisited by the Monitor.

Ossining enacted several changes to its zoning code on July 23, 2014 to “expand the opportunities for multifamily housing and therefore increase the opportunities for affordable housing in the Town.” TOWN OF OSSINING LOCAL LAW #2 OF 2014 § 2. The zoning changes allow multifamily and townhouse development as-of-right in the Multifamily District (“MF”), Multifamily-Inn District (“MF-I”), and GB district. Ex. 45, Amended Ossining Zoning Report, at 2. These districts occupy about 9% of Ossining’s land area. *Id.* at 3. In addition, the minimum lot area for multifamily housing developments was reduced from 40,000 square feet to 20,000 square feet. *Id.* at 2. Mixed-use housing is now permitted as-of-right in the GB district. *Id.* Two-family dwellings are allowed by special permit in the MF and MF-I districts, bringing to seven the number of districts allowing such housing by special permit. *Id.*

With regard to the four zoning impediments identified in the *Berenson* Report, Ossining’s amendments have addressed and overcome three: (i) with land now zoned for as-of-right multifamily housing, Ossining’s zoning code is less restrictive of multifamily housing; (ii) with the new mandatory set-asides for affordable housing and density bonuses, Ossining no longer lacks incentives and mandates for affordable housing; and (iii) the rezoning of the MF, MF-I, and GB districts enables more mixed-use developments and two-family homes within the Town and thus eliminates Ossining’s restrictions on alternative sources of affordable housing.

b. Progress of the Town of Pound Ridge

The Monitor initially met with representatives of the Town of Pound Ridge on October 10, 2013 to discuss issues raised by the *Berenson* Report. At the meeting, the Town described proposed amendments to its zoning code. The amendments have since been enacted. The Monitor then conducted a conference call with Town leaders on July 10, 2014, focusing largely on environmental concerns that impeded the development of multifamily housing in the Town. A site visit by members of the Monitor's team followed the call in late July 2014.

At the time of the *Berenson* Report, Pound Ridge restricted multifamily housing as-of-right to commercial districts as part of mixed-use developments and by special permit as senior housing or residential care facilities in residential districts (with minimum lot sizes of one to three acres). *See* Amended Housing Consultant Report for the Town of Pound Ridge, at 2, attached hereto as Exhibit 46. Although there were no minimum lot size requirements in commercial districts, building coverage and height restrictions limited the number of units per building. *Id.* at 3. The result was that multifamily housing was permitted on just 0.3% of the Town's land area, all in and around the hamlet of Scott's Corners. *Id.* at 5, 7. Mixed-use development was also allowed as-of-right in the Town's three commercial districts, and accessory apartments were allowed in two districts. *Id.* at 2.

The Town enacted the model zoning ordinance in May 2013 and made further amendments to its code effective February 6, 2014 to "allow multi-family housing in the Town, which in turn will further the goal of the development of affordable housing in the

Town.” See POUND RIDGE LOCAL LAW #2 OF 2014 § 2. The zoning changes allow multifamily housing by special permit in the R-1A, R-2A and R-3A districts, the Town’s three residential districts. TOWN OF POUND RIDGE CODE § 113-57. The minimum lot size required for developments in each of these districts is 20, 20, and 30 acres, respectively. *Id.* Height restrictions limit multifamily housing in residential districts to two or three stories. *Id.* The Town Code was also revised to require that within all developments of 10 or more dwelling units created by subdivision or site plan approval, 10% or more of the total units must be affordable fair housing units. TOWN OF POUND RIDGE CODE § 113-100(A).

With regard to the four zoning impediments identified in the *Berenson* Report, Pound Ridge’s amendments have addressed and overcome three: (i) with more land zoned to allow multifamily housing by special permit and expedited review procedures available for affordable housing developments, Pound Ridge’s zoning code is less restrictive of multifamily housing; (ii) with mandatory set-asides for affordable housing and density bonuses, the Town does not lack incentives and mandates for affordable housing; and (iii) by allowing for mixed-use development as-of-right in the three commercial districts and accessory apartments in two residential districts, the Town allows for alternative sources of affordable housing.

