ANTI-DISCRIMINATION CENTER, INC.

"ONE COMMUNITY, NO EXCLUSION"

May 11, 2016

Hon. Denise Cote
United States District Judge
500 Pearl Street
New York, New York 10007

Re: U.S. *ex rel.* Anti-Discrimination Center v. Westchester County, 06-CV-2860

Your Honor:

There has been a flurry of recent activity in the case, including this Court's Order of April 26th expanding the scope of the May 23rd hearing regarding the Chappaqua Station project to the "steps that the County plans to take …to 'ensure the development of at least' 750 new affordable housing units";[1] the Monitor's filing of his Biennial Report,[2] and the Monitor's request that the Court issue a "declaration reemphasizing the essential terms" of the consent decree.[3] This letter, written on behalf of Anti-Discrimination Center (ADC), the original relator in the case, and containing information and perspective not otherwise being provided to the Court by any of the parties, is in the nature of an *amicus* submission. It includes a report from one of the nation's leading demographers on how a key type of zoning restriction perpetuates segregation and causes a disparate impact in 19 municipalities, far more than the six acknowledged by the Monitor.[4] We respectfully request consideration of this letter by the Court.[5]

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[1] Order of April 26, 2016, p. 4 (ECF No. 575).

[2] Monitor's April 28, 2016 Report (ECF No. 576).

[3] Monitor's March 17, 2016 Report, p. 56 (ECF No. 562).

[4] *See* discussion at pp. 10-12, *infra.* The report itself is annexed hereto as Exhibit 1.

[5] *See* Proceedings of Hearing of May 2, 2014, at 3:13-17 (the Court stated that, "given the history of the litigation and that [ADC] initiated it and were responsible for it up until the time of the settlement that as a friend of the Court if not under some other guise it's appropriate for me to hear them"). The transcript of that hearing is annexed hereto as Exhibit 2. ADC's participation here is far different from the proposed participation of the Center for Individual Representation, recently rejected by this Court. Order of May 5, 2016 (ECF No. 582). There, the proposed amicus sought to treat issues of federalism, the separation of powers, and the First Amendment that have been and continue to be raised by the County. ADC, by contrast, is proposing to present the Court with facts and analysis that neither the County on the one hand, nor the Monitor or the Government, on the other, have had any interest in acknowledging or pursuing.

1. The Monitor's request that the Court provide a declaration "reemphasizing the essential terms" of the consent decree fails to seek reaffirmation that the consent decree's core purpose is precisely to dismantle all such local zoning as is exclusionary or otherwise poses barriers to fair housing choice.

The Monitor is, of course, correct to criticize the County Executive for repeatedly suggesting that HUD wishes to dismantle *all* local zoning. Indeed, the County Executive's role has been the old and ugly one of stoking race-based fears. For example, a re-election flyer of his featured an apartment building being squeezed between and looming over two single-family homes with the words "Don't Let the Federal Government INVADE" superimposed above the scene. For anyone not getting the point, a peaceful suburban sky was replaced by menacing black clouds.[6]

But the answer is not to focus only on what the consent decree does *not* do. Nor is the answer to present the consent decree as requiring nothing more than a little analysis and a smattering of housing units (units located, not coincidentally, outside of existing ultra-white residential neighborhoods). While the latter, unfortunately, represents the record of inadequate implementation of the decree by the Government and the Monitor from 2009 to 2015, it has nothing to do with what the decree intended. As we put it in a letter to the Monitor only two weeks after the entry of the consent decree:

> B. Overcoming zoning barriers is the linchpin of successful implementation of both the County's unit-specific and broader Settlement Order obligations. We need not speculate about the efficacy of an approach that tries to work within the constraints of existing zoning. That has been Westchester's policy, the County's AFFH [Affirmatively Furthering Fair Housing] obligations notwithstanding. The policy has been an abysmal failure. The Settlement Order recognizes that a different path is required. That is, one must take the objectives of the agreement as the starting point (not existing zoning), and then determine the steps that are necessary to achieve the Settlement Order's objectives. It is this reorientation – acknowledging the primacy of the broad public interest in AFFH and no longer subordinating that interest to an exclusionary status quo – that must drive implementation planning.[7]

What the Government and the Monitor should have been doing all along was informing the public that the consent decree: (a) affirmatively intends that exclusionary zoning – all of it – be dismantled; (b) provides the means for doing so; and (c) must be understood as a remedial court order. Instead, they have understated the breadth of the decree or omitted to mention critical elements of it. In a filing just this week, for example, the Government quotes the HUD Deputy Secretary as having made the point in 2013 that "HUD has never suggested that the County must

[6] The image is found at page 18 of ADC's 2014 *Cheating On Every Level* report, annexed hereto as Exhibit 3.

[7] Letter from ADC to Monitor, August 24, 2009, pp. 3-4, annexed hereto as Exhibit 4.

'dismantle' zoning in any neighborhood."[8] In the absence of clear explanation of the consent decree's sweeping aims and provisions, there is little public understanding that the County is not locked in a petty political squabble with HUD,[9] but rather is persistently violating a binding federal court civil rights order and thereby undermining the rule of law.

So it is disappointing that, in the very report where the Monitor asks for the essential terms of the decree to be reemphasized, he provides an incomplete picture. The Monitor states that the consent decree "contains two provisions that relate either to analyzing municipal zoning regulations or modifying them," and then identifies them as Consent Decree ¶¶ 25 and 32.[10] He fails to mention the significance of the acknowledgments and agreements set forth in the first two pages of the decree, of either of the two separate requirements of Consent Decree ¶ 7(j), or of the requirements of Consent Decree ¶ 31. These are all core elements of the decree specific to the goal of dismantling exclusionary zoning. Any order "reemphasizing the essential terms" of the decree should explain their meaning and how they were intended to operate.

