

# **Cheating On Every Level**

## **Anatomy of the Demise of a Civil Rights Consent Decree**

**Anti-Discrimination Center**

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Why not just defy the federal government in connection with Westchester's obligations under a federal court order?

- Supporter of County Executive Rob Astorino in telephone call with the county executive

"Well, I've been doing that...I'm holding our ground...I'm not yielding an inch to these guys."

- County Executive Astorino in reply (audiotape recording)

## I. Introduction

Most people understand that it is fundamental to the operation of our society that federal court orders -- like them or not -- need to be obeyed. The days of Southern officials making their "states' rights" defense of segregation are, after all, long gone. But in liberal Westchester County, New York, a federal court housing desegregation order has been defied for almost five years, and Westchester has yet to be held to account. How can that be?

### A. Demographic and zoning perspective: creating and maintaining a segregated county

Prior to World War II and for decades thereafter, housing patterns in Westchester County, as elsewhere in the country, were shaped by open and active discriminatory policies engaged in by every category of player in the housing market: governmental entities, private developers, landlords, and individual homeowners. Once in place, housing patterns tend to remain in place even if nothing further is done to reinforce those patterns. That is especially true when members of a traditionally excluded group continue to feel unwelcome.

In Westchester, existing housing patterns were powerfully reinforced by municipal zoning restrictions that effectively prevented the construction of affordable housing with desegregation potential. The impact of these zoning policies was magnified by the county's policy of steering subsidized housing for lower-income families (most notably Section 8 housing) into areas of minority concentration.

**20 towns and villages in Westchester (nearly half of Westchester's local jurisdictions) have African-American populations of 2.0 percent or less.**

The results were predictable and visible today to anyone who does not close his eyes to demographic reality. 20 towns and villages in Westchester (nearly half of Westchester's local jurisdictions) have African-American populations of 2.0 percent or less.<sup>1</sup> This in a county whose overall African-American population is about 13 percent and that has cities with significant concentrations of African-Americans (including Mount Vernon, which is over 60 percent African-American). New York City -- the adjoining jurisdiction that is part of the same housing market and part of any reasonable calculation of regional housing need -- has an African-American population of about

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<sup>1</sup> 2010 United States Census data, with population in group quarters excluded. 13 of the 20 also have

23 percent; there are almost twice as many African-Americans living in New York City as there are people of all races and ethnicities living in Westchester.

### B. Challenging the status quo

Eight years ago, in 2006, the Anti-Discrimination Center (ADC) filed under seal a False Claims Act lawsuit against Westchester County, a wealthy New York suburb, because Westchester had been defrauding the federal government (which is to say defrauding American taxpayers) by falsely claiming that it had been meeting its affirmatively furthering fair housing (AFFH) obligations. Those are the obligations to analyze, identify, and take the necessary actions to eliminate barriers to fair housing choice.

All the while Westchester represented that it was complying -- a requirement in order to get tens of millions of dollars of federal housing funds -- it was really ignoring its AFFH obligations, instead taking a hands-off attitude toward ultra-white towns and villages in the County that were deeply resistant to the construction of affordable housing with desegregation potential.

After the U.S. Attorney declined to intervene in the case at the end of 2006, the complaint was unsealed, and two-and-a-half years of intense litigation followed. The evidence against Westchester was so strong that the federal judge presiding over the case, the Hon. Denise Cote, found in February 2009 as a matter of law that Westchester had "utterly failed" to meet its AFFH obligations and that more than a thousand representations that it had complied were either "false or fraudulent."

**Westchester "utterly failed" to meet its AFFH obligations and more than a thousand representations that it had complied were either "false or fraudulent."**

Even after that ruling, the U.S. Attorney's office refused to intervene in the case. It was unwilling to join with ADC and advocate a civil rights perspective.

Ultimately, in August 2009, a consent decree was entered, thereby resolving the litigation phase of the case. Because the case had been brought under the False Claims Act, the Government, not ADC, was a party to the decree. ADC, relying on promises that the decree would be enforced, did not, as was its right, interpose objections to the proposed decree.

### **-- Judge Cote, 2009**

The consent decree was designed to begin the process of ending the residential segregation that had long characterized Westchester. The County was obliged to take on a variety of obligations, all of which were intended to overcome barriers to fair housing choice. The most well known of these obligations was the requirement to fund the construction of at least 750 units of affordable housing that would AFFH and would be developed pursuant to an implementation plan that met the objectives of the decree to AFFH. But there were others.

Westchester had to agree to take all necessary actions both to facilitate the construction of the affordable housing units and, more generally, to overcome barriers to fair housing choice maintained by its municipalities, including zoning barriers. Litigating as necessary against those municipalities was explicitly specified as part of the obligation.

Westchester also had to start using all of its housing policies and programs to end residential segregation in the County. And Westchester had to submit an "analysis of impediments" to fair housing choice that was satisfactory to HUD.

Throughout the text of the consent decree -- as it had been throughout the litigation -- the conduct of municipalities took center stage. It was restrictive municipal zoning (and Westchester's acceptance of that zoning) that was the most powerful impediment to fair housing choice, and thus action to counter precisely that resistance was at the core of what was demanded.

C. Westchester shows its contempt...and the Government and the Monitor accept window dressing

It became clear very quickly that Westchester was backing away from each and all of its commitments. That in itself was not terribly surprising: civil rights defendants often continue to resist change, even when a consent decree is in place.

What was surprising was the willingness of the Government and the Monitor that had been appointed (James Johnson) to allow Westchester to evade its obligations under a binding federal court order.

ADC warned within weeks of the entry of the consent decree that "appeasement only emboldens resistance," but the warning was not heeded.

- **Westchester failed to develop a decree-compliant implementation plan so that it had more leeway to spend money on inappropriate sites that did not AFFH**
- **Most of the sites picked have been isolated or otherwise undesirable**
- **When counting only units appropriate to the consent decree, Westchester is more than two-thirds (more than 200 units) behind the development obligations it had by the end of 2013**
- **Westchester has refused, across-the-board and regardless of circumstance, to meet its obligations to use all means necessary to overturn restrictive municipal zoning**
- **Westchester has failed to have the ending of de facto segregation be a goal of its housing policies and programs**
- **Westchester has fomented opposition to a lawful federal court order -- the county executive in his campaign literature, for example, depicted dark and threatening clouds over a Westchester town with an apartment building suffocating single-family homes, with the headline, "Don't Let the Federal Government INVADE Tarrytown" (the theme of "invasion" is, of course, a traditional method used to stoke racial fears)**
- **Westchester has never submitted an analysis of impediments that is satisfactory to HUD**

Despite these ongoing violations and provocations, the Government and the Monitor have not sought to have the court hold the County in contempt. Instead, the Government and the Monitor pretend that "progress" is being made.

D. What's happening here?

Westchester tells the story that, despite doing great, it is being pressed by the Government to go beyond the requirements of the decree. The Government and the Monitor acknowledge that there have been bumps in the road, but insist that good progress is being made. ADC, by contrast, says that the consent decree process is entirely off the tracks. Who to believe?

We say: take the time to learn what the consent decree actually says. Then see which narrative fits the facts as they have developed over the last four and a half years the best.

In terms of Westchester, the answer is obvious: this is a civil rights defendant who wanted to maintain the status quo as much as it was able. The County was especially concerned to make sure that housing developments would be sited in ways to avoid raising the ire of residents of ultra-white neighborhoods as much as possible. Accordingly, every development *has* avoided taking on a barrier in the midst of any existing, ultra-white residential neighborhood.

**As a political matter, however, it takes some courage to stand behind a decree that, if actually enforced according to its terms, is apt to generate a political firestorm. Neither the U.S. Attorney, nor the Secretary of HUD, nor the Monitor has had that courage.**

Consistent with the goal of maintaining the status quo as much as possible, Westchester has tried to squeeze the greatest number of units into the fewest possible developments. Accordingly, most projects have consisted of 100 percent subsidized units (instead of including market rate units), and several are large projects in isolated areas.

And, of course, Westchester is committed -- politically and ideologically -- to maintaining the barriers of restrictive zoning. So it has flat out refused to meet its obligation to challenge them.

The willingness of the Government and the Monitor to go along -- and the Monitor was clear early on that he was looking for the easy road, to seek "low-hanging fruit" -- can only be understood as being governed first and foremost by considerations of political expediency. As a factual matter, it is not difficult to understand that a county whose residential zoning (especially in ultra-white jurisdictions) is overwhelmingly single-family cannot make significant progress on generating affordable housing with desegregation potential if it is agreed to allow all of that zoning to remain undisturbed. As a political matter, however, it takes some courage to stand behind a decree that, if actually enforced according to its terms, is apt to generate a political firestorm. Neither the U.S. Attorney, nor the Secretary of HUD, nor the Monitor has had that courage.

An additional factor (and sometime explicit rationale) is that easing the decree will yield "buy-in" (the misguided and naïve view that a long-time civil rights outlaw will magically volunteer to engage in structural civil rights change).

E. What's next?

In all likelihood, the promise of the consent decree has been lost.

It is possible, of course, that some combination of the U.S. Attorney, HUD, and the Monitor will see the light, although each has been consistently and persistently unresponsive to ADC's appeals.<sup>2</sup>

The best hope is that the presiding judge, who has acknowledged a court's own juridical interest in the enforcement of its orders, will take a close look at both Westchester's pattern of violating the decree and at the failure of the Government and the Monitor to vindicate the public interest in enforcement of the order.

**"The location of affordable housing is central to fulfilling the commitment to AFFH because it determines whether such housing will reduce or perpetuate residential segregation."**

**-- Consent Decree, ¶ 31(c)**

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<sup>2</sup> For example, see the letter, annexed as Exhibit A, that ADC sent to the Assistant United States Attorney working on this case back in June seeking to find out if the U.S. Attorney disagreed with any of 25 propositions about Westchester's obligations and the County's violation of them. No response was ever forthcoming.



**II. Instead of enforcing the decree requirement that all development proceed pursuant to an Implementation Plan that furthers the decree's goal of affirmatively furthering fair housing, the Government and the Monitor have allowed Westchester to proceed with development on an ad hoc basis. The results have been predictable: a proper accounting shows that Westchester is way behind schedule in terms of its unit-specific obligations; more fundamentally, the units that have been allowed to be built represent a betrayal of the promise of the consent decree to secure affordable housing units that both affirmatively further fair housing on their own and act as catalysts to break down barriers to fair housing choice more broadly.**

A. Lack of a decree-compliant implementation plan

The consent decree could have been written so that all that had to be followed were municipal-level demographic limitations on where housing intended to meet the unit-specific requirements of the decree could be built. But that was *not* what was negotiated. Yes, there were municipal-level limitations, but: (a) the decree contemplated that they would be updated to include 2010 Census data; (b) there were requirements at the level of *census blocks* as well (such as seeking to place units on the census *blocks* with the lowest concentrations of African-Americans and Latinos); and (c) most importantly, all development was required to proceed pursuant to an Implementation Plan that affirmatively furthered fair housing, which is to say: all the units were supposed to overcome barriers to fair housing choice.