In addition, the Town recently participated in a Community Design Institute run by the Monitor’s design consultants, WXY Architecture and Urban Design, a New York-based architecture and design firm. The Design Institute explored design solutions to the environmental issues that Pound Ridge faces in building multifamily housing, including

the Town's lack of municipal sewers and its location within the watersheds of New York City, Norwalk, and Stamford.

The Monitor and the Housing Consultants have determined that the Town of Pound Ridge should no longer be considered exclusionary under *Berenson*. The allowance of multifamily housing by special permit in the residential districts, the implementation of density bonuses, and the requirement that affordable housing be included in all dwellings of 10 or more units will increase the opportunities for affordable housing in Pound Ridge.

c. Progress of Other Municipalities

Lewisboro, Pelham Manor, and Croton-on-Hudson have also met with the Monitor and begun to make progress on zoning reforms. Lewisboro prepared several draft amendments to its zoning code that would include expanded allowance of accessory apartments and multifamily housing. Croton-on-Hudson has stated that it is considering lifting the restriction on accessory apartments to seniors and making zoning changes to two commercial districts to allow mixed-use development.

Pelham Manor is considering adopting the model zoning ordinance, but, in a setback, rejected a proposed zoning change that would have permitted mixed-use developments by special permit in one district. *See Alex Wolff, Manor Board Rejects Plan to Rezone Four Corners Area and Allow 6 Story Apartments, The Pelhams – Plus*, November 5, 2014, attached hereto as Exhibit 47. Pelham Manor officials cited HUD's

September 24, 2014 letter criticizing the Monitor's *Huntington* report as one basis for rejecting the proposed change. *Id.*

C. *Huntington* Report

The *Berenson* Report also took a preliminary step in identifying whether the municipal zoning ordinances of the 31 eligible municipalities were problematic under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631; 24 C.F.R. § 100.500; and *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988). See *Berenson* Report, at 40-41. The *Huntington* legal standard examines whether zoning codes have a discriminatory impact on racial and ethnic minorities. The *Berenson* Report identified “further analytical steps” to be taken by the County under *Huntington* in a future, more fulsome report. *Id.*

The Monitor undertook the *Huntington* analysis of the 31 eligible municipalities' demographic data and zoning ordinances at the request of BOL Chairman Kaplowitz and the HUD Regional Administrator. The request was made in an ultimately unsuccessful attempt to close the gap between the County and HUD over zoning. That conflict prevented HUD from distributing Community Development Block Grant (“CDBG”) funds to municipalities, eligible and ineligible, throughout the County.

The Monitor and the Housing Consultants collected, reviewed, and analyzed data provided by the County pursuant to a *Huntington* methodology approved by the BOL Chairman and HUD. After the Housing Consultants prepared preliminary factual reports, each municipality was provided the opportunity to correct and comment on these reports.

HUD and the County's executive and legislative branches were also given an opportunity to review the preliminary reports. Feedback from the municipalities, the County, and HUD was incorporated into the completed report.

On September 8, 2014, the Monitor issued a memorandum setting forth his preliminary analysis of the eligible communities in light of *Huntington*. Consistent with *Huntington*, applicable HUD regulations, and the report's methodology, the report analyzed the discriminatory impact each municipality's zoning code had on the County's minority residents. The report did not make any findings with respect to whether any municipality drafted its zoning code with the intent to discriminate against minorities. *See, e.g.*, 24 C.F.R. § 100.500 ("Liability may be established under the Fair Housing Act based on a practice's discriminatory effect . . . even if the practice was not motivated by a discriminatory intent.").