A. The development and significance of the decree's prefatory language.

Little if any attention has been paid to the first two pages of the decree, but it is impossible to understand this court order – and its focus on dismantling exclusionary zoning – without understanding both why that language was put in place and what it means about Westchester's obligations.

The intention of the decree had been and continues to be that Westchester would work actively to eliminate exclusionary zoning, using individual units not as the means just to "get to 750," but rather as the means by which to break down barriers to fair housing choice and thereby act as

[8] Response of the Government to Monitor's Consent Decree ¶ 33(c) report, p. 16, May 9, 2016 (ECF No. 585). This is not an isolated incident: HUD officials have sought repeatedly to give the public the impression that the consent decree does not not impose obligations on Westchester beyond those imposed on all recipients of federal funding. *See, e.g.,* Interview with HUD Regional Administrator Holly Leicht on the television program "Richard French Live," May 13, 2014, *available at* https://youtu.be/-w5jXZ7SBbg ("What is being asked of Westchester is what is asked of every place in the country that receives federal funds").

[9] *See* "Lowey, Cuomo deal frees $5 Million in Westchester grants," Westchester Journal News, February 10, 2015, *available at* "http://www.lohud.com/story/news/politics/2015/02/09/westchester-housing-grants-new-deal/23117723/ (Rep. Nita Lowey states that, "Like so many in our community, I've been fed up with the seemingly never-ending fight between the county and HUD").

[10] Monitor's March 17, 2016 report, p. 32. Even in connection with Consent Decree ¶ 32 (commonly referred to as the Analysis of Impediments requirement), the Monitor fails to point out that the critical aspect of that paragraph is the mandatory obligation it places on Westchester not simply to *analyze*, but also to "take all *actions* identified in the AI" (emphasis added). *See* further discussion, *infra* p. 13.

catalysts for follow-on private affordable housing development. The practical importance of this catalytic role cannot be overstated. In the decades prior to the entry of the decree, there had been little appetite on the part of private developers – despite a favorable legal landscape – to try to build where doing so required confronting zoning barriers.

As the terms of the decree were being negotiated, ADC knew that municipalities remained attached to their exclusionary practices. Accordingly, overcoming municipal resistance was central to our conception of what needed to be remedied. *See, e.g.,* Consent Decree ¶ 32(b)(i) (the only impediments to fair housing choice other than "race" that are specified to be included in Westchester's required analysis of impediments are those based on "municipal resistance to the development of affordable housing").

We also were carefully attuned to the fact that, prior to and throughout the litigation phase of the case, Westchester had been asserting the false proposition that it had no authority over local zoning as a matter of state law.

In connection with that issue, in one of the many pre-trial motions made shortly before the trial that had been scheduled in the case, ADC had sought to have the Court take judicial notice of two longstanding state law doctrines that belied Westchester's position that local control was the beginning and end of the zoning inquiry.[11] The first was *Berenson v. Town of New Castle,* 38 N.Y.2d 102 (N.Y. 1975) (any person who owns or controls land has standing to challenge a municipality's zoning on the ground that the zoning is not "properly balanced" or that it does not take sufficient account of regional housing need for multi-family housing). The second was *Matter of County of Monroe (City of Rochester),* 72 N.Y.2d 338 (N.Y. 1988) (a county may challenge a municipality's restrictive zoning on the grounds that the county's public interests in proceeding with development outweigh the municipality's interests in restricting such development).[12]

[11] For the submissions on this question, *see* ECF Nos. 143-45 (ADC's main papers), ECF No. 220 (Westchester's opposition), and ECF Nos. 276-77 (ADC's reply papers), all filed in the period between April 10, 2009 and April 24, 2009.

[12] The motion also sought to have the court take judicial notice of a third case: *Westhab, Inc. v. Village of Elmsford*, 574 N.Y.S.2d 888, 891 (N.Y. Sup. Ct., Westchester County 1991) (local governmental units in New York cannot use their local building codes or regulations to "impede the County in the performance of an essential governmental duty for the benefit of the health and welfare of [its] residents"). Doing so "would be anomalous." *Id.* In *Westhab*, Westchester County itself had filed a brief in which it relied on the *County of Monroe* doctrine and argued that "Westhab is performing an essential governmental function as an agent of Westchester County, as well as fulfilling the expressed intent of the legislature to aid the homeless in the public interest. Neither Westhab nor the County are, therefore, bound by local laws." County's Memorandum of Law in Response to Plaintiff's Motion for a Preliminary Injunction at 18-25; *quoted material* at 24-25. The brief is found as Exhibit 1 to Allen Decl., ECF No. 144.

Before the Court could rule on the motion, however, the parties entered into a framework agreement to resolve the matter.

It was absolutely essential to ADC that the consent decree resolve in the affirmative the question of whether Westchester had the authority and responsibility to act against those of its municipalities that retained barriers to fair housing choice. Anticipating continued resistance, we wanted to take away any excuses that Westchester might interpose for failing to litigate against those of its municipalities that continued to have fair housing barriers; we wanted to create a strong record that the County's interest in housing with desegregation potential outweighed any narrow local interest in maintaining exclusionary zoning; and we wanted there to be no doubt, in the event that Westchester needed to be compelled to fulfill its obligations, that the County had known from the beginning that litigation was an available and necessary weapon in its arsenal.

These are exactly the things that the first two pages of the consent decree do.

The County's agreement and acknowledgment that "pursuant to New York State law, municipal land use policies and actions shall take into consideration the housing needs of the surrounding region"[13] is a restatement and acknowledgment of the *Berenson* doctrine. The County's agreement and acknowledgment that "pursuant to New York State law, municipal land use policies and actions…may not impede the County in its performance of duties for the benefit of the health and welfare of the residents of the County"[14] is a restatement of the *County of Monroe* doctrine.