Why require an Implementation Plan ("IP") that affirmatively furthers fair housing? Because a civil rights defendant that had been committed to coddling municipal resistance to affordable housing with desegregation potential could reasonably be expected -- if left to its own devices -- to try to get away with as little structural change as it could.

**When a revised version was "insufficient to accomplish the objectives and terms set forth" in the decree, the consent decree commanded that "the Monitor shall specify revisions or additional items that the County shall incorporate into its implementation plan." Consent Decree ¶ 20(d).**

So not only did the decree demand an Implementation Plan to be developed within months of the entry of the August 2009 decree (paragraph 18), it came up with a mandatory "two-strikes-and-you're-out" rule with an accompanying mandatory remedial response (paragraph 20(d)).

In the event that the County's original IP wasn't acceptable, and a revised version was "insufficient to accomplish the objectives and terms set forth" in the decree, the consent decree commanded that "the Monitor shall specify revisions or additional items that the County shall incorporate into its implementation plan." Consent Decree ¶ 20(d) (emphasis added).

It is important to pause to understand that the "objectives" of the decree are not cloaked in mystery. As stated in paragraph 7(j), the purpose of the decree is "to AFFH." Paragraph 13 gives the Monitor the "powers, rights, and responsibilities" to accomplish "the AFFH purposes" of the decree. The purpose of the decree "to AFFH" is referenced again at paragraph 15(a)(iii).

Affirmatively furthering fair housing involves overcoming *barriers* to fair housing choice. Restrictive municipal zoning was the barrier most on the mind of ADC during its litigation against Westchester, and that overriding concern was reflected in the consent decree.

But, despite his not accepting Westchester's first two submissions (his rejection of the second occurred in July 2010), the Monitor has refused to fulfill his obligation to specify a decree-compliant IP -- either then or in the years that have followed.<sup>3</sup>

*In other words, Westchester remains in violation of its obligation to produce a compliant IP and, through the complicity of the Monitor and the Government, nothing has been done about it.*

The results of throwing the IP requirement overboard have been enormously consequential. Basic provisions necessary to make sure that an IP affirmatively furthers fair housing have never been put in place. These include requirements that developments: (a) actually overcome barriers to fair housing choice; (b) are not sited on or near undesirable sites (like brownfield sites or those that abut railroad tracks or large highways); (c) are not isolated away from existing white residential neighborhoods; and (d) are themselves mixed income (to provide, among other things, cross-subsidy from market-rate units for the subsidized units, economic integration within the development, protection against poor siting, and a greater ability to integrate into the broader community).

**Could the Monitor really be violating a mandatory duty?**

**It seems so incongruous that the officer charged with making sure that a court order was being obeyed would himself pick and choose the obligations he obeys, but the text of paragraph 20(d) leaves no doubt that he is. There is no "defer indefinitely" proviso.**

They also include locational requirements designed to maximize the number of units on blocks with the lowest concentrations of African-Americans and Latinos (consistent with paragraph 22(f) of the decree).

Critically, they would include actual plans to overcome municipal zoning barriers. As noted earlier, the acknowledgment the County was forced to make in the decree that it had the authority and responsibility to litigate against resistant municipalities pursuant to, among other powers, the *County of Monroe* and *Berenson* doctrines would have no meaning if the County failed to plan to acquire interests -- direct or indirect -- in properties whose desegregation potential was stymied by restrictive zoning.

Westchester's IP submissions had none of this, and the Monitor failed to impose any of these requirements. Indeed, most of the relief that ADC had sought in its May 2011 motion to enforce the decree consisted of action items that belong in a compliant IP.<sup>4</sup> Instead of acknowledging this to the Court, the Government and the Monitor joined Westchester in urging the Court not to hear an enforcement motion at all.

Three years after successfully keeping the questions ADC raised from the Court, the IP process lies abandoned, and the necessary AFFH components of an IP ignored.

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<sup>3</sup> A screen shot taken on April 16, 2014 of the implementation plan page of the Monitor's website is annexed hereto as Exhibit B. The text describes the IP submitted in August 2010 as being "currently under review by the Monitor." See also the April 2013 revision to Westchester's Analysis of Impediments, p. 165 ("the full and final approval of the Implementation Plan remains pending").

<sup>4</sup> Annexed hereto as Exhibit C is the declaration of ADC's executive director in support of ADC's May 2011 motion to enforce the decree. It explains the relief sought.

It has never been difficult to see the writing on the wall. The Monitor revealed early on that he was not interested in having the units built under the decree be catalysts for broader change -- or even have them be the means by which to overcome barriers to fair housing choice.

Instead, within weeks of his appointment in 2009, he said that he would be looking for "low-hanging fruit," that is, properties that could yield "countable units" without difficulty.

Indeed, looking for units to count -- instead of looking for units that *should* count -- has been the procedure all along.

#### B. Westchester has failed to meet even half of its unit-specific obligations due by the end of 2013

Because the Government and the Monitor have gone along with the County's unit-specific deceptions, Westchester has been able to claim repeatedly that it is ahead of schedule in terms of building units (the most recent year-end claim was that financing was in place for 399 units at the end of 2013, more than the 300 units required by that time).

In fact, Westchester has produced well under half of its unit-specific obligations. There have been four principal methods of cheating that have concealed that fact:

##### 1. Isolated or otherwise undesirable sites

It should be obvious, but when an isolated or otherwise undesirable site is selected for affordable housing, the units are unlikely to affirmatively further fair housing. That is especially the case when the project contains only subsidized units. The development is not integrated into the existing community in any respect; on the contrary, it is easily stigmatized as being separate and different. It does not offer the experience of genuinely living within an established residential neighborhood. It means that the price of admission for prospective African-American and Latino residents is the acceptance of conditions that market-rate residents would customarily avoid. Crucially, it is also reflective of a decision to *avoid* finding sites in a jurisdiction that are free of negative features because doing so would require Westchester to confront the restrictive single-family zoning that characterizes so much of the County.

**In fact, Westchester has produced well under half of its unit-specific obligations. There have been four principal methods of cheating that have concealed that fact.**

The initial projects submitted by the County and approved by the Monitor provide useful illustrations:

Larchmont development (46 units): a brownfield site, located where a moving company used to be. Its census block is separated from I-95 only by the railroad tracks that directly abut the block. The census block extends to within 500 feet of New Rochelle, a municipality that already has a high percentage of African-American and Latino residents. No market-rate units.

Cortlandt development (83 units): the site abuts a major Veterans Administration psychiatric and substance abuse facility, a major road, and railroad tracks. Other than VA facility residents, the block was unpopulated. No market-rate units.

City of Rye development (18 units): the site is located next to two major highways (I-95 and I-287) and is distinctly separated from almost the entire city. It abuts Port Chester, a Latino-majority jurisdiction -- so much so that, to get to the public street from the property, one has to cross into Port Chester. The census block itself is majority-minority. The units -- studios and one-bedrooms -- were designed for seniors but allowed to count as housing without age restriction because the "seniors-only" label was removed (without changing the configuration of units to make them family-friendly). No market-rate units.

Even were these the only projects sited in ways that meant that they failed to AFFH -- and they're not -- that would be 147 inappropriately counted units. Thus, not even taking into account other forms of cheating, Westchester could count no more than 252 units (399 minus 147), already under the 300 required by the end of 2013.

## 2. Sites where pre-decree litigation meant that there was no longer a barrier to overcome

A central element of the strategy to avoid taking on restrictive single-family zoning was the decision to seek out sites where a zoning barrier had already been removed by litigation concluded prior to the entry of the decree. These sites are some of the "low-hanging fruit" to which the Monitor has referred. The result -- unacceptable in consent decree terms because AFFH means *removing* barriers -- is that the opportunity to *expand* the universe of possible sites for affordable housing was sacrificed.

Both the Larchmont and Cortlandt sites, already mentioned, fall into this category. The North Salem site (June Road, 65 units) does as well. That represents a total of 194 units of cheating on these grounds. Leaving aside units already deducted because they should not have been counted because of site isolation and desirability, this brings Westchester down to 187 units.

It is important to note that the 194 units of cheating (or 212 units if you include the undesirably sited City of Rye development that was already underway prior to the entry of the consent decree) are not simply a large percentage of 750 units. Westchester was obliged to have newly constructed units that are not age-restricted constitute at least half of that total (375 units). Thus, the cheating units discussed here represent over 50 percent of the minimum consent decree obligation for such housing.

**The cheating units discussed in this subsection represent over 50 percent of the minimum consent decree obligation for new construction that is not age-restricted.**

## 3. Double-counting

The Somers site (Clayton Boulevard, 75 units) is another that is not properly counted. This is a circumstance where Somers had a pre-existing agreement with Westchester to build at least 188 units of affordable housing or lose \$2 million of \$4 million the County had given Somers to help purchase open

space (the Angle Fly Preserve). It is nothing more than a shameless accounting trick to count units for consent decree purposes that were already required to be built (and which will be counted towards the Angle Fly obligation). Here again, Westchester, with the collaboration of the Monitor and the Government, is getting away with *failing to expand* the sites where affordable housing can be built. This does not constitute affirmatively furthering fair housing, as all units were supposed to do.

Subtracting out these units, Westchester is down to 112 units, less than 40 percent of its 2013 year-end obligation and 188 units short.

#### 4. Ignoring 2010 census data to evade municipal-level limits

If what one wanted to do was to be faithful to the consent decree's desire to have the overwhelming bulk of housing (84 percent) built in the municipalities that have the lowest concentrations of African-American and Latino residents (less than 3 percent and 7 percent, respectively), one would naturally have looked to 2010 Census data as soon as it became available, as the decree empowered the Monitor to do.<sup>5</sup>

Failing to do that would allow housing to be built even in jurisdictions that had come to have percentages higher than the caps. This was not especially relevant in respect to African-Americans, whose numbers remained basically flat from 2000 to 2010, but was very much relevant to Latinos, the population of which had grown substantially (although in still powerfully segregated patterns).

Why would the Monitor and the Government choose not to look at 2010 data? Because there would be fewer towns and villages within which to build a minimum of 630 units and thus greater difficulty in avoiding taking on existing zoning barrier or facing down opposition to construction on a block that was part of an existing white residential block.