The report identified six municipalities as to which there was evidence of a *prima facie* violation of *Huntington*: Harrison, Larchmont, North Castle, Rye Brook, Lewisboro, and Pelham Manor. These municipalities were determined to have zoning regulations that either: (1) perpetuate clustering by restricting multifamily or two-family housing to districts that have disproportionately high minority household populations; or (2) disparately impact the County minority household population by restricting the development of housing types most often used by minority residents.¹²

¹² Larchmont, North Castle, and Rye Brook were determined to have evidence of a *prima facie* violation of prong (1) of the analysis only. Lewisboro and Pelham Manor were determined to have evidence of a *prima facie* violation of prong (2) of

The report noted that these findings were not the final step in the analysis. The *Huntington* framework provides for either the County or the municipality to come forward with evidence of a legitimate government purpose for the zoning regulations for which no less discriminatory alternative exists. The report also noted that it was not binding on the parties and that both the County and HUD could offer comment. While the County wrote to the Monitor before the report was completed that it did not believe the Monitor had “the authority to make any determination on zoning issues involving the 31 eligible municipalities,” it did not respond to the report after its release. Letter from Kevin J. Plunkett to James E. Johnson, August 22, 2014, attached hereto as Exhibit 48.

In the weeks immediately following the release of the *Huntington* report, the Monitor met with officials from Larchmont, North Castle, and Rye Brook to learn more about the municipalities and their zoning issues and to discuss potential actions to increase affordable housing and make their zoning codes more inclusive.

On September 24, 2014, HUD wrote the Monitor to highlight several perceived errors in the report and requested that portions of it be withdrawn. *See* Letter from Glenda L. Fussá to James E. Johnson, September 24, 2014, attached hereto as Exhibit 49. HUD stated, among other things, that the report: (i) impermissibly grouped black and Hispanic data and should have considered each group separately; (ii) departed from the *Huntington* standard by analyzing “clustering” rather than “patterns of segregation”; (iii) failed to define the term “*Huntington* threshold”; (iv) failed to conduct a “regional

the analysis only. Evidence of a *prima facie* violation of both prongs was determined with respect to Harrison.

analysis” comparing municipal data to county data; (v) should have included a discussion of zoning code limitations on development size, restrictions that limit the number of bedrooms in a unit, and restrictions on lot size; (vi) inconsistently treated the data presented in the Housing Consultants’ factual report; and (vii) should not have contained determinations that purport to absolve municipalities of liability, discuss demographic changes between 2000 and 2010, or reference a given area’s “desirability.” *Id.* As a result of HUD’s concerns, the Monitor’s work with the municipalities was temporarily stopped.

The Monitor responded to HUD by letter dated September 26, 2014, noting that HUD’s criticisms stemmed from factual misunderstandings and faulty assumptions. *See* Letter from James E. Johnson to Hon. Helen R. Kanovsky, September 26, 2014 (ECF No. 505). The Monitor highlighted two such errors in HUD’s letter: (i) although Scarsdale and Lewisboro shared certain zoning characteristics, it was analytically consistent for the Monitor to determine that Lewisboro had *prima facie* evidence of a violation and that Scarsdale did not due to critical differences in the towns’ zoning codes, which showed that Scarsdale was more permissive of multifamily and two-family housing and had adopted the model zoning ordinance while Lewisboro had not; and (ii) HUD’s criticism that regional data was not used was unfounded because the Monitor’s disparate impact analysis was predicated on county-wide data showing that minority residents more frequently used multifamily, affordable, and rental housing. *Id.* In light of these flaws, the Monitor expressed concern over whether this letter represented the “considered

judgment of the senior legal team of HUD” and the DOJ and requested a response “vetted by appropriate officials at HUD and DOJ.” *Id.*

By letter dated October 24, 2014, the Government wrote with a list of nine specific suggested changes to the *Huntington* report. *See* Letter from David J. Kennedy to James E. Johnson, October 24, 2014, attached hereto as Exhibit 50. The Government maintained that if the changes were made and if the revised report were adopted by the County, HUD would accept the report and the County would be deemed to have satisfied its AI obligation under the Settlement. *Id.* In a December 8, 2014 letter, the Monitor responded, “[w]e understand and appreciate your concerns and will work to accommodate them.” *See* Letter from James E. Johnson to David J. Kennedy, December 8, 2014, attached hereto as Exhibit 51. The Monitor anticipates undertaking additional work on a revised *Huntington* report in the coming months consistent with the Government’s October 24, 2014 letter.