So that there was no question as to the relationship of affordable housing with desegregation potential to duties "for the benefit of the health and welfare" of County residents, the decree stated that:

> [T]he broad and equitable distribution of affordable housing promotes sustainable and integrated residential patterns, increases fair and equal access to economic, educational, and other opportunities, and advances the health and welfare of the residents of the defendant County of Westchester...[15]

So that there was no question about the important weight that affirmatively furthering fair housing should play in a *County of Monroe* analysis or otherwise, the decree states that "the development of affordable housing in a way that affirmatively furthers fair housing is a matter of significant public interest,"[16] and that "AFFH significantly advances the public interest of the County and the municipalities therein."[17]

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[13] Consent Decree, p. 2, para. 1.

[14] *Id.*

[15] Consent Decree, p. 1, para. 2.

[16] Consent Decree, p. 1, para. 1.

[17] Consent Decree ¶ 31(b).

And to underline the fact that litigation was a tool that could not be shied away from, Westchester had to acknowledge and agree without equivocation that, "*It is appropriate* for the County to take legal action to compel compliance if municipalities hinder or impede the County in its performance of such duties" (emphasis added).[18] The term "such duties" refers back to duties for the health and welfare of county residents, which, in turn, is defined in part as the "broad and equitable distribution of affordable housing," something that "promotes sustainable and integrated residential patterns."[19]

Thus, the language of the first two pages of the decree not only identifies the need for the County to vindicate its interest in creating affordable housing with desegregation potential, but also provides some of the legal answers to *how* the County should go about doing so. It makes clear that *Berenson* and *County of Monroe* are viewed as tools to dismantle exclusionary zoning under the decree. These are facts about which the public is unaware, and are facts that should be included in any "essential terms" order.

B. The Consent Decree ¶ 7(j) requirements (plural).

The Court has already expanded the scope of the May 23rd hearing beyond the Chappaqua Station development to encompass the "steps the County plans to take …to 'ensure the development of at least' 750 new affordable housing units."[20] Part of that inquiry, of course, are any steps that are encompassed by the first of the Consent Decree ¶ 7(j) obligations:

> In the event that a municipality does not take actions needed to promote the objectives of this paragraph, or undertakes actions that hinder the objectives of this paragraph, the County shall use all available means as appropriate to address such action or inaction, including, but not limited to, pursuing legal action.

But there is a second Consent Decree ¶ 7(j) requirement that continues to be ignored:

> The County shall initiate such legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH.

Your Honor will notice that the first obligation pertains to the paragraph of which it is part; that is, to the requirement of Consent Decree ¶ 7 that at least 750 units of AFFH housing be built. But the second obligation is very different. It is pegged to the overall purpose of the consent decree to AFFH (and is exists independent of unit-specific obligations). Basic rules of construction (whether

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[18] Consent Decree, p. 2, para. 1.

[19] Consent Decree, p. 1, para. 2.

[20] Order of April 26, 2016, p. 4 (ECF No. 575).

of statutes or orders) preclude treating obligations that are explicitly directed to different purposes as merely duplicative of one another, and it is important to reemphasize as part of an "essential terms" order the fact that these two separate obligations exist. (Likewise, it is important to consider at the hearing what, if anything, Westchester has done to AFFH, which includes the question, "What has Westchester done to overcome municipally-imposed barriers to fair housing choice like exclusionary zoning?")

Perhaps the most important thing an "essential terms" order could do would be to reject the unprecedented and unsupportable interpretation of the Consent Decree ¶ 7(j) obligations taken by the Government at the May 2, 2014 hearing; to wit, "[B]ecause the county says that none of the municipalities within its area have exclusionary zoning the obligation to [file] any lawsuit is not triggered."[21]

This is a breathtaking principle, a principle under which any defendant could avoid its obligation by a unilateral assertion that the factual predicate for action did not exist. As we promptly pointed out in a letter to the Government,[22] the obligation to take action pursuant to Consent Decree ¶ 7(j) does not depend on the County's *subjective* view of the circumstances.

Each of the Consent Decree ¶ 7(j) obligations is phrased in mandatory language ("shall use all available means" and "shall initiate," respectively). The first obligation is triggered by one of two events: a municipality has not taken action needed to promote the objectives of Consent Decree ¶ 7 to have at least 750 units of AFFH housing built or a municipality has undertaken actions that hinder those objectives. So either at least one of the events has taken place, in which case the obligation to act arises; or neither of the events has taken place, in which case the obligation to act does not arise.

The second obligation operates in a similar fashion. Either there is or is not a legal action that is appropriate to accomplish the consent decree's AFFH purpose. If there is, action is mandatory.

The Government's stated position would make sense if the first obligation, for example, read as follows: "In the event that, *in defendant's unreviewable judgment*, a municipality does not take actions needed…the County *may in its discretion* use all available means as *the County, in its unreviewable judgment, considers* appropriate." But the actual decree language does not change the trigger for action from an objectively observable event to one that exists only if the County says it does; it does not have permissive "may" language, but rather mandatory "shall" language; and it does not change what is actually appropriate into whatever the County's version of appropriateness is, however unreasonable the latter may be.

None of this means that the Government had the authority to direct the County to take particular actions in the first instance (*cf.* Consent Decree ¶ 32, where the determination of whether an

[21] Transcript, *supra* n. 5, at 18:2-4.

[22] ADC to David J. Kennedy, May 6, 2014, annexed hereto as Exhibit 5. We have never received a response.

Analysis of Impediments is satisfactory is vested in HUD). As such – as is the norm in countless consent decrees – the initial decision about how to proceed so as to be in compliance is in the hands of the party on whom the obligation falls (here, the County). But when disputes arise as to whether there has been compliance, it is incumbent on the Government to bring those disputes to the Court for resolution.