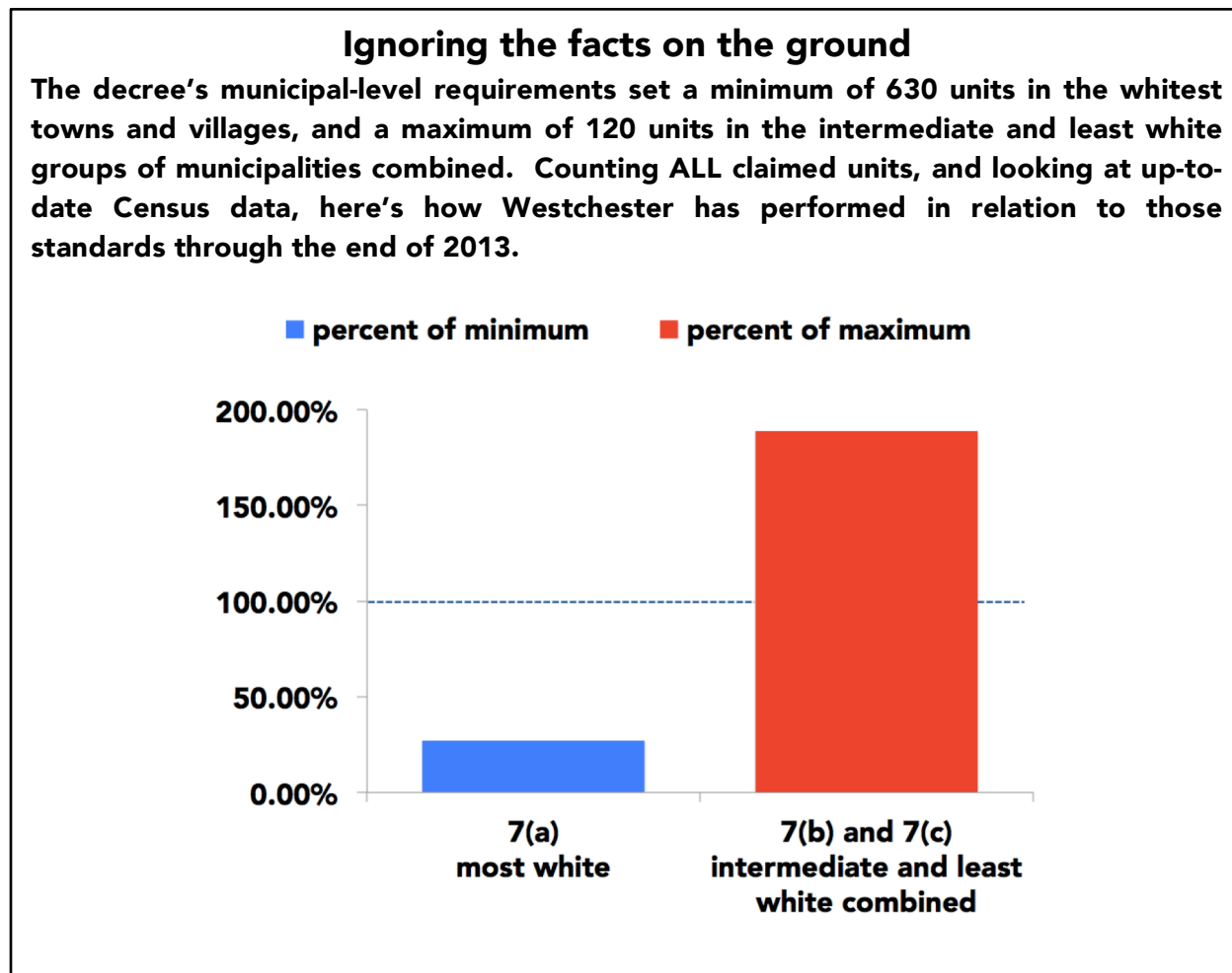
ADC has examined 2010 Census data, and found that, of the units being developed, only 172 of the total claimed units comply with the demographic requirements of paragraph 7(a) (the ultra-white jurisdictions, required at the municipal level to have an African-American population of less than 3 percent and a Latino population of less than 7 percent). This represents only 27.30 percent of the *minimum* ultimately required by the decree.

227 of the total claimed units are located either in paragraph 7(b) jurisdictions (those where the African-American population is less than 7 percent and the Latino population is less than 10 percent) or in paragraph 7(c) jurisdictions (those where the African-American population is less than 14 percent and the Latino population is less than 16 percent). This violates the Decree because only a *maximum* of 120 such (b) and (c) units are permitted by the Decree. In other words, the defendant is already at 189.17 percent of the maximum. So Westchester, in addition to performing disproportionately poorly in the whitest jurisdictions, is cheating by 107 units on the dimension of municipal-level (b) and (c) requirements. Because our accounting has already removed the North Salem (65 units) and Cortlandt (83 unit sites) for other reasons, we do not deduct any units on this basis in our overall count. (If they

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<sup>5</sup> A proper IP would have taken population change into account; see also Consent Decree, ¶ 15(a)(3) (giving the Monitor additional authority to do so).

hadn't been deducted for other reasons, then overage on 7(b) and 7(c) sites would have required a deduction of 107.)

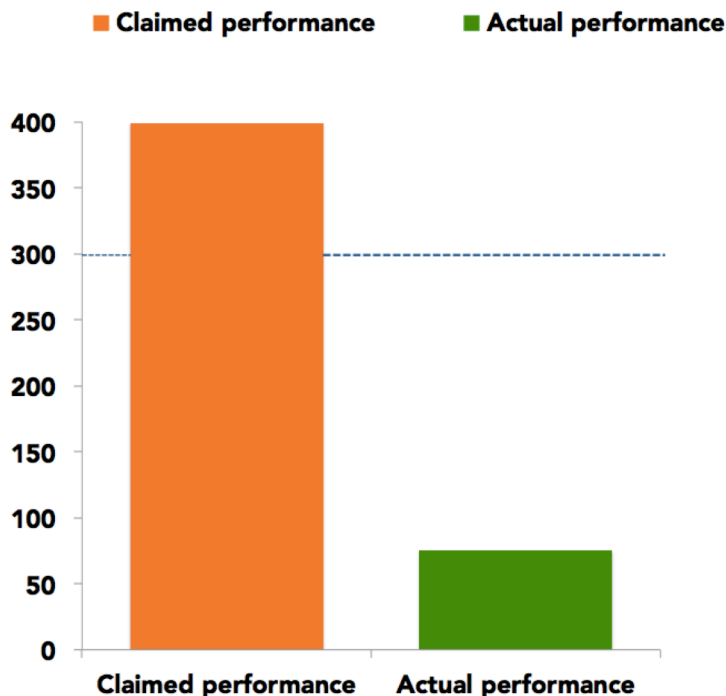


To review: the first three forms of cheating (without even a comprehensive analysis of sites for isolation or proximity to undesirable features) brought Westchester down to 112 countable units.

Included in the remaining 112 units are 4 units in Rye Brook on a block that is 43 percent Latino and 12 percent African-American (majority minority); 2 units in Tarrytown on a block that is 37 percent Latino and 11 percent African-American; 27 units in Yorktown Heights on a block that is 13 percent Latino; another 3 units in Yorktown on a block that is 32 percent Latino and 12 percent African-American; and a single unit in Buchanan on a block that is 32 percent Latino. None of these units would have been counted if development had proceeded according to an IP that required AFFH development in general and was obliged to figure out even more specifically the means by which to maximize development on the census blocks with the lowest concentrations of African-Americans and Latinos. Remove these 37 units, and Westchester is down to 75 units, only 25 percent of its required minimum by the end of 2013.

### Claimed versus actual performance

By the end of 2013, Westchester was supposed to have at least 300 units with financing in place. The County has trumpeted its success, and the Government and the Monitor haven't challenged its claims. But once you exclude units improperly counted (the "cheating units"), there is a much different story.



#### C. Squandering the potential multiplier effect that decree-compliant units would have created

In a county of nearly one million people, 750 units of housing over seven years is, in terms of people actually housed, a drop in the bucket. (That is one of the reasons the decree treats Westchester's unit-specific obligations as only one of its many duties under the decree.) But the units built were supposed to do more than provide housing for slightly more than 100 families a year. They were supposed to act as catalysts that would spur future development by private developers. The way that would have worked would have been for the units to be sited on parcels that required a town or village to relax a zoning barrier, including the barrier created by single-family zoning.<sup>6</sup>

<sup>6</sup> Some of that zoning -- large-lot zoning, in particular -- has long been recognized as being exclusionary. But there are ways to build more than a single unit even on smaller lots while at the same time being cautious to avoid building more units on a site than can reasonably be sustained. In short, despite fear tactics that have been employed by Westchester, neither ADC nor anyone else is proposing to have apartment buildings built on small lots.

Once the zoning barrier had been relaxed, two things would have occurred. First, existing residents would have learned that the sky did not fall: affordable housing can be placed in the midst of an existing single-family neighborhood and co-exist harmoniously. Second, the consent decree housing would have done the heavy lifting of removing a zoning barrier, so the private developers would have been able to follow along with the easier task of constructing affordable housing with desegregation potential under a reformed zoning regime.

Instead, Westchester -- joined by the Government and the Monitor -- took the path of least resistance (the low-hanging fruit, as the Monitor puts it). That, of course, leaves no low hanging fruit for private developers. They will be forced to try to overcome barriers without the tools and the resources provided under the decree.

As noted, the motivation is simple to understand: trying to build on the most appropriate sites -- including, pursuant to paragraph 22(f) of the decree, on the census blocks with the lowest percentages of African-Americans and Latinos -- is more controversial than building on sites set apart from existing ultra-white residential neighborhoods.

It is also the case that implementing the decree without taking single-family zones off the table would have required each development to be smaller, and thus more developments in total. More developments would have meant more barriers to overcome. That is a positive in consent decree terms, but the additional battles are something that Westchester, the Government, and the Monitor wanted very much to avoid.

### **Playing games with paragraph 22(f)**

**This provision of the decree requires Westchester to maximize the housing built on census blocks "with the lowest concentrations of African-American and Hispanic residents."**

**Westchester has claimed that building on vacant blocks meets the requirement: that is, zero members of any group means that there is a low concentration of every group.**

**In fact, this command contemplates that one is looking for blocks that are residential in character. "Lowest concentrations" is meant as a relative term: low concentrations of African-Americans and Hispanics in comparison to high concentrations of whites.**

**Housing on blocks that were vacant or not residential in character might have counted for 22(f) purposes if the requirement were only to avoid *high* concentrations of African-Americans and Hispanics (a vacant block can't be said to have such concentrations), but not when the requirement was an affirmative one to seek out *low* concentrations.**



**III. Westchester has flatly refused to obey the dual obligations of paragraph 7(j) to litigate against municipalities that continued to maintain barriers to fair housing choice, and the Government and the Monitor have never called the County to account for its failure to act.**

The consent decree does impose analysis and planning obligations on the County (see, for example, the discussion at page 34 of Westchester's failure to comply with its obligation to develop an analysis of impediments to fair housing choice that is deemed acceptable by HUD).

But one cannot appreciate the scope of Westchester's misconduct -- or the extent to which the Government and the Monitor have failed to meet their enforcement obligations -- if one doesn't understand that there are *action* obligations as well, action obligations that go beyond the construction of a minimum of 750 units of housing.

A. The obligation to take legal action

It has been, for example, a core obligation of the Monitor to assess -- first at the end of 2011, next at the end of 2013 -- whether "the County has taken *all possible actions* to meet its obligations" under the decree (emphasis supplied). Specifically included in the Monitor's obligation was determining whether all possible steps were taken by Westchester to promote "inclusionary and other appropriate zoning by municipalities" by "taking legal action." Consent Decree, ¶ 15.