The Monitor’s *Huntington* report was conducted using the prevailing standard under the Fair Housing Act (“FHA”) in the Second Circuit at the time of the Settlement (and today), which analyzes whether zoning codes have a disparate impact on minorities regardless of discriminatory intent. On January 21, 2015, the United States Supreme Court heard oral argument in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, Dkt. No. 13-1371, and seems likely to rule on whether disparate impact claims are cognizable under the FHA. While the Supreme Court’s ruling may affect the holding in *Huntington*, parties—like the Government and the County here—are free to agree to contract terms that demand more than the threshold

requirement under federal law.¹³ Paragraph 32 of the Settlement, for instance, calls for an AI “that complies with the guidance in HUD’s Fair Housing Planning Guide,” which “must be deemed acceptable by HUD.”

D. Termination of Westchester County Urban County Qualification

As noted above, HUD rejected the County’s FY 2012-2014 Action Plans. By letter dated February 3, 2015, HUD advised the County that “pursuant to Section 102(d) of the Housing and Community Development Act of 1974, . . . [the County’s] failure to receive a grant for FY 2012 has terminated its existing qualification as an urban county.” See Letter from Clifford Taffet to Robert P. Astorino, February 3, 2015, attached hereto as Exhibit 52. HUD explained that the County’s termination meant that it was ineligible to receive entitlement block grants under the CDBG program until such time as it requalified. *Id.* HUD further noted that the County’s FY 2013 and FY 2014 allocations of CDBG funding would be reallocated, as their FY 2012 funding had been, and that funds from the HOME Investment Partnerships Program (“HOME”) from FY 2012 and 2013 and Emergency Solutions Grant (“ESG”) funds for FY 2013 and FY 2014 would be reallocated to New York State to be used within the County. *Id.*

On the same day, HUD wrote the State to inform it that the County had been terminated from the CDBG, HOME and ESG programs and that “units of general local

¹³ In February 2013, HUD promulgated a new rule with respect to the discriminatory impact/effect analysis under the FHA, 24 C.F.R. § 100.500, but this rule affects only the burden shifting after evidence of a *prima facie* violation has been presented. Because the Monitor’s current report deals only with the first, *prima facie* step, this rule change does not affect the Monitor’s *Huntington* report.

government that had previously participated in the urban county” may be eligible to receive State CDBG, HOME and ESG program funds going forward. *See* Letter from Clifford Taffet to Darryl C. Towns, February 3, 2015, attached hereto as Exhibit 53. HUD further stated that “the population and demographics of the previously-participating units of general local government [would] be added to the State’s nonentitlement balance-of-state demographics.” *Id.*

On February 9, 2015, Governor Andrew M. Cuomo and Representative Nita M. Lowey announced an agreement whereby federal funds from the CDBG, HOME, and ESG programs would be routed through the State and made available to Westchester municipalities and nonprofit groups. *See* Jon Campbell and Mark Lungariello, *Lowey, Cuomo deal frees \$5M in Westchester grants*, [The Journal News](#), February 10, 2015, attached hereto as Exhibit 54. HUD and the State are now working on a request-for-proposal process whereby municipalities can request allocated grant money from the State.

E. Model Ordinance

Paragraph 25(a) of the Settlement requires the County to work with municipalities to enact a “model ordinance” that will advance fair housing. As of year-end 2014, the County reported that 19 of the 31 eligible communities have adopted all or part of the model ordinance provisions and that all 31 had considered the issue. *See* Ex. 4, 2014 Q4 Report, at 18-19. In addition, the Town of Lewisboro has shared with the County

Department of Planning draft zoning amendments that would incorporate the model ordinance provisions into local regulations. *Id.* at 19.

According to the County, four municipalities determined that they had sufficient incentives to affordable housing in place and would not adopt the model ordinance at that time. County officials stated that their obligation was merely to “promote” the model ordinance—and not to force the municipalities to adopt it—and that they had done so. The Monitor and his Housing Consultants will analyze the affordable housing provisions of these four municipalities’ zoning codes to determine whether, in fact, they sufficiently advance fair housing consistent with the Settlement.