Now it is up to the Government to say whether it actually believes the position it expressed or whether it was just saying it to dissuade the Court from taking seriously ADC's argument that the Government and the Monitor had failed to take their enforcement responsibilities seriously.[23] But it is clear that the Government's conduct has continued to be consistent with the idea that Westchester controls the operative status of Consent Decree ¶ 7(j). Despite the fact that the Monitor last year reported that the County "undertook no direct activities to address zoning impediments in 2014" and that the inaction, in light of his *Berenson* and *Huntington* reports, "may support a finding that the County is in breach of certain duties" under the consent decree, "including its duty under Paragraph 7(j),"[24] the Government has not been prepared to bring the issue of Westchester's unwillingness to make *structural* changes to zoning to the Court's attention in connection with a contempt motion.

By contrast, the Government has made an issue of the Chappaqua Station project, one that Westchester itself believes should go forward. The irony is almost too painful. Westchester, not surprisingly, is prepared to allow a project to go forward that is located on a brownfield site, sandwiched between the Saw Mill River Parkway and the railroad, and separated from any residential Chappaqua neighborhood both by geography and by designed tenancy (100 percent affordable, no market rate units). It is a project that, whatever else one has to say about it, would not be permitted if, as intended, development under the consent decree had proceeded pursuant to an Implementation Plan (IP) that met the goals of the decree to AFFH. Consent Decree ¶ 18-20. This is the ground where the Government seeks action, all while ignoring the exclusionary zoning of New Castle and numerous other jurisdictions. It is as though a physician were to diagnose both

[23] As part of its argument, the Government went on to suggest that it was foolish to have Westchester initiate litigation as it was obliged to do under the decree because defendant municipalities would point to the County's analysis that said that there was no exclusionary zoning. Transcript, *supra* n. 5, at 18. As we pointed out to the Government thereafter: "it is bizarre to suggest that a mandatory obligation should be ignored or deferred for purposes of court intervention because a defendant has taken steps to sabotage its ability to pursue such an obligation. If such a policy were followed more broadly, there is nothing to deter others subject to court orders from pursuing a strategy of rejection and denial…If the U.S. Attorney were truly concerned that Westchester would be foiled in performing its duty because of the resistant and recalcitrant steps it has taken, the answer would not be to hope that the defendant will have a come-to-Jesus moment. Instead, the U.S. Attorney would have first established to the Court that Westchester had violated its paragraph 7(j) obligations and then have asked the Court, as part of a remedial order, to appoint a Special Master to stand in the place and stead of the County to litigate the required claims in the name of the County." ADC to Kennedy, *supra* n. 22, at 2-3.

[24] Monitor's April 1, 2015 report, pp. 32-33 (ECF No. 506).

advanced cancer and the existence of a birth mark, and then decide to ignore the cancer and excise the blemish.[25]

An "essential terms" order must make clear the existence of dual obligations under Consent Decree ¶ 7(j); the fact that those obligations were operative as of the day the consent decree was entered; and the fact that Westchester's subjective assertions as to facts on the ground cannot act either to limit its obligations or seize from the Court the ultimate responsibility for determining compliance or non-compliance based on facts and evidence.

C. The altogether-ignored Consent Decree § 31(a) – eliminating *de facto* residential segregation.

Consent Decree ¶ 31(a) makes "the elimination of de facto residential segregation" one of the "official goals of the County's housing policies and programs." This provision underlines the fact that the decree is not simply about building some affordable housing units, but rather is designed to tackle residential segregation.[26] By definition, reducing barriers to affordable housing throughout *residential* Westchester is a key part of that process – de facto residential segregation cannot be eliminated without it.

The Government has treated this requirement as a nullity: Westchester has passed a resolution setting forth the relevant language, and hence has a compliant "policy statement." That perverts the meaning of the provision. It says: "We don't care if you *actually* treat the elimination of de facto residential segregation as a goal in all of your housing policies and programs, it is enough to have made a nominal or rhetorical commitment." Under that interpretation, Westchester could have said the magic words and then turned around and eliminated any housing policies and programs that had desegregation potential. (Indeed, with the Government's acquiescence, that is what happened: the targets for affordable housing development that had been set by the Housing Opportunity Commission were abandoned as Westchester policy.)[27]

The better explanation of Consent Decree ¶ 31(a) is that the goal of eliminating de facto residential segregation was so critical that it was important to make it an integral part of the County's law (an "official" goal) so that action to undo it would require subsequent legislative action, not simply the writing of a new administrative memo either by the current or some future administration.

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[25] Except for the fact that there is no evidence that the Government has ever bothered to diagnose for itself the scope of exclusionary zoning.

[26] See also Consent Decree ¶ 31(c) ("[T]he location of affordable housing is central to fulfilling the commitment to AFFH because it determines whether such housing will reduce or perpetuate residential segregation").

[27] It is from Westchester's Housing Opportunity Commission that the figure of 10,768 housing units comes. The Monitor should not be seeking to have the Court distance the decree from that number, but rather affirm that the elimination of those targets was contrary to the substance of the Consent Decree ¶ 31(a) requirement.

This latter interpretation means that Westchester's conduct is supposed to be assessed to see whether it has operated its housing policies and programs consistent with the ending-segregation goal it professed. An "essential terms" order should include this fact, and the question of compliance should be explored at a hearing.

2. The Monitor unjustifiably abandoned his commitment to correct his flawed disparate impact report; as the new report from ADC's expert makes clear, at least 19 jurisdictions have exclusionary zoning that, in violation of the Fair Housing Act, perpetuates segregation and causes a disparate impact.

A. The Monitor's initial report and his failure to revise it.

The inadequacy of the Monitor's *"Huntington"* report[28] is, uncommonly, something about which ADC, HUD, and the Government have agreed. After the issuance of the Monitor's proposed methodology, ADC explained some of the key deficiencies in a letter to him.[29] In a joint letter a few weeks thereafter, the Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense & Educational Fund, and the Poverty & Race Research Action Council informed the Monitor of their agreement with ADC's letter, and submitted their own additional critique.[30]

The Monitor failed to heed these critiques in the report he issued on September 8, 2014. Thereafter HUD issued its own criticism of the Monitor's Huntington report,[31] which the Monitor did not accept as authoritatively representing the position of the Government.[32] The Government then wrote the Monitor another letter of critique,[33] to which the Monitor responded, "[w]e understand and appreciate your concerns and will work to accommodate them."[34]

In his 2015 annual report, the Monitor repeated his undertaking to complete a new report: "The

[28] The report is found at Exhibit 84 to the Monitor's April 28, 2016 report (ECF No. 578-43).