The most important action obligations are the two separate obligations contained in paragraph 7(j). The first obligation relates to unit-specific obligations (building units that affirmatively further fair housing). It states:

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.

**We are not talking here about the "spirit" of the decree, an elective matter, or an obligation subject to negotiation. The obligation on the County is mandatory: it is required ("the County shall") to use all available means as appropriate (not a limited and predetermined subset) to address a municipality's action or inaction.**

We are not talking here about the "spirit" of the decree, an elective matter, or an obligation subject to negotiation. The obligation on the County is mandatory: it is required ("the County shall") to use all available means as appropriate (not a limited and predetermined subset) to address a municipality's action or inaction. The only item specifically mentioned was "pursuing legal action." This had to be specified because the voluntary means used over the years had already proven to be insufficient, and because the County -- prior to and throughout the litigation -- had falsely claimed that it had not authority to take such action.

Each municipality is supposed to be examined to see if it is either failing to promote the construction of units or hindering the construction of units. No municipality is excepted, and no municipality is given a pass in the

circumstance that other municipalities are compliant.

The failure to eliminate zoning rules that pose an impediment to the construction of decree-appropriate affordable housing obviously constitutes a failure to take action needed to promote the construction of affordable housing with desegregation potential (the continued enforcement of such zoning provisions is also properly seen as actions that hinder the objective of building such housing).

The second obligation of paragraph 7(j), unlike the first obligation, is *not* limited to securing the objectives of the decree's paragraph on developing a minimum number of units of affordable housing with desegregation potential.

It states that:

The County shall initiate such legal action as appropriate to accomplish the purpose of this [consent decree] to AFFH.

It is impossible to construe this second obligation as being merely duplicative of the first. The first is framed in terms of the objectives of a single paragraph of the decree; this second obligation is framed in terms of the purposes of the decree as a whole.

The sweeping nature of this obligation cannot be overstated. Here is a mandatory obligation to initiate the legal action needed to accomplish the purpose of the decree to AFFH, which is to say overcome the barriers to fair housing choice.

As a final preliminary matter, it is also important to note that paragraph 7(j) had no delayed implementation date. Westchester's obligations under paragraph 7(j) began on August 10, 2009.

B. An open, continuous, and across-the-board refusal to comply

That numerous Westchester towns and villages have had and still maintain zoning that creates impediments to fair housing choice is not subject to serious dispute (illustrations are discussed at pages 24-26, below). But it is important first of all to understand that it has been the express position of the County -- as expressed in numerous venues and in numerous ways by the county executive -- to refuse on an across-the-board basis -- to perform either of its paragraph 7(j) action obligations in relation to even a single municipality.

**“The County shall initiate such legal action as appropriate to accomplish the purpose of this [consent decree] to AFFH.” It is impossible to construe this second obligation as being merely duplicative of the first. The first is framed in terms of the objectives of a single paragraph of the decree; this second obligation is framed in terms of the purposes of the decree as a whole.**

The county executive began to express his position early in his term. In his first month of office, for example, he said in connection with the possibility of taking municipalities to court, “I won't do that. I will not do that.” He added that “we don't want to use...a stick...*the approach we're*

going to be using...is the carrot.”

This is the exact opposite of an attempt to shape action to varying conditions in different municipalities, and his posture has not varied.

At a press conference in July of 2011, for example, he railed against requests by HUD that Westchester list in its Analysis of Impediments the steps the County would take, including litigation, if municipalities did not change their restrictive zoning.<sup>7</sup> Astorino said, “We can’t dismantle local zoning, *nor would I*,” asserting that such a request “certainly goes beyond” what is in the consent decree and shows a “complete ignorance of the laws of New York State as a ‘home rule’ state” (emphasis added).<sup>8</sup>

### C. The county executive’s position is flatly contradicted by the decree

The county executive should have read the consent decree. Paragraph 7(j), as explained above, makes clear Westchester’s obligation to overcome municipally imposed barriers to fair housing choice. But the consent decree went even further. Westchester had, prior to and during the litigation, consistently pretended that it had no authority or responsibility in relation to the conduct of municipalities. So that consent decree was determined to eliminate that excuse.

Westchester was forced to acknowledge and agree that, “pursuant to New York state law,” “municipal land use policies and actions shall take into consideration the housing needs of the surrounding region.” Consent Decree, page 2, para. 1, subpara. (i). That’s an acknowledgment of the *Berenson* doctrine, the law in New York since 1975.<sup>9</sup>

**Westchester was forced to acknowledge and agree that “municipal land use policies and actions...may not impede the County in its performance of duties for the benefit of the health and welfare of the residents of the County.”**

Westchester was forced to acknowledge and agree that “municipal land use policies and actions...may not impede the County in its performance of duties for the benefit of the health and welfare of the residents of the County.” *Id.* That’s an acknowledgment of the *County of Monroe* doctrine,<sup>10</sup> the

<sup>7</sup> Note that HUD was focused on the analysis of impediments, ignoring the action requirements of paragraph (7)(j)

<sup>8</sup> July 15, 2011, video available online at <http://bit.ly/1hJmCyL>.

<sup>9</sup> *Berenson v. Town of New Castle*, 378 N.Y.S.2d 672 (N.Y. 1975).

<sup>10</sup> *Matter of County of Monroe (City of Rochester)*, 533 N.Y.S.2d 702 (N.Y. 1988). Ironically, Westchester itself made use of this doctrine. The County argued successfully that the *County of Monroe* test was applicable to the County’s interest in creating a family shelter and that the interests of the County and its developer agent in forming such an essential governmental function outweighed those of the Village. *Westhab, Inc. v. Village of Elmsford*, 574 N.Y.S.2d 888 (N.Y. Sup. Ct., Westchester County, 1991).

law in New York since 1988, a doctrine that holds that 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.

The consent decree didn't leave any room for Westchester to argue that the county's interest wasn't substantial. The first clause of the entire decree states that "the development of affordable housing in a way that affirmatively furthers fair housing is a matter of significant public interest." Consent Decree, page 1, para. 1.

**Westchester was forced to acknowledge and agree 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, including the furtherance of the terms" of the decree.**

The decree goes on to state explicitly that "the broad and equitable distribution of affordable housing promotes sustainable and integrated residential patterns...and advances the health and safety of the residents" of the county and its municipalities. Consent Decree, page 1, para. 2.

For good measure, the consent decree evaluates in advance the circumstance where a municipality hinders or impedes the County in the performance of duties for the benefit of the health and welfare of the residents of the County. Westchester was forced to acknowledge and agree 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, including the furtherance of the terms" of the decree.

In short, the county executive's position is directly contradicted by the text of multiple parts of the decree. The refusal to obey the decree constitutes contempt.

#### D. County Executive Astorino's contempt escalates further

The county executive's contempt has not abated. Last fall, for example, a recorded conversation between County Executive Astorino and a supporter (Sam Zherka) was published in The Journal News.<sup>11</sup> Astorino claimed to have "such support in this county" on the "steps to stand up to the federal government."

Zherka responded by saying that if Astorino "just stood up a little more and defied it" he would be "governor and presidential" material; "if you told the Feds 'I'm not doing it; you can arrest me,' and let them put handcuffs on you."

Astorino's response was clear: "Well, I've been doing that." HUD, he said, was attacking zoning, but "we're holding our ground."

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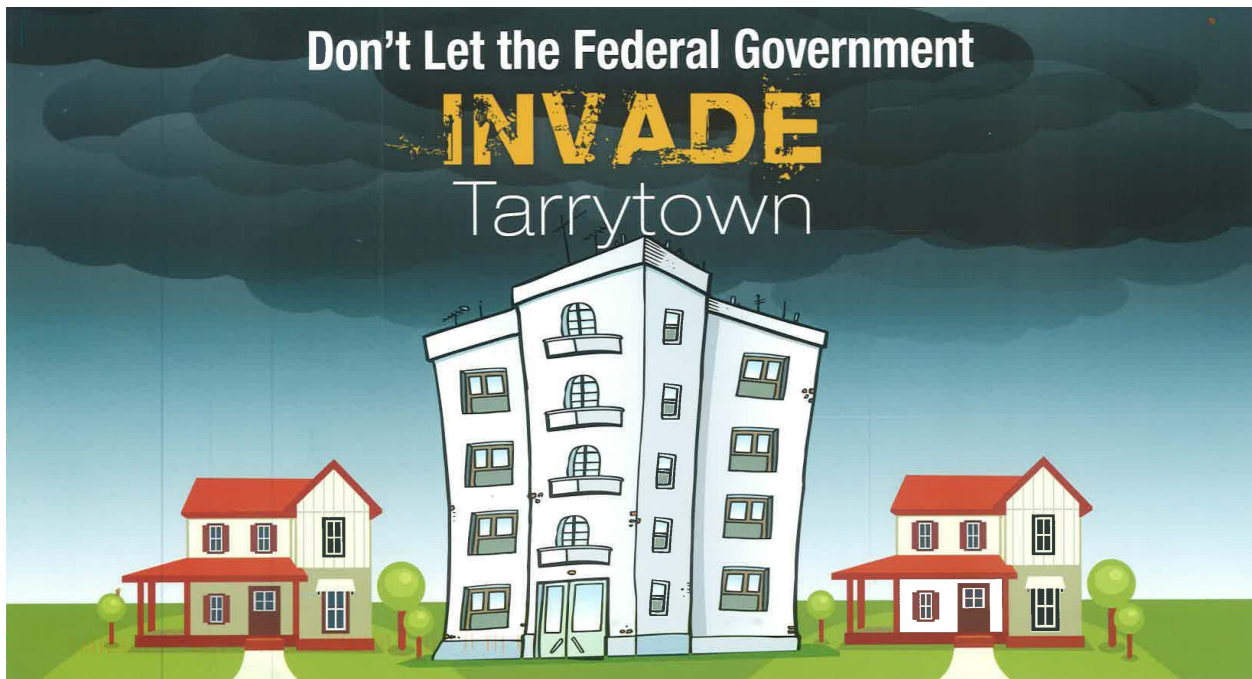
<sup>11</sup> "Astorino loses Independence ruling," Westchester Journal News, Aug. 12, 2013. The audiotape recording is available online at [www.antibiaslaw.com/node/1405](http://www.antibiaslaw.com/node/1405). The portion of the recording related to the case begins at about the seven-minute mark.

Zherka said, "Hold your ground. Hold it hard, hard, hard." Astorino replied: "Oh my God, I'm not yielding an inch to these guys."

The promise not to yield an inch on zoning is nothing more or less than a promise to continue to violate the requirements of the decree.

Astorino's version of standing on the schoolhouse steps in defense of the status quo -- and in defiance of the consent decree -- did not stop.

In campaign literature that can only be described as constituting disgusting appeals to fear and prejudice (see below), he depicted dark and threatening clouds over a Westchester town with an apartment building suffocating single-family homes, with the headline, "Don't Let the Federal Government INVADE Tarrytown." The theme of "invasion" is, of course, a traditional method used to stoke racial fears.