IV. The Monitor’s 2014 Activities

A. Second Biennial Assessment

The Monitor spent a considerable part of the first and second quarters of 2014 preparing the Second Biennial Assessment, which evaluated the County’s efforts to implement the Settlement from January 1, 2012 through March 31, 2014. The Second Biennial Assessment, a 70-page report with 92 exhibits, was filed with the Court on June 26, 2014, following several months of fact gathering and analysis by the Monitor and his team, as well as meetings and phone conferences with the Monitor’s housing and design consultants and the parties.

B. Activities Relating to Municipal Zoning

In addition to the extensive effort described above with respect to the *Berenson* and *Huntington* reports, the Monitor’s 2014 activities with respect to municipal zoning

included working with officials from the municipalities, the BOL, HUD, and the DOJ to improve the inclusiveness of municipal zoning and present a resolution to the impasse between the County and HUD over the County's AI.

After the release of the *Berenson* Report, the Monitor met with officials from all seven of the municipalities found to have exclusionary zoning. The Monitor participated in multiple phone conferences with Ossining, Croton-on-Hudson, Mamaroneck, and Pound Ridge officials and met with Harrison and Pelham Manor officials.

The Monitor met often with other Settlement stakeholders. BOL Chairman Kaplowitz and the Monitor frequently conferenced regarding the Monitor's efforts to break the impasse between the County and HUD over the County's submission of an acceptable AI. The Monitor also attended a September 10, 2014 BOL meeting to address questions relating to the recently released *Huntington* report.

The Monitor spoke with all parties, including the BOL, concerning the *Berenson* and *Huntington* reports. The Monitor coordinated and attended a meeting between HUD officials and the Housing Consultants on May 16, 2014 to discuss the Housing Consultants' work on the reports. The Monitor also had frequent phone calls and meetings with HUD officials in June, July, and August 2014 to discuss the methodology and preparation of the *Huntington* report and in September and October to discuss HUD's concerns over the Monitor's findings.

Following the release of the *Huntington* report, and as discussed above, the Monitor met with Larchmont, North Castle, and Rye Brook officials to discuss the report's preliminary findings.

C. The Design Institutes and Design Report

The Second Biennial Assessment explained that “[g]ood design is vital to the sustainability of affordable housing and is often of critical concern to members of the community where the housing has been built.” Second Biennial Assessment, at 65. The Monitor devoted considerable time in 2014 to working with design consultants to develop community design institutes in Tarrytown and Pound Ridge to address design-related obstacles to the development of affordable housing that those communities faced, and to the creation of a design workbook that will be a resource for those wishing to develop affordable housing. This design work has gone forward without significant support from the County.

The Monitor met with his design consultants, architects from WXY Architecture and Urban Design, on January 6, 2014 to discuss the idea of developing design institutes. Thereafter, the Monitor included the design consultants in weekly coordination calls to discuss issues relating to the design institutes and to allow the design consultants to offer their expertise on other work being done by the Monitor’s team. On March 7, 2014, the Monitor participated in a meeting at Pace Law School in White Plains to coordinate the first design institute, which would be held in Tarrytown.

On April 3, 2014, the Monitor and his team visited Teachers Village, a mixed-use community in the heart of Newark, New Jersey based around three charter schools, to explore other models for applying urban design solutions to the development of affordable housing in the County.

In July 2014, the Monitor and his design consultants began work drafting an affordable housing design report to further assist the County, developers, and municipalities in meeting the challenge of incorporating affordable housing in Westchester communities. This project was briefly suspended while the team focused its attention on completing the *Huntington* report and working with the municipalities, but resumed in late November and December 2014. The Monitor and the design consultants have continued their work and the report will be issued this year.

In an effort to increase funding for the initiatives launched by the design consultants, the Monitor met with members of a globally-oriented private foundation on January 16, 2014, February 13, 2014, and May 13, 2014.