[29] Letter from ADC to Monitor, June 5, 2014, annexed hereto as Exhibit 6.

[30] Joint Letter from Lawyers' Committee, NAACP Legal Defense & Educational Fund, and Poverty & Race Research Action Council to Monitor, June 30, 2014, annexed hereto as Exhibit 7.

[31] Letter from HUD to Monitor, September 24, 2014, annexed to the Monitor's April 28, 2016 report as Exhibit 89 (ECF No. 578-48).

[32] Letter from Monitor to HUD, September 26, 2014, ECF No. 505.

[33] Letter from U.S. Attorney to Monitor, October 24, 2014, annexed to the Monitor's April 28, 2016 report as Exhibit 90 (ECG 578-49).

[34] Letter from Monitor to U.S. Attorney, December 8, 2014, annexed to the Monitor's April 28, 2016 report as Ex. 91 (ECF No. 578-50).

Monitor anticipates undertaking additional work on a revised *Huntington* report in the coming months consistent with the Government's October 24, 2014 letter."[35]

Now, more than a year later, the Monitor has announced that he will not be completing a revised report. The articulated rationale is peculiar: "Subsequently, it became clear that the County would no longer be seeking federal funds and the Monitor shelved the Huntington analysis to direct his resources to other compliance issues."[36] In fact, the County had already explained on May 9, 2014 that it would not be seeking further funding.[37]

In any event, the purpose of the *Huntington* report was never limited to resolve a funding issue, but rather included among its functions helping the County comply with its *consent decree* obligations, including its obligations to complete an Analysis of Impediments to Fair Housing Choice (AI).[38] Even leaving aside the AI, a revised report continues to be necessary to assess the full scope of jurisdictions that are maintaining barriers to fair housing choice (Consent Decree ¶ 7(j) requires Westchester to take all necessary actions in respect to each such barrier).[39]

B. ADC's expert shows that exclusionary zoning in violation of the Fair Housing Act is rampant among the 25 jurisdictions with African-American population of less than 3 percent.

Dr. Andrew Beveridge, Chair of the Department of Sociology at Queens College, is one of the nation's leading demographers. His areas of expertise include demography the statistical and quantitative analysis of social science data sets, most particularly including Census data, survey data, and administrative records. He is an expert in the application of GIS technology to the analysis of social patterns, including residential segregation. Among his other work, he has been retained by the Department of Justice in civil rights matters on numerous occasions, including his work with the Civil Rights Bureau of the U.S. Attorney for the Southern District of New York in a Westchester-based voting rights matter, *U.S. v. Port Chester.*

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[35] Monitor's April 1, 2015 report, p. 48.

[36] Monitor's April 28, 2016 report, p. 42.

[37] *See County of Westchester v. U.S. Department of Housing and Urban Development*, 13-CV-2741, Order of July 17, 2015, p. 45 (ECF No. 41).

[38] *See, e.g.,* Letter from U.S. Attorney to Monitor, *supra* n. 33, at 1 ("The purpose of the Report is to assist the County with a proposed analysis zoning impediments that could be incorporated into the County's Analysis of Impediments to Fair Housing Choice ("AI"), which is long overdue. The Consent Decree in the above-referenced case requires that the County submit an AI that is 'deemed acceptable by HUD.' Consent Decree ¶ 32."

[39] It should not be necessary for the Government: were there any serious intention to enforce Consent Decree ¶ 7(j) robustly, the Government would have completed its own analysis long before this point, nearly seven years after the entry of the decree.

Dr. Beveridge's report identifies some of the errors in the Monitor's *Huntington* report. It then shows that at least 19 of 25 "Under-3" jurisdictions (*i.e.,* jurisdictions with less than 3.0 percent African-American households) have exclusionary zoning based on limited multi-family as-of-right zones, a restriction that deprives developers of a necessary condition by which affordable housing can be built. In turn, that lack of affordable housing perpetuates segregation and bears more heavily on African-Americans (*i.e.,* has a disparate impact on African-Americans).[40]

These are 19 jurisdictions where the County should have been taking all necessary steps, including litigation, to reform (dismantle) the exclusionary aspects of the zoning.

Having said that, what should not get lost in the discussion of disparate impact and perpetuation of segregation is the fact that action on the part of Westchester against municipalities pursuant to the County's Consent Decree is not only triggered by full-blown violations by municipalities of the Fair Housing Act (or of their *Berenson* obligations).[41]

Anything hindering AFFH unit development, failing to promote AFFH unit development, or, more generally, any barrier to fair housing choice was intended to trigger action. And the *County of Monroe* doctrine gave Westchester the tool to proceed even in the absence of a Fair Housing Act or *Berenson* violation.

3. The Monitor's biennial report should have addressed the County's across the board, continuing violations of Consent Decree ¶ 7(j) and sought to have the Court hold Westchester in contempt for those violations.

Remarkably, the biennial report does not address Consent Decree ¶ 7(j). But it does say that, "rather than promoting inclusionary zoning, the County essentially informed the municipalities that the zoning currently in place should not be challenged and then raised the spectre, detailed in the public statement report, that HUD threatened local zoning."[42] Informing the municipalities

[40] As noted in the report, the analysis was limited to the Under-3 jurisdictions, and thus does not exclude the possibility of exclusionary zoning with a disparate impact (or that perpetuates segregation) in eight excluded jurisdictions or in six included jurisdictions with African-American households at or above 3.0 percent. The analysis also does not examine Latinos, who may or may not face different or additional barriers. Finally, the analysis did not look at other zoning restrictions that could form the basis of a conclusion that exclusionary zoning exists that perpetuates segregation and/or operates to the detriment of African-Americans (as the Monitor found in respect to Pelham Manor).