Another flyer (see next page) poses the electoral choice as "DEFEND or SURRENDER?" and promises that Astorino will "continue to DEFEND our local communities." The flyer -- again featuring dark storm clouds to represent the threat -- says that Astorino has been "a tireless DEFENDER of the home rule rights" of municipalities and will "fight for our communities" against the threat to "our neighborhoods."

There are two points to be made. The first: shame on the county executive for such conduct. The second: this is not the posture of someone who has even the smallest intention to obey paragraph 7(j).

**DEFEND vs. SURRENDER?**  
Your neighborhood is **AT RISK** on Tuesday

**Rob Astorino will continue to DEFEND our local communities.**

**ON TUESDAY, NOV. 5TH  
VOTE ROB ASTORINO**

**Washington Bureaucrats**  
want to bulldoze local zoning — safeguards that protect all of our communities from overdevelopment, overcrowded schools and dirty drinking water.

**Noam Bramson would SURRENDER to Washington.**

## Defend vs. Surrender That's the choice on Tuesday

Rob Astorino has been a tireless DEFENDER of the home rule rights of Westchester's cities, towns and villages.

**Noam Bramson would SURRENDER to Washington.**

In fact, Bramson says the county and local communities should work to *"meet tests that have been outlined by the federal government."* — (RNN, 4/25/13)

Those "tests" include removing local "restrictions that limit: size of a development; multifamily housing; Section 8 or other affordable housing; number of bedrooms in a unit; and lot size." — (U.S. Department of Housing and Urban Development, 3/13/13)

**The threat to home rule—and our neighborhoods—is very real. We can count on Rob Astorino to fight for our communities.**

**ON TUESDAY, NOV. 5TH  
VOTE TO RE-ELECT  
ROB ASTORINO**

Read the HUD letters: [robastorino.com/issues/affordable-housing-settlement](http://robastorino.com/issues/affordable-housing-settlement)

E. The barriers to fair housing choice imposed by municipalities are deep and widespread

The techniques of the big lie are well known: just keep insisting on a proposition -- regardless of its falsity -- and hope that: (a) some people will believe it to be true; and (b) "he said, she said" media sources will report, "People disagree." This is what Westchester has done. "There is no exclusionary zoning," it says. Let's be clear: that is a lie. The barriers to the construction of affordable housing that would AFFH are enormous and exist in virtually every municipality where such housing is supposed to be built pursuant to the decree.

The fact that there is very little land zoned for multiple-family housing, and the fact that many of the municipalities have remarkably low population density, is well known, *and was actually documented by Westchester itself back in 2010.*

Its "Parcel-Based Land Use Map," annexed hereto as Exhibit D, provides a striking visual representation of the fact that residential property (depicted in yellow) is overwhelmingly single-family and that multi-family housing (depicted in orange) is hardly anywhere to be found in the towns and villages where consent decree housing is supposed to be built.

**Multi-family housing including condominiums constitutes less than 1.0 percent of all residential acreage in eight municipalities,<sup>1</sup> and between 1.0 and 4.75 percent in another 10 municipalities.<sup>1</sup>**

Westchester's 2010 Land Use Report provides the back-up data. For example, multi-family housing including condominiums constitutes less than 1.0 percent of all residential acreage in eight municipalities,<sup>12</sup> and between 1.0 and 4.75 percent in another 10 municipalities.<sup>13</sup>

**Residential density (units per acre) is only 0.27 in Pound Ridge, 0.32 in North Salem, 0.441 in Bedford, 0.48 in Lewisboro, 0.57 in North Castle, and 0.70 in New Castle.**

Residential density (units per acre) is only 0.27 in Pound Ridge, 0.32 in North Salem, 0.441 in Bedford, 0.48 in Lewisboro, 0.57 in North Castle, and 0.70 in New Castle.

Data gathered by consultants to the Monitor and submitted in connection with a September 13, 2013 report from the Monitor also paints a devastating picture of the failure of Westchester municipalities to remove zoning restrictions that are impediments to fair housing choice (and thus continue to constitute both conduct that hinders the development of consent decree housing and conditions that undercut the purpose of the decree to AFFH). That is, the conditions that exist are conditions that triggered both of

Westchester's paragraph 7(j) obligations.

The Monitor's commentary on the data tries to play down its significance, and his exclusionary zoning analysis is remarkably incomplete (as discussed in pages 23-30 of this report). But even the Monitor

<sup>12</sup> Bedford, Harrison, Lewisboro, North Castle, North Salem, Pound Ridge, Rye Brook, and Scarsdale.

<sup>13</sup> Ardsley, Briarcliff Manor, Buchanan, Croton-on-Hudson, Larchmont, Mamaroneck, Mount Pleasant, New Castle, Pelham, and Pelham Manor.

found that seven municipalities<sup>14</sup> had exclusionary zoning (“the County’s assertion that exclusionary zoning is absent from Westchester is strongly contradicted by its own zoning,” he wrote).<sup>15</sup>

Moreover, another nine municipalities were found to have affordable housing provisions that were “too narrow in scope to provide genuine opportunities to meet local and regional need.”<sup>16</sup>

**In Mount Pleasant, for example, the Monitor’s analysis says the town is only ready to meet future need for affordable housing to the extent of five units. That circumstance, by any reasonable definition, is one that makes the town one where there are AFFH barriers that need to be overcome.**

This already accounts for 16 municipalities with zoning that acts as a barrier to fair housing choice. The fact that the Government and the Monitor have chosen not to place this information in the context of Westchester’s paragraph 7(j) obligations doesn’t change the fact that Westchester was indeed supposed to confront them starting in 2009 and has refused to do so across-the-board.<sup>17</sup>

Many other municipalities also have barriers and are in the Monitor’s “warrants improvement” category, a category inconsistent with the conclusion that those municipalities are not hindering the building of consent decree housing or impeding the AFFH purposes of the decree.

In Mount Pleasant, for example, the Monitor’s analysis says the town is only ready to meet future need for affordable housing to the extent of five units. That circumstance, by any reasonable definition, is one that makes the town one where there are AFFH barriers that need to be overcome.

#### F. The Monitor and the Government won’t hold Westchester to account

Neither the Government nor the Monitor have ever sought the Court’s intervention on the grounds that Westchester, ignoring the hindrances to fair housing choice maintained by so many municipalities, has failed to take legal action against municipalities pursuant to its paragraph 7(j) obligations. The Government and the Monitor have stood by despite Westchester’s outright denial that a problem exists, and despite the County’s clear statement that it will not act against any municipality’s zoning.

To repeat: there has not been any time in more than four and a half years where the Government or the

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<sup>14</sup> Croton-on-Hudson, Harrison, Lewisboro, Mamaroneck, Ossining, Pelham Manor, and Pound Ridge.

<sup>15</sup> Monitor’s Report to the Court, Doc. 452, filed Sept. 13, 2013 (hereafter “Monitor’s Sept. 2013 Report”), p. 40.

<sup>16</sup> Briarcliff Manor, Bronxville, Buchanan, Cortlandt, Eastchester, Larchmont, Rye, Somers, and Tuckahoe.

<sup>17</sup> Westchester officials will often say that municipalities are “cooperating.” But they are not cooperating with what the consent decree demands, they are cooperating with Westchester’s approach of trying to maintain the status quo.



Monitor has gone to Judge Cote and sought to hold the County In contempt for failing to take the actions required by paragraph 7(j).

There are a variety of distractions that will be interposed in an attempt to distract people from this dereliction of duty. None have merit.

The Government will say that it *has* sought to have Westchester *identify* exclusionary zoning and a program to respond to such zoning. But that is not what paragraph 7(j) demands. The first prong of paragraph 7(j) speaks in terms of "pursuing legal action"; the second prong speaks in terms of "initiating such legal action as appropriate to accomplish the purpose of this [consent decree] to AFFH." Neither the Government nor the Monitor has sought to hold the Westchester responsible for failing to have done so.

The Government will also point to the fact that it belatedly began to withhold federal grant money from Westchester. In doing that without holding Westchester to account under paragraph 7(j), the Government is very seriously undercutting the rule of law.

Westchester, like all jurisdictions, is subject to having funding withheld if it fails to meet its AFFH obligations. HUD has done that.

But Westchester is not like other jurisdictions -- it is operating under a federal court consent decree that imposes additional obligations.

The Government's position tells Westchester -- and all other jurisdictions across the country -- that there are no more consequences to violating both the general AFFH obligation and a separate consent decree obligation than there are to violating only the general AFFH obligation. That reduces the consent decree obligation to a nullity.

The way that the funds cutoff does bear on the degree of culpability the Government bears for its failing to enforce the decree is that *the funds cutoff reflects the fact that the Government does actually recognize that Westchester has failed to confront the zoning barriers that continue to exist.* As such, the Government's failure to vindicate the paragraph 7(j) requirements does not come merely from inexcusable ignorance of the facts, but rather from an inexcusable unwillingness to enforce the consent decree.

**The Government's position tells Westchester -- and all other jurisdictions across the country -- that there are no more consequences to violating both the general AFFH obligation and a separate consent decree obligation than there are to violating only the general AFFH obligation. That reduces the consent decree obligation to a nullity.**

The Monitor, who has consistently operated under the belief that he can substitute his own judgment for the course of action demanded by the consent decree itself, will doubtless say that he has undertaken discussions with some municipalities about their zoning. But the consent decree imposes obligations on Westchester, and simply does not permit the Monitor (or the Government) to decide that discussions with non-parties are an acceptable alternative to holding the defendant to its paragraph 7(j) obligations.

G. The Monitor downplays the scope and significance of restrictive zoning and the United States Attorney stands idly by

The Monitor's report on exclusionary zoning is woefully incomplete, does not focus on the consent decree, and fails to apply the appropriate standards.

(1) *Paragraph 7(j)*.

In his September 13, 2013 report to the Court on zoning, the Monitor simply did not evaluate the zoning data from the perspective of how much of it represented a "failure to promote" or a "hindering" of the construction of consent decree units, nor did he evaluate the data from the perspective of whether the zoning contradicted the decree's purpose to AFFH. He likewise failed to examine whether Westchester had taken any actions (let alone "all possible actions," Consent Decree ¶ 15) to meet its paragraph 7(j) obligations. The United States Attorney did not bring this to the Court's attention.

(2) *County of Monroe*.

The Monitor also failed to consider the fact that Westchester was unjustifiably failing to exercise its rights under the *County of Monroe* doctrine in respect to the seven jurisdictions he found to have exclusionary zoning nor in respect to the fact that, "There is evidence of exclusionary zoning in many of the 20 category 2 ["warrants improvement"] municipalities."<sup>18</sup> Even if it were true that there were factors that "militated" against a finding that zoning was exclusionary under the Berenson doctrine (and it isn't true), that wouldn't change the fact that the consent decree began by identifying a stronger interest on the part of the County (and of the citizens of its municipalities) to encourage affordable housing with AFFH potential than municipalities have in maintaining restrictive zoning, and by forcing Westchester to acknowledge its authority and responsibility to challenge such zoning, *inter alia*, pursuant to *County of Monroe*. The United States Attorney did not bring these facts to the Court's attention.