D. Depositions of County Executive Officials and Employees

In conjunction with the Second Biennial Assessment, the Monitor filed the Motion to Compel to take sworn oral depositions of certain officials and employees of the County Executive's Office, including County Executive Astorino. *See* Motion to Compel, June 26, 2014 (ECF No. 480); Letter from David J. Kennedy to Hon. Denise L. Cote, July 8, 2014 (ECF No. 492) (noting that the DOJ joined the Motion to Compel). As explained in the Second Biennial Assessment, *see id.* at 9-17, the depositions are meant to elicit testimony that will allow the Monitor to provide a detailed report to the Court about whether public statements by the County Executive that were critical of the Settlement and that discouraged municipalities from cooperating with the Monitor violated the County's Settlement obligations. After the parties completed briefing the

motion, Judge Cote convened a conference on July 24, 2014 and heard argument from the Monitor and the County. Judge Cote granted the Monitor's motion in substantial part, authorizing the Monitor to compel and take the sworn, oral, videotaped depositions of Deputy Commissioner of Planning Norma Drummond, Commissioner of Planning Edward Buroughs, Communications Director for the County Executive Ned McCormack, and County Executive Robert Astorino. *See* Order, August 27, 2014 (ECF No. 504); Transcript of July 24, 2014 Proceedings, August 1, 2014 (ECF No. 500).

Parallel to the motion, the Monitor issued a request for information ("RFI") seeking documents relating to the County Executive's Settlement-related communications with municipalities, developers, and the BOL, as well as documents concerning the County Executive's public statements about the Settlement. *See* Letter from James E. Johnson to Robert F. Meehan, June 26, 2014, attached hereto as Exhibit 55. The County objected to the Monitor's RFI. *See* Letter from Kevin J. Plunkett to James E. Johnson, July 3, 2014, attached hereto as Exhibit 56.

The Monitor and the County met and conferred on July 14, 2014 in an attempt to resolve the dispute; the County agreed to provide the Monitor with a proposed list of custodians, while the Monitor agreed to provide the County with a list of search terms the County would use to identify responsive documents. After further negotiations, the parties agreed that the County's first production of documents would focus on responsive e-mails and documents from four custodians—Norma Drummond, Edward Buroughs, Ned McCormack, and County Executive Astorino—spanning the period April 2013 through May 2013. *See* Letter from James E. Johnson to Robert F. Meehan, September

12, 2014, attached hereto as Exhibit 57; Letter from James E. Johnson to Robert F. Meehan, November 18, 2014, attached hereto as Exhibit 58. The County's first production of documents responsive to the Monitor's RFI was made on December 5, 2014. On January 9, 2015, the Monitor directed the County to produce responsive documents from June through September 2013. *See* Ex. 40, Letter from J. Johnson to R. Meehan, January 9, 2015. The County produced these documents on February 27, 2015.

E. Dispute Regarding Chappaqua Station

The Monitor continued to follow developments surrounding the proposed Chappaqua Station project in the Town of New Castle. On January 9, 2014, the Monitor met with principals of Conifer and their counsel to discuss the developer's progress in obtaining variances required by the special permit. On December 15, 2014, the Monitor sent letters to the County, HUD, and the DOJ to solicit their positions with respect to whether Chappaqua Station's proposed 28 units should be credited under the Settlement's interim benchmark for units with financing in place. *See* Ex. 31, Letter from J. Johnson to R. Astorino, December 15, 2014; Ex. 30, Letter from J. Johnson to H. Leicht, G. Fussá, and D. Kennedy, December 15, 2014.

F. Monitor Costs

Debevoise & Plimpton LLP has handled this matter pro bono and absorbed \$2,453,634.50 in fees and expenses in 2014. In addition to the Monitor, the firm has committed the time of one counsel and three associates. The Monitor's budget under the

Settlement, \$175,000 for the year, has paid the costs of consultants, which have included two housing consultants, two architects, and a community liaison.

Dated: April 1, 2015
New York, New York

Respectfully submitted,

/s/ James E. Johnson
James E. Johnson
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
(jejohnson@debevoise.com)
Monitor