[41] In addition to the seven jurisdictions that the Monitor found in violation of their *Berenson* obligations, he found that an additional 20 needed improvement in their zoning. Monitor's *Berenson* report, September 13, 2013, pp. 33-37 (ECF No. 452).

[42] *Id.* at 43.

that current zoning should remain in place is wholly inconsistent with the Consent Decree ¶ 7(j) obligations, but is consistent with the County's posture of non-compliance throughout the consent decree period. That is, it has taken an *a priori*, across-the-board, regardless-of-circumstance approach of saying "no" to legal action against exclusionary zoning. And it makes clear that the County's excuse – the "cooperative" approach is working – is meaningless. Of course, exclusionary jurisdictions are cooperating with an approach that encourages them to maintain the residential zoning status quo! The cooperation that the consent decree required to avoid being sued was very different: cooperation with materially changing that zoning status so as to eliminate barriers both to unit construction and to fair housing choice (including zoning in violation of *Berenson, County of Monroe,* and the Fair Housing Act). That has not happened.

The County remains in violation of its Consent Decree ¶ 7(j) obligations and there should be a hearing and determination on that question. The biennial report neglected to make that recommendation.

4. The Monitor's biennial report should have sought to have the Court hold Westchester in contempt for its continuing failure to meet its obligation to produce an analysis of impediments to fair housing choice acceptable to HUD.

The Monitor's biennial report has found what has been known over the course of the last six years (the deadline for submission of a proper AI was back in 2010): "the County has failed to comply with the duty under Paragraph 32 to complete an AI that is acceptable to HUD."[43]

This obligation is entirely independent of such AI obligations as the County had in relation to the receipt of federal funding. First, it is a consent decree provision. Second, it is a decree provision particularly focused on the issues of race and municipal resistance. Third, the AI is supposed to work in tandem with an Implementation Plan.[44]

Finally, and very importantly, it creates a *consent decree* obligation to "take all actions identified in the AI."[45] (The focus of the Government and the Monitor on "analysis" has meant that this last piece has gotten lost.) It was anticipated that Westchester would have to take additional decree-based action as a result of a compliant AI.

Very clearly, Westchester has been and continues to be in contempt in respect to this obligation, so, independent of any remedial steps, there should be a hearing and determination on that question. The biennial report neglected to make that recommendation.

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[43] Monitor's April 28, 2016 report, p. 46.

[44] Consent Decree ¶ 21.

[45] Consent Decree ¶ 32.

5. The Monitor's biennial report gives a misleadingly optimistic view of Westchester's progress on securing the construction of AFFH Units.

The Monitor reported that, even leaving aside Chappaqua Station and The Cambium, "the County remains above its current annual benchmark requirement and, therefore, is currently in compliance with Paragraph 23."[46]

A. Non-compliant unit distribution by municipality.

In fact, consent Decree ¶ 7(a)(i) requires that at least 84 percent of all units be located in municipalities that have African-American population of less than 3 percent and Latino population of less than 7 percent, excluding population in group quarters. ADC has analyzed where units have been built using 2010 Census data.[47] It turns out that only approximately 45.6 percent of the units are in jurisdictions that, in 2010, were "under 3 and under 7." Consent Decree ¶ 7(b)(i) permitted a maximum of 8 percent of the units to be located in municipalities that have African-American population of less than 7 percent and Latino population of less than 10 percent, excluding population in group quarters. It turns out that approximately 31.7 percent of the units are located in such jurisdictions. Finally, Consent Decree ¶ 7(c)(i) permitted a maximum of 8 percent of the units to be located in municipalities that have African-American population of less than 14 percent and Latino population of less than 16 percent, excluding population in group quarters. It turns out that approximately 22.7 percent of the units are located in such jurisdictions.

These are very significant variations from the municipal-level distributional requirements that, even without excluding what we've previously characterized as the "cheating" units,[48] mean that the County's unit-based decree obligations are not being met.

Why hasn't this been pointed out? Because the Monitor and the Government still insist on using old 2000 Census data. There is no good justification for this. The purpose of the decree's municipal-level requirements was not to spread out the housing evenly among the maximum number of municipalities, but rather to concentrate the housing in the municipalities that had the lowest percentages of African-Americans and Latinos. Note that whether to require the population of African-Americans *and* Latinos to be under a certain threshold or simply to require the population of African-Americans *or* Latinos to be under a certain threshold was a negotiated term of the decree. The decision was to require both populations, African-American and Latino, to be under the respective thresholds. What sticking with the 2000 data does is take all the municipalities where the Latino population has risen above the 7 percent threshold of Consent Decree ¶ 7(a)(i) and pretend that those municipalities still belong in the category of under 3 percent African-American *and* under 7 percent Latino. That way, there are more jurisdictions among which to spread 630 units, meaning that it is easier to avoid confronting zoning barriers in existing white residential neighborhoods (*i.e.,* easier to avoid massive resistance). That course has obvious

[46] Monitor's April 28, 2016 report, p. 6.

[47] A table showing housing by 2010 tier and municipality is annexed as Exhibit 8.

[48] *See Cheating on Every Level, supra* n. 6, at 8-11, and discussion, *infra*, p. 15.

political appeal, but it is the purpose of the decree and not political considerations that should be governing decisions.

Adapting to 2010 Census data was specifically contemplated by the decree, with the Monitor given the explicit authority to "to take into account 2010 Census data in the determination of eligible municipalities and census blocks set forth in paragraphs 7(a), 7(b), and 7(c)." Consent Decree ¶ 15(a)(iii). The Government was also given the authority to propose modifications or refinements, and to seek review if such proposals were not accepted. Consent Decree ¶¶ 15(c), (f).