(3) *Berenson*

As to whether municipalities failed to comply with the *Berenson* doctrine, the Monitor's primary focus -- the Monitor mangled the legal standards and failed to apply the facts to the law.

Take the requirement that a municipality must have a "properly balanced and well ordered plan for the community."<sup>19</sup> In addition to those the Monitor found to be exclusionary on this ground, the Monitor rated 17 jurisdictions as "warrant[ing] improvement."<sup>20</sup>

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<sup>18</sup> Monitor's Sept. 2013 Report, p. 57.

<sup>19</sup> *Berenson*, *supra*, 378 N.Y.S.2d at 680.

<sup>20</sup> Exhibit 2 to the Monitor's Sept. 2013 Report, annexed hereto as Exhibit E, contains three charts: the first is intended to show whether municipalities have provided a properly balanced and well-ordered plan for the community (the "Balanced Plan Chart"); it is that chart that contains the rankings referred to

These are all jurisdictions where the Monitor was unable to find that they *did* provide a well-ordered plan, but where he was unwilling to say that the jurisdictions were exclusionary. It is the equivalent of a school district using a very lenient grading scale to avoid being seen as having too many failing students.

Indeed, the Monitor explicitly states that jurisdictions are being given “credit” for “addressing” affordable housing need even if their comprehensive plans only mention that affordable housing should be considered without making detailed recommendations on how to develop that housing.<sup>21</sup>

Here are a few of the jurisdictions that the Monitor was unwilling to put into the exclusionary category. According to the Monitor’s reported data:

Ardsville only has 1 percent of residential land zoned for multi-family use. The *undeveloped* land that is zoned multi-family is only 0.3 percent of the village’s total acreage.

Bedford only has 0.5 percent of residential land zoned for multi-family use. The *undeveloped* land that is zoned multi-family is only 0.01 percent of the village’s total acreage.

Mount Pleasant only has 1.2 percent of residential land zoned for multi-family use. The *undeveloped* land that is zoned multi-family is only 0.03 percent of the village’s total acreage. Mount Pleasant’s ability to meet “future need” for affordable housing is a total of only five units.

Scarsdale only has 0.26 percent of residential land zoned for multi-family use. The *undeveloped* land that is zoned multi-family is only 0 percent of the village’s total acreage -- there is no such land. Scarsdale’s ability to meet future need for affordable housing is a total of zero units.

**Scarsdale only has 0.26 percent of residential land zoned for multi-family use. The *undeveloped* land that is zoned multi-family is only 0 percent of the village’s total acreage -- there is no such land. Scarsdale’s ability to meet future need for affordable housing is a total of zero units.**

To reiterate, the Monitor declined to place any of these jurisdictions in the exclusionary category of failing to provide a properly balanced and well-ordered plan for the jurisdiction.

The other *Berenson* obligation is that the municipality must consider *and* provide for its share of regional affordable housing need.<sup>22</sup> The Monitor took as his guide to regional need the report prepared in 2005

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above. The second chart contained in the exhibit is intended to show whether municipalities have or can meet their share of regional affordable housing need (the “Regional Share Chart”); the third is intended to show factors that could justify restrictive zoning (the “Rebuttal Factors Chart”).

<sup>21</sup> Balanced Plan Chart, n. 8.

<sup>22</sup> *Berenson*, *supra*, 378 N.Y.S.2d at 681-82.

by the Center for Urban Policy Research at Rutgers University for Westchester's Housing Opportunity Commission. That Commission determined that regional need was for over 10,000 units of affordable housing.<sup>23</sup>

The first problem with this aspect of the Monitor's analysis is that Westchester is part of a broader housing market that includes New York City. To treat the affordable housing needs of New York City households as zero units profoundly understates the regional need for affordable housing in the metropolitan area, and thus understates each municipality's obligation in relation to that regional need.

The second problem is that the Monitor did not ultimately take the question of meeting regional need seriously. Bronxville, Buchanan, Dobbs Ferry, Mount Pleasant, and Scarsdale have each failed to build a single unit of their allocation from 2000 (when initial allocations were made) through 2013. Eastchester built only 2; New Castle, only 3;<sup>24</sup> and Irvington only 4. In terms of "potential" to meet regional need as measured by the allocation, Bronxville and Scarsdale, the Monitor states, have the potential to meet 0 percent of the benchmark; Mount Pleasant, 0.5 percent; Irvington, 2.6 percent; Buchanan, 12.5 percent; and New Castle only 13.7 percent.

North Castle only has the potential, the Monitor says, to get to 18 percent of its share of countywide need (again, ignoring the needs of that part of the region that is outside Westchester).

None of these nine jurisdictions were treated by the Monitor as having failed to provide for its share of regional need.<sup>25</sup>

A critical means by which the Monitor avoided making findings of exclusionary zoning pursuant to *Berenson* was to treat "certain other factors" (not made transparent) as providing a "rebuttal to the presumption that [the municipalities'] ordinances are exclusionary."<sup>26</sup>

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<sup>23</sup> Monitor's Sept. 2013 Report, p. 21. The Monitor provides only a portion of the picture when he focused on the fact that those units do not "expand" the County's unit-specific obligations under the decree. *Id.*, n. 8. What the Monitor doesn't discuss is that the County's abandonment of those goals runs directly contrary to its obligation under paragraph 31(a) of the decree. See discussion, below, at pp. 33-34.

<sup>24</sup> The Monitor made a point of noting that a developer was seeking approvals for the "Chappaqua Station" development, which would include 28 affordable units. The development shares some of the undesirable characteristics of several other projects "counted" by the Monitor: it is a brownfield site, it is separated from residential Chappaqua, and it is squeezed between the railroad tracks and the Saw Mill River Parkway.

<sup>25</sup> This may be, in part, because of a linguistic trick in the Monitor's categorization scheme. The exclusionary category is reserved for municipalities that have "not considered" and "does not have the potential to satisfy its share of regional need." Regional Share Chart, n. 8. In fact, a municipality is exclusionary under *Berenson* if it does not have the potential to satisfy its share of regional need, even if that municipality has "considered" the question of regional need.

<sup>26</sup> Monitor's Sept. 2013 Report, p. 34

In the Monitor’s chart of rebuttal factors, one category is “rebuttal unsuccessful because the zoning ordinance, though it may have provisions addressing affordable housing opportunities, is too narrow in scope to provide genuine opportunities sufficient to meet local and regional need.”<sup>27</sup>

Leaving aside municipalities ultimately found by the Monitor to be exclusionary under *Berenson*, there were an additional 11 jurisdictions with *unsuccessful* rebuttals that the Monitor nonetheless placed only in the “warrants improvement” category instead of in the “fails *Berenson*” category.<sup>28</sup> In fact, zoning ordinances that are “too narrow in scope to provide genuine opportunities sufficient to meet local and regional need” are indeed exclusionary.

One factor treated as a significant positive development by the Monitor is if a municipality adopted the so-called Model Ordinance. The consent decree had provided that one of the obligations of Westchester under the decree was to develop and promote a “model inclusionary housing ordinance.” Consent Decree, ¶ 25(a).

Model ordinances can serve an important purpose. But the version that the Monitor approved is entirely inadequate. It has literally no provision to expand the acreage that a municipality is required to devote to as-of-right multi-family housing. It is only when municipality is *already* permitting building to go forward that a modest component of affordable units is required. Municipalities most committed to preserving an anti-development, anti-affordable-housing status quo, in other words, are let off the hook.

Put another way, even if every jurisdiction were to adopt the model ordinance, that would not mean that even a single additional unit of as-of-right multi-family housing was required to be built anywhere in the County.

**Even if every jurisdiction were to adopt the model ordinance, that would not mean that even a single additional unit of as-of-right multi-family housing was required to be built anywhere in the County.**

Nevertheless, at least in some cases, the Monitor used the adoption of the model ordinance as the basis by which to say that municipalities met their rebuttal burden (Bedford and New Castle are two examples.)

It is ironic that the Monitor did so because he himself cited in his report *Continental Building Co., Inc. v. Town of North Salem*, 625 N.Y.S.2d 700, 704 (3rd Dept. 1995), a case in which the court cautioned that provisions (like the density bonuses at issue in that case) that are “intrinsically narrow in scope and do very

**Leaving aside municipalities ultimately found by the Monitor to be exclusionary under *Berenson*, there were an additional 11 jurisdictions with *unsuccessful* rebuttals that the Monitor nonetheless placed only in the “warrants improvement” category instead of in the “fails *Berenson*” category.**

<sup>27</sup> Rebuttal Factors Chart, n. 6.

<sup>28</sup> Briarcliff Manor, Bronxville, Buchanan, Cortlandt, Eastchester, Larchmont, Mamaroneck, Pelham, Rye, Somers, and Tuckahoe.

little to genuinely address the established need for multifamily housing” are insufficient to meet a jurisdiction’s burden of proof of non-exclusion, and also cited *Land Master Montg I. LLC v. Town of Montgomery*, 821 N.Y.S.2d 432, 440 (Sup. Ct., Orange Cty. 2006 (a case that rejected a zoning scheme that, “effectively, creates the illusion of affordable housing availability while limiting its reality to a few chosen sectors and vesting almost total control in the Town”).<sup>29</sup>

The model ordinance is exactly the kind of illusory gain for multi-family housing that the decisions condemned, but Monitor didn’t apply the law to the incentives or mandates that were similar to the model ordinance. As elsewhere, the U.S. Attorney failed to bring the wider scope of *Berenson* violations to the Court’s attention.

#### (4) Disparate impact under the Fair Housing Act

The Monitor does reference the fact the municipal zoning can violate the Fair Housing Act if it has a disparate impact on the basis of race, national origin, or other protected class, either by having a disproportionate adverse impact on a minority group or by perpetuating segregated housing patterns, citing, *inter alia*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2nd Cir. 1988) and *United States ex rel. Anti-Discrimination Center*, 495 F. Supp. 2d 376, 387 (S.D.N.Y. 2007).<sup>30</sup>

But he fails to perform basic, relevant analysis necessary to identify the various expressions of disparate impact. The focus of his inquiry is whether there is large variation between the African-American or Latino population of zoning districts within a municipality and the African-American or Latino population of zoning districts *within the same municipality*. The Monitor saw the relevant “import of *Huntington*” to be to “identify the types of housing that appear to correspond to the preferences of blacks and Hispanics *in the community* and whether such housing is then restricted to one or two segments *of that community*” (emphasis added).<sup>31</sup>

#### **Why would the monitor accept an inadequate model ordinance?**

**The Monitor was explicit that the model ordinance he approved was suboptimal. But he argued that it had to be one that was not unpalatable to municipalities. In other words, instead of requiring Westchester to do the things that would cause municipalities to adapt to the goals of the consent decree (including litigation), the Monitor had the consent decree adapt to anticipated intransigence on the part of municipalities. See Monitor’s Oct. 2010 Report, Doc. 334, p. 7.**

Such restrictions indeed constitute one form of disparate impact in violation of the Fair Housing Act, but

<sup>29</sup> Sept. 2013 Monitor Report, p. 22.

<sup>30</sup> *Id.*, p. 24.

<sup>31</sup> *Id.*, p. 42, n. 14.

the scope of disparate impact doctrine sweeps much broader. *Huntington* itself pointed out that permitting the housing that the defendant town had denied “would likely [result in] a desegregative effect on Huntington Township as a whole in comparison to the region, given the tight housing market throughout the area.”<sup>32</sup> The court did not make a factual finding on this question, however, only “because we find sufficient desegregative impact with Huntington itself from the project.”<sup>33</sup> In other words, the question of whether a governmental entity perpetuates segregation is not just a local question, but a regional one as well.

In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, for example, the court held as follows:

We reaffirm our earlier holding that the Village's refusal to rezone had a discriminatory effect. The construction of Lincoln Green [the project that had been blocked] would create a substantial number of federally subsidized low-cost housing units which are not presently available in Arlington Heights. Because a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing, the Village's refusal to permit MHDC to construct the project had a greater impact on black people than on white people. Moreover, Arlington Heights remains almost totally white in a metropolitan area with a significant percentage of black people. Since Lincoln Green would have to be racially integrated in order to qualify for federal subsidization, the Village's action in preventing the project from being built had the effect of perpetuating segregation in Arlington Heights.<sup>34</sup>

The regional perspective is crucial. Consider a municipality that has limited multiple-family housing available, and little if any of that is now affordable. Because the municipality had historically been unwelcoming to African-Americans when the multiple-family housing was constructed and tenanted (and when it was more affordable), even the multi-family zones have just as low a percentage of African-Americans as the zones that do not allow multi-family housing. To use that lack of variation in the African-American population between types of zones to suggest the municipality's current zoning perversely rewards the whitest municipalities that most effectively kept African-Americans out, and is unsuited to answering the question, “What would be the impact on segregation if zoning restrictions were loosened?”

**Only a regional perspective can go beyond the housing needs of the people who haven't been excluded altogether from a jurisdiction and look to the housing needs of the people who have been excluded.**

Only a regional perspective can go beyond the housing needs of the people who *haven't* been excluded altogether from a jurisdiction and look to *the housing*

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<sup>32</sup> *Huntington*, *supra*, 844 F.2d at 938, fn. 8.

<sup>33</sup> *Id.*

<sup>34</sup> *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977) (emphasis added).

*needs of the people who have been excluded.*

The Monitor, however, never performed a regional analysis -- the widest lens he used was a town's county subdivision. In the Monitor's frame of reference, New York City does not exist. The omission is particularly glaring because the consent decree very consciously treated New York City as part of the broader housing market of which Westchester is part: New York City is the principal geographic area "with large non-white populations outside, but contiguous or within close proximity to, the County" in which consent decree housing (and, indeed, all affordable housing) had to be affirmatively marketed. Consent Decree, ¶ 33(e).

Remember that 20 Westchester municipalities have African-American populations of 2.0 percent or less, excluding population in group quarters. The African-American population of New York City is 22.8 percent, and, in raw numbers, almost twice the population of Westchester as a whole. The numbers shout exclusion, and a loosening of restrictive zoning practices -- thereby enhancing the ability to construct affordable housing -- would very clearly have a desegregative impact (or, put another way, the maintenance of those restrictive zoning practices perpetuate segregation). No one would seriously argue otherwise.

ADC performed an analytical experiment that illustrates how even steps that would only assist middle-class and upper-middle-class households would have a desegregative impact.<sup>35</sup> What if zoning restrictions were eased *just to the extent of making housing affordable to households earning at least \$75,000 per year*? We looked at the percentage of households earning at least that much who were non-Latino, African-Americans.

In New York City, 17.7 percent of those \$75,000-plus households were African-American. This is more than 875 percent to more than 2,500 percent greater than the African-American populations of the 20 Westchester municipalities with African-American populations of 2.0 percent or less.

**In New York City, 17.7 percent of those \$75,000-plus households were African-American. This is more than 875 percent to more than 2,500 percent greater than the African-American populations of the 20 Westchester municipalities with African-American populations of 2.0 percent or less.**

Even in Westchester, 9.11 percent of \$75,000-plus households are African-American (from more than 450 percent to more than 1,300 percent greater than in those Westchester jurisdictions).

And combining Westchester and New York City, 16.4 percent of the \$75,000-plus households are African-American (from more than 800 percent to more than 2,300 percent greater than in those Westchester municipalities).

This analysis -- which, as noted, doesn't even look at the vast disparate impact of restrictive zoning practices from the point of view of *low-income* African-American households in New York City -- shows that the practices of Westchester towns and villages to limit the availability of affordable housing powerfully perpetuate segregation on the basis of race (and are thus

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<sup>35</sup> It is in no way acceptable to continue practices that exclude poorer households; the experiment simply highlights the breadth of current restrictive practices.



exclusionary in Fair Housing Act terms), regardless of whether African-Americans may be relatively evenly distributed between and among a single municipality's different types of zoning districts.

The Monitor acknowledged that his analysis provided "only an initial step in identifying whether the municipal zoning ordinances are such that they may impede integration by placing a barrier on the ability to build affordable housing" and that "further analysis would be necessary."<sup>36</sup>

Stop and consider how remarkable that is. More than four years after the entry of a housing desegregation consent decree, and the person charged with monitoring compliance professes not to be able to say whether municipalities that Westchester was supposed to sue on the basis of practices that contravened the purpose of the decree to AFFH are continuing practices that rise to the level of disparate impact violations of the Fair Housing Act.

The only thing more extraordinary is the deafening silence from the U.S. Attorney for the Southern District of New York. As it surely cannot take that office more than four years to conduct a disparate impact analysis, the only reasonable conclusion is that the U.S. Attorney has chosen to avert his eyes from the disparate impact (and from Westchester's refusal to act against it).

**The only thing more extraordinary is the deafening silence from the U.S. Attorney for the Southern District of New York.**

A powerful contrast is provided by the case just filed by the U.S. Attorney for the Eastern District of New York against Oyster Bay, a town in Nassau County.<sup>37</sup> The complaint challenges preferences for town residents and relatives of town residents for below-market-rate housing because "African-Americans constituted less than 1% of families living in Oyster Bay who were income eligible and otherwise qualified" as compared with the fact that the "eligible population of Nassau County and Suffolk County residents was approximately 10% African-American" and the "*eligible population in the New York metropolitan areas was approximately 20.5% African-American.*"<sup>38</sup>

In other words, the U.S. Attorney for the Eastern District (working with the Civil Rights Division of the Justice Department) had no difficulty determining that in-jurisdiction demographics has to be measured against out-of-jurisdiction demographics, even to the extent of including the New York metropolitan area.

The failure of the Government and the Monitor to highlight the disparate impact of the zoning of many Westchester municipalities simply cannot be explained by the facts or the law.

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<sup>36</sup> Monitor's Sept. 2013 Report, pp. 40-41, 58

<sup>37</sup> United States of America v The Town of Oyster Bay et al., 14-CV-2317 (Spatt, J.), filed April 10, 2014. The complaint is annexed hereto as Exhibit F.

<sup>38</sup> Complaint, ¶ 20; see also Complaint, ¶ 9 (referencing the demographics of the population of the five boroughs of New York City).

H. Paragraph 7(j) does not have a "litigation last" provision

The Monitor describes paragraph 7(j) as placing the County under a duty to "engage with municipalities."<sup>39</sup> He then claims that that engagement "may" encompass "a variety of tools, from technical assistance, through litigation."<sup>40</sup> Noticeably absent, as discussed earlier, is any assessment that the County should have litigated at any point from 2009 through 2013, or any demand that it do so now.

The approach is consistent with the Monitor's desire to avoid litigation, but not with the language of the decree. Paragraph 7(j) requires Westchester to use *all* available means to address hindrances to its unit-specific obligations, and states that the County *shall* initiate the legal action needed to accomplish the purpose of the consent decree to AFFH.

**Throughout the text of the consent decree -- as it had been throughout the litigation -- the conduct of municipalities took center stage. It was restrictive municipal zoning (and Westchester's acceptance of that zoning) that was the most powerful impediment to fair housing choice, and thus *action* to counter precisely that resistance was at the core of what was demanded.**

Paragraph 15(a) of the decree underlines the fact that litigation is not supposed to be reserved as a last option: Westchester's compliance -- including in the first biennial report of the Monitor that was due at the end of 2011 -- was supposed to be evaluated on the basis of whether it has taken "*all* possible actions to meet its obligations" under the decree. These actions include taking legal action to secure appropriate zoning. Paragraph one of page two of the decree also recites that it is appropriate for the County to take legal action against municipalities that hinder the County in the fulfillment of the terms of the consent decree or, more generally, in its duty to develop housing that promotes integrated residential patterns.

In the absence of the consent decree, the Monitor or the Government would certainly be free to pursue policy options that demoted or ignored altogether the lever of litigation. But, of course, the consent decree exists, and neither is free to ignore the course of conduct the decree prescribes.

It is a very basic failing of oversight and enforcement that the question, "Has Westchester been using all available means at its disposal to overcome municipal barriers to fair housing choice?" has never been addressed by the Monitor or the Government.<sup>41</sup>

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<sup>39</sup> Monitor's Sept. 2013 Report, p. 7.

<sup>40</sup> *Id.*

<sup>41</sup> It is true that, in its eagerness to make sure that ADC's motion to intervene was denied and its motion to enforce not heard, the U.S. Attorney cynically used a declaration from a Westchester legislator -- that is, a representative of the defendant -- that said, "To my knowledge, no municipality has sought to obstruct the development of Affordable AFFH Units." Declaration of John M. Nonna, July 29, 2011, Doc 370, ¶ 6. If the U.S. Attorney actually believes that Westchester has been using all available means to overcome municipal barriers to fair housing choice, he should say so and explain why he disagrees with HUD, his client.

I. Other basic steps not taken

A useful tip-off to the fundamental unwillingness of the Government and Monitor to enforce the decree has been their failure to push Westchester to acquire -- directly or indirectly -- interests in sites with desegregation potential where AFFH development is stymied by restrictive zoning.

Such interests would, in the normal course, be the basis on which Westchester could use its *Berenson* and *County of Monroe* litigation tools. The same would generally be necessary for Westchester to have standing to pursue a disparate impact claim under the Fair Housing Act.<sup>42</sup>

The decree contemplated that such interests would be acquired. If it hadn't, the extensive recitations in the first two pages of the decree about Westchester's authority under *Berenson* and *County of Monroe* and its responsibility to litigate against municipalities would have been of no practical consequence.

We are unaware of a single circumstance where the Government or the Monitor has asked Westchester to take this prerequisite step. Given the fact that acquiring a site and working up a development proposal and seeking municipal approval takes time (before the inevitable turndown), Westchester's inaction on this front -- and the failure of the Government and the Monitor to push Westchester to act -- means that Westchester has already guaranteed that most of the seven-year period initially contemplated as the term of the consent decree will have been squandered without any required litigation being commenced.