The Monitor's failure in 2012, 2014, and this year to convert to 2010 Census data represents an abuse of discretion. The Government's failure to seek such a change represents another instance of failing to act in a way consistent with maintaining the integrity of the decree. The Court should order that 2010 data be used hereafter.

B. Qualitative non-compliance

Sites are supposed to overcome barriers to fair housing choice. That is why the Monitor had a mandatory duty, triggered back in 2010, to put in place an IP that fulfilled the decree's goal of AFFH in the face of the County's failure to do so. Consent Decree ¶ 20(d). Because the Monitor has failed to do so, all development has proceeded in the absence of such an IP.

ADC's table of completed units[49] identifies some of the reasons that many of the units being "counted" should not count, including units where barriers to construction of units had been removed prior to the entry of the consent decree, units that are isolated or otherwise improper or undesirable, and units where an agreement independent of the consent decree had already required them to be built.

In other words, the count is inflated on these dimensions by hundreds of units. The pattern of development is consistent only with the desire to avoid confronting post-consent-decree barriers in existing white residential areas.

C. Non-compliance at the block level

The Monitor states that, of a projected 845 units to be completed, 362 are projected to be located "in census blocks that, in 2000, had neither African American nor Hispanics residents."[50] Leaving aside the already-discussed problem of using 2000 data instead of 2010 data (and leaving aside whether all the units will ultimately be built), the reference fundamentally misdirects attention away from what the consent decree requires. Consent Decree ¶ 22(f) is not framed to maximize the development of AFFH units on census blocks with no African-Americans or Latinos regardless

[49] *See* Exhibit 8, annexed hereto.

[50] Monitor's April 28, 2016 report, p. 6.

of context. Instead, the idea is to "maximize the development of Affordable AFFH Units in the eligible municipalities and census blocks" that have the "lowest *concentrations* of African American and Hispanic residents" (emphasis added). Consent Decree ¶ 22(f).

There is an important difference. The term lowest "concentrations" connotes a low number in relation to the other people (*i.e.,* principally white, non-Latino) who live on the block. The actual goal was to integrate the "whitest" blocks. What has happened instead is that sites have been included as meeting the Consent Decree ¶ 22(f) criteria where there are no African-Americans or Latinos living on the block because *no one* is living on the block. That approach winds up prioritizing the placement of developments on vacant blocks rather than in established, white-dominated residential neighborhoods.

5. Remedies

We respectfully propose that the Court proceed as follows:

(a) Issue an order reemphasizing the obligations discussed earlier in this letter.

(b) In connection with Consent Decree ¶ 7(j), find that Westchester has been in contempt of its obligations throughout the decree period (2009-2016); order that it pursue those obligations over the course of the next seven years (*i.e.,* a period of compliance equal to the period of non-compliance); and impose a substantial fine that accrues monthly until Westchester begins to comply.

(c) Either through a portion of an IP incorporated into the decree, through a portion of an AI that is required to be acted upon pursuant to the decree, or through an alternative process to be determined by the Court, establish a plan by which the County would: (i) acquire interests in sites with maximum desegregation potential that require material zoning change to an existing low-density, highly-white residential neighborhood; and (2) plan and prepare to litigate against such municipalities that resisted the necessary zoning change.[51]

Acquiring an interest in appropriate sites was always important (and has always been ignored by all the parties). The *Berenson* and *County of Monroe* doctrines were not referenced in the

[51] These basic steps were discussed in ADC's 2010 *Prescription for Failure* report, annexed hereto as Exhibit 9 (appendices omitted). *See* pages 18-19. They were also discussed, in ADC's March 25, 2010 Draft Implementation Plan, annexed as Exhibit 3 to the Monitor's July 7, 2010 report (ECF No. 329-4). *See* pages 9-12. *See also* the papers filed in connection with ADC's motion to enforce, specifically the Motion to Dismiss itself, May 31, 2011 (ECF No. 343) (items (j) through (l) of the relief requested sought to have Westchester directed to identify and acquire sites and prepare for litigation); the Gurian Declaration of May 31, 2011, ¶¶ 28-35 (ECF No. 351) (discussing site identification, site acquisition, and litigation). That motion was never heard. *See* Order of June 9, 2011 (ECF No. 360 (dismissing the motion without prejudice until after the determination of ADC's motion to intervene).

beginning pages of the decree because those doctrines were of academic interest, but rather because they were intended to be *deployed* as part of the implementation of the decree. For that to be able to happen in the normal course of events, Westchester would have to acquire interests in appropriate properties in order to have standing to proceed.[52]

The Monitor has recommended that the Department of Justice bring lawsuits against the subset of municipalities with exclusionary zoning that the Monitor identified in his *Huntington* report. There has, of course, been nothing stopping the U.S. Attorney from bringing litigation against such municipalities under the Fair Housing Act. With respect to *Berenson,* however, the normal basis for standing is that the plaintiff have an interest in a relevant property. And the interest that outweighs that of a municipality under *County of Monroe* is the interest of the state or state subdivision (here, Westchester County), not some independent interest of the Government.

(d) In the event that the Court determines that it is futile to expect that Westchester will ever comply on its own with its Consent Decree ¶ 7(j) obligations, appoint a Fair Housing Special Master or Receiver to act in Westchester's place and stead.

Such a Special Master or Receiver would be able to engage in appropriate site acquisition and conduct the full range of necessary steps, acting as and for Westchester.

(e) Direct the Monitor to prepare an IP that fulfills the purposes of the decree and to designate appropriate elements of the IP as benchmarks to be met as with other decree obligations. Consent Decree ¶¶ 20(d) and 24.

That proceeding without a compliant IP is deeply problematic has always been easy to see:

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

[52] Note that the limitations on costs to be assumed by Westchester do not apply to the meeting of its Consent Decree ¶ 7(j) duties. It is true that it would have been more *efficient* for the County if it had used the funds to assist in the development of a minimum of 750 units of AFFH housing to break down zoning barriers as required by Consent Decree ¶ 7(j), but the fact that the County deliberately chose not to do so means that it should not be heard to complain about the additional costs of remediating its Consent Decree ¶ (7)(j) non-compliance.

> associated with undesirable features, like proximity to railroad tracks and highways; developing units in locations isolated from the residential community of which the units are supposed to be a part, or on non-populated census blocks; and "saving" the "less controversial" units – like seniors-only units and existing units – for the Whitest towns and villages.[53]

The predicted issues have occurred with a vengeance. Even though it is late in the process, it is still worthwhile that remaining development not be allowed to proceed on an *ad hoc* basis.

(f) Order that only jurisdictions with African-American population of less than 3 percent and Latino population of less than 7 percent according to 2010 Census data be included as Consent Decree ¶ 7(a) jurisdictions.

(g) Order that, in connection with the development of AFFH Units intended to be "counted" for the purposes of Consent Decree ¶ 7, only units that meet all of the following criteria are permitted:

(i) Located in a Consent Decree ¶ 7(a) municipality as defined by 2010 Census data;

(ii) Located in an existing residential neighborhood;

(iii) Located on a populated Census block with the lowest concentrations of African-Americans and Latinos in the municipality;

(iv) Requires material modification of low-density residential zoning to proceed;

(v) Is new construction;

(vi) Is not age-restricted; and

(vii) Is not already required by some other obligation of the County, a municipality, or a developer.

This relief helps address Westchester's failure to have sought the zoning changes that it was obliged to seek, and its practice, thus far, to try to emphasize developments that avoided a challenge to the status quo of white residential neighborhoods.

(h) In connection with the Monitor's proposal for a new mechanism to complete a compliant AI, it should first of all be noted that a significant portion of the actions that can be achieved through an AI would have been able to have been achieved if the Monitor had fulfilled his duty pursuant to Consent Decree ¶¶ 20(d) and 24. However, the AI obligations do exist as separate and independent obligations of the County under the decree, and:

[53] ADC's Memorandum in Support of Motion to Enforce, pp. 19-20, May 31, 2011 (ECF345).

(i) the Court should first of all hold Westchester in contempt of its obligations under Consent Decree ¶ 32.

(ii) the Court, if it determines that it is futile to seek compliance from Westchester at this stage, should itself appoint a Special Master, acting in Westchester's place and stead, to develop an AI satisfactory to both HUD and the Court.

(iii) the Court should order Westchester, pursuant to the existing obligation set out in Consent Decree ¶ 32, to "take all actions identified in the AI."

(iv) In view of the fact that neither the Monitor nor the Government has been willing to identify the full scope of exclusionary zoning in Westchester, and in light of the report that ADC is submitting herewith, the Court should order that the Special Master consult with ADC during the preparation of the AI and permit ADC the opportunity to comment on the AI prior to its submission to the Court.

(i) While the Magistrate Judge assigned to the case has in all circumstances acted promptly and properly, experience has shown that the additional step of Magistrate review has contributed to unnecessary delays. This Court has long since expressed its willingness to the parties that it is prepared to take up any matters directly and, indeed, proceedings in connection with the Monitor's biennial report appear to be moving forward on a direct track. The Court should formalize the process and order that all matters should be heard by the Court in the first instance, including those where the terms of the consent decree commit them initially to the Magistrate Judge.

Conclusion

The warning signs of that the consent decree was in trouble were clear almost seven years ago when the Monitor acknowledged going for "low hanging fruit" and ADC warned that "[a]ppeasement only emboldens resistance";[54] six years ago when ADC published *Prescription for Failure* and warned of the dangers of backing away from demanding full compliance;[55] five

[54] Letter from ADC to Monitor, August 24, 2009, *supra* n. 7, at 1.

[55] *Prescription for Failure, supra* n. 51, p. 43 ("Westchester was given the impression over the last several months, intentionally or unintentionally, that *structural* change would not really be required, that the Settlement Order would be looked at 'flexibly,' and that Westchester could progress towards unit-specific targets by focusing on 'low-hanging fruit' (*i.e.,* the kinds of projects that minimize municipal or other opposition). Not surprisingly, Westchester has understood these signals to mean, 'Let's see what we can get away with.'. . .Westchester is banking on an old strategy: adopt an extreme position, and hope that you can negotiate a middle ground. In this case, the extreme position is a woefully non-compliant submission that bears a striking resemblance to Westchester's pre- Settlement Order positions. The risk, of course, is that the Monitor will take the bait...and negotiate. The terms of the Settlement Order, however, are non-negotiable.

years ago when ADC, separate from its motion to intervene, sought to have the Court exercise its independent, juridical interest to remedy Westchester's brazen violations of the decree;[56] and two years ago, when ADC published *Cheating On Every Level* and called on the Court to extend the effective term of the decree to "defeat Westchester's run-out-the-clock strategy."[57]

This is hardly the first time that the Government has failed to seek the full breadth of appropriate relief, or the first time that some have indulged the fanciful notions that there will be voluntary "buy in" or that a soft-sell will defuse opposition. On the contrary, we have seen this pattern repeat itself over the course of 150 years of American civil rights history. Every time, halfway measures are ultimately seen to be a failure of will and a lost opportunity.

It is late in the day, but not too late to try to take meaningful steps to restore the integrity and intended vigor of the consent decree.

Respectfully submitted,

Craig Gurian
Counsel for Relator ADC

cc: James E. Johnson, Monitor
Robert F. Meehan, County Attorney
David J. Kennedy, Assistant U.S. Attorney
(all via ECF)

Negotiating away either portions of the letter or spirit of the Settlement Order would be improper and impermissible").

[56] *See* ADC's Memorandum in Support of Motion to Enforce, *supra* n. 53, at 8 (observing that the consent decree "was built as a firm and unmistakable rejection of [the] failed 'all carrot, no stick' approach").

[57] *Cheating On Every Level, supra* n. 6 at 37.