Another useful tip-off as to the reluctance to enforce is the unwillingness of the Government and Monitor to discuss the fact that single-family zoning cannot remain unchanged throughout the County if genuine AFFH is to occur. To be clear: given how much of Westchester is already zoned and occupied as single-family housing, the ability to generate affordable housing units with desegregation potential is significantly more limited if redevelopment of existing residential sites is excluded.

Neither the Government nor the Monitor appears willing to recognize this. On the contrary, there is a willingness to look principally for other alternatives.

In a recent court filing, for example, the Monitor reported that Mamaroneck had made "great strides" towards the provision of affordable housing and the meeting of regional need for such housing.<sup>43</sup> It turns out, however, that the rezoning that occurred involved permitting residential development as of right in what had previously been a business district and allowing residential development by special permit in what had previously been a service business district. These are not bad changes, by any means. But they don't change the reality that development remains strictly limited in residential districts.

One other element of that recent filing bears mention. The Monitor describes recent meetings with exclusionary municipalities as "an important starting point for a collaborative process designed to

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<sup>42</sup> This is not intended to exclude the possibility that Westchester could bring one or more claims under a *parens patriae* theory.

<sup>43</sup> Monitor's Report, Feb. 10, 2014, Doc. 463, p. 9.

improve opportunities for affordable housing development.”<sup>44</sup> Optimism is fine, but it is simply unacceptable to treat the first four and a half years of the consent decree’s term as nothing more than a warming-up period, with the prospect that open-ended negotiations will consume the balance of the consent decree’s present term.

**IV. The Government and the Monitor refuse to bring to the Court’s attention Westchester’s ongoing violation of paragraph 31(a): the obligation to use all the County’s housing policies and programs to eliminate de facto residential segregation throughout the County.**

Another consent decree obligation that goes well beyond the obligation to build a minimum of 750 units of AFFH housing is set out in paragraph 31(a) of the decree. Westchester had to establish as “official goals of the County’s housing policies and programs” the “elimination of de facto residential segregation.”

Notice that the obligation is not simply to eliminate *intentional* segregation; the focus is on housing patterns characterized by residential segregation -- regardless of one’s view of the original cause of those patterns.

The obligation is not limited by time, does not expire when a set number of units (let alone as few as 750) are built, and was operational as of November 2009.

Westchester has done nothing to meet this obligation; on the contrary, it has taken the existing Housing Allocation Plan (which reflected more than 6,000 un-built units in the municipalities covered by the decree and had desegregation potential if implemented) and thrown it out the window.

It wouldn’t be surprising to hear a civil rights defendant try to wheedle its way out of its commitment by saying that, as an “official” matter, a policy statement reciting the goal of using all housing policies and programs to end de facto segregation has been issued, and the obligation ends there.

What is shocking, however, is that this is apparently the view of the Government and the Monitor. Under that view, there is no substantive point to the provision, only window dressing: “We don’t care if you *actually* have the ending of de facto residential segregation as a policy or goal; we only want the goal to be on paper as ‘official’ so as to create the appearance of a policy or goal.”

In fact, the clear and natural import of the paragraph 31(a) requirement is, in plain terms, “We’re not only going to require the County to marshal all its housing policies and programs towards the goal of ending de facto residential segregation, this consent decree objective is so fundamental that we’re going to require the County to embed that objective as part of its own laws.” In short, the obligation is for the County to have as a real goal in all its housing policies and programs the ending of de facto residential segregation. That is something that is judged by the County’s conduct, not by whether it nominally has set forth something “official.”

As the Government and the Monitor have refused to vindicate this provision of the consent decree, it

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<sup>44</sup> *Id.*, p. 4.

falls to the court to hold Westchester to account for failing to have the ending of de facto residential segregation as a goal of its housing policies and programs.

**V. The Government and the Monitor refuse to seek to hold Westchester in contempt for being in violation of paragraph 32, notwithstanding the undisputed fact that Westchester has not submitted an analysis of impediments that has been deemed acceptable by HUD.**

Every recipient of federal housing funds is subject to having funding withheld or rescinded if it fails to meet its AFFH obligations, including its obligation to submit an adequate analysis of impediments to fair housing choice ("AI").

Westchester has an additional obligation: paragraph 32 of the consent decree required it to develop an AI that was "deemed acceptable by HUD," one that included analysis of impediments to fair housing choice based on "race or municipal resistance to the development of affordable housing."

It is clear that Westchester never submitted such an AI, either in November 2009 when originally due, in Spring 2010 (per an agreed-upon extension), or in the years thereafter.<sup>45</sup> Indeed, when the Assistant U.S. Attorney appeared before the Court almost a year ago, he noted that, as opposed to the 120 days originally allotted under the consent decree, there had already been 1,200 days that had elapsed without the submission of an adequate AI.<sup>46</sup>

Simply put, there is no question that Westchester has violated its paragraph 32 obligations for years, and the Government and the Monitor have never sought to have the Court hold defendant in contempt for this violation.

The fact that the Government has withheld funding from Westchester does not excuse its failure to vindicate this consent decree provision; on the contrary, its failure to act when its funding actions confirm that it has not deemed any AI submission satisfactory is especially pernicious to the rule of law.

The Government and the Monitor have sent a remarkably destructive message: a jurisdiction that is a civil rights defendant under a consent decree will not face consequences beyond those faced by jurisdictions *not* under consent decrees. It is hard to imagine a posture more conducive to encouraging disrespect for the law in general and for the integrity of the court's orders in particular.

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<sup>45</sup> That Westchester thinks that HUD *should* have deemed one or more iterations of its AI acceptable is not relevant. That doesn't change the fact that what the consent decree demands of Westchester is an AI that HUD *has* deemed acceptable, and that type of AI has not been produced.

<sup>46</sup> Transcript of conference of April 26, 2013, p. 15.

## VI. The problems with “buy-in” theory

Over the years, we have heard from many people who shake their head in wonder at why the Government and the Monitor have such a difficult time understanding that court orders are supposed to be obeyed in full. But we have also heard from people who say, in effect, “What’s so bad about trying to work things out?”

The answer: nothing...so long as you insist on full compliance and don’t think of “buy-in” as a substitute for enforcement.

Unfortunately, it is not uncommon for people to indulge in the fantasy that “engagement” is a surefire means by which to achieve change in any and all circumstances. The party that is being wooed will “buy in” to what you are selling. Often paired with the cult of buy-in is strong skepticism that a forced-compliance approach is appropriate.

As ProPublica has reported, the Monitor has “argued that *persuading* the county to draw up an acceptable [implementation] plan would achieve more than *forcing* one upon it” (emphasis added). “Actually engaging with those whose behavior you would like to change has yielded results,” he said.<sup>47</sup>

### **“Appeasement only emboldens resistance”**

**- ADC to Monitor, Aug. 2009**

What about actually enforcing the consent decree? “I can’t predict what the county’s behavior would have been in that circumstance,” he said. “I could have played a game of chicken, but I wasn’t going to do that.”<sup>48</sup>

As is evident from the foregoing, it is clear that *the Monitor* had bought in to the idea that old-fashioned enforcement of a court order was too fraught with peril (in this he is not alone; the Government has expressed similar sentiments).

The problem, of course, is that Westchester has *not* bought in to the idea that fundamental zoning change was good for it.

Why would anyone have staked the fate of the consent decree on achieving buy-in? Westchester and its municipalities had for decades maintained exclusionary zoning; there was in 2009 (and there remains today) a powerful commitment to the status quo.

But when people are committed first and foremost to the idea that engagement will yield cooperation,

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<sup>47</sup> Nikole Hannah-Jones, “Soft on Segregation: How the Feds Failed to Integrate Westchester County” (ProPublica, Nov. 2, 2012).

<sup>48</sup> *Id.* HUD’s fear of genuine enforcement was also palpable. A “former high-ranking HUD official who worked on Westchester strategy” said that HUD was worried that the decree could fall apart entirely if they pushed too hard. “The key was not to make mistakes,” the former official said. “HUD loses this case, we’re back to a loss of confidence and people would say we’re worthless.” *Id.*

three things tend to happen.

First, the “engagement” is imagined as a negotiation. That may be fine when one is sent to mediate an international dispute between two warring factions in circumstances where there is no authority to compel a resolution. There, fostering mutual understanding -- or at least a sense of mutual self-interest - is the only tool one has. But a federal court order is not supposed to represent the starting point for a negotiation. It is the culmination of a negotiation and the task is to see that it is obeyed. Negotiating away any part of a court order represents a betrayal of that order and of the rule of law. Moreover, unlike the international mediation, there are very clearly powerful means to compel compliance available, if only they were not disdained by those with the authority to employ them.

**“Westchester is banking on an old strategy: adopt an extreme position, and hope you can negotiate a middle ground...The terms of the [consent decree], however, are non-negotiable. Negotiating away either portions of the letter or the spirit of the [consent decree] would be improper and impermissible.”**

**- ADC’s “Prescription for Failure” report, February 2010**

Second, a commitment to buy-in often means that proponent of that strategy often comes to measure success by whether he has yielded an agreement to do *something*, not whether there is agreement to do the *required thing*. Here again, the allure of “cooperation” is allowed to trump the actual demands of the court order.

Third, a commitment to buy-in frequently goes along with a failure to appreciate how strict enforcement is itself the best hope for yielding cooperation *with the terms that are actually required*.

Where a party is permitted to choose between and among three options – full compliance, nominal compliance, and maintaining the status quo – many will pick maintaining the status quo, and most of the others will elect nominal compliance. Few if any will opt for full compliance.

This has been the experience in Westchester for close to five years now.

The only way to maximize voluntary cooperation is to make people understand that full compliance is a given; and that neither maintaining the status quo nor some facsimile of it is a viable option. The only choice that should have been offered is whether full compliance was going to be achieved with local input (the choice made available to those who would cooperate), or whether full compliance was going to be achieved without that local input (the choice made available to those who would resist).

It should also be noted that the idea that strong enforcement will just “wear off” and that matters return to the status quo ante (in a manner similar to that which might occur if a peacekeeping force left without having altered attitudes and power relations) ignores the changes that strong enforcement would stimulate.

Opening towns and villages to affordable housing would spur new construction by developers encouraged by the breaking down of zoning barriers. When a town or village is no longer seen as an all-white preserve, there is a consequent increase in the willingness of those members of groups traditionally excluded to move into that town or village.

If, as currently seems likely, the consent decree fails to achieve what it set out to achieve, let it not be said that the failure was a failure of a litigation-based or enforcement-based model. Let it be recognized that the failure was the failure to try to enforce compliance.

## **VII. Conclusion**

Westchester's violations of the consent decree have continued unabated. The Government and the Monitor are unwilling to enforce the consent decree as written. It falls to the Court, exercising its power to vindicate its own juridical interest in the enforcement of its order, to step in and independently examine the facts; to direct Westchester to show cause why it should not be held in contempt and why remedial obligations should not be put in place; to order Westchester to comply with its existing obligations; to create a process of effective oversight and direction for the County; to extend the term of the decree to defeat Westchester's run-out-the-clock strategy; and to direct such other relief as is necessary to vindicate the decree.