Prescription for Failure:

A Preliminary Report on Westchester's Attempt

to Ignore and Evade the Requirements

of the Historic Desegregation Order Entered in

U.S. ex rel. Anti-Discrimination Center v. Westchester County,

a/k/a Westchester's "Implementation Plan"

February 2010

Anti-Discrimination Center
"One Community – No Exclusion"
54 West 21st Street, Suite 707
New York, New York 10010
212-346-7600

About the Anti-Discrimination Center

ADC is a civil rights and public policy not-for-profit. We do advocacy, analysis, and public education on ways to improve civil rights enforcement, to promote the idea of "one community, no exclusion," and to help people realize that there are broader public policy choices available than they have been led to believe. Contact us by email. The address is center@antibiaslaw.com.

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I. Introduction

Every year, Westchester County receives millions of dollars in Community Development Block Grant (CDBG) and other federal housing funds. The only way that Westchester – or any other jurisdiction – is entitled to those funds is by certifying that is has and will "affirmatively further fair housing" ("AFFH"). In other words, Westchester over the years kept representing to the federal government that it had and would analyze, identify, and act to overcome impediments to fair housing choice.

The Anti-Discrimination Center ("ADC") believed that Westchester was lying, and that the County had no intention of complying with its AFFH obligations. In particular, ADC believed that Westchester was determined to ignore impediments to fair housing choice that were related to race and to municipal resistance to affordable housing development. The aversion to dealing with issues of race was particularly egregious is view of the fact that Westchester remains staggeringly residentially segregated on the basis of race (*see* map on page 2).[1] The aversion to dealing with issues of municipal resistance was particularly egregious because, as Westchester's own Housing Opportunity Commission has long reported,[2] municipal resistance is a central obstacle to the creation of affordable housing units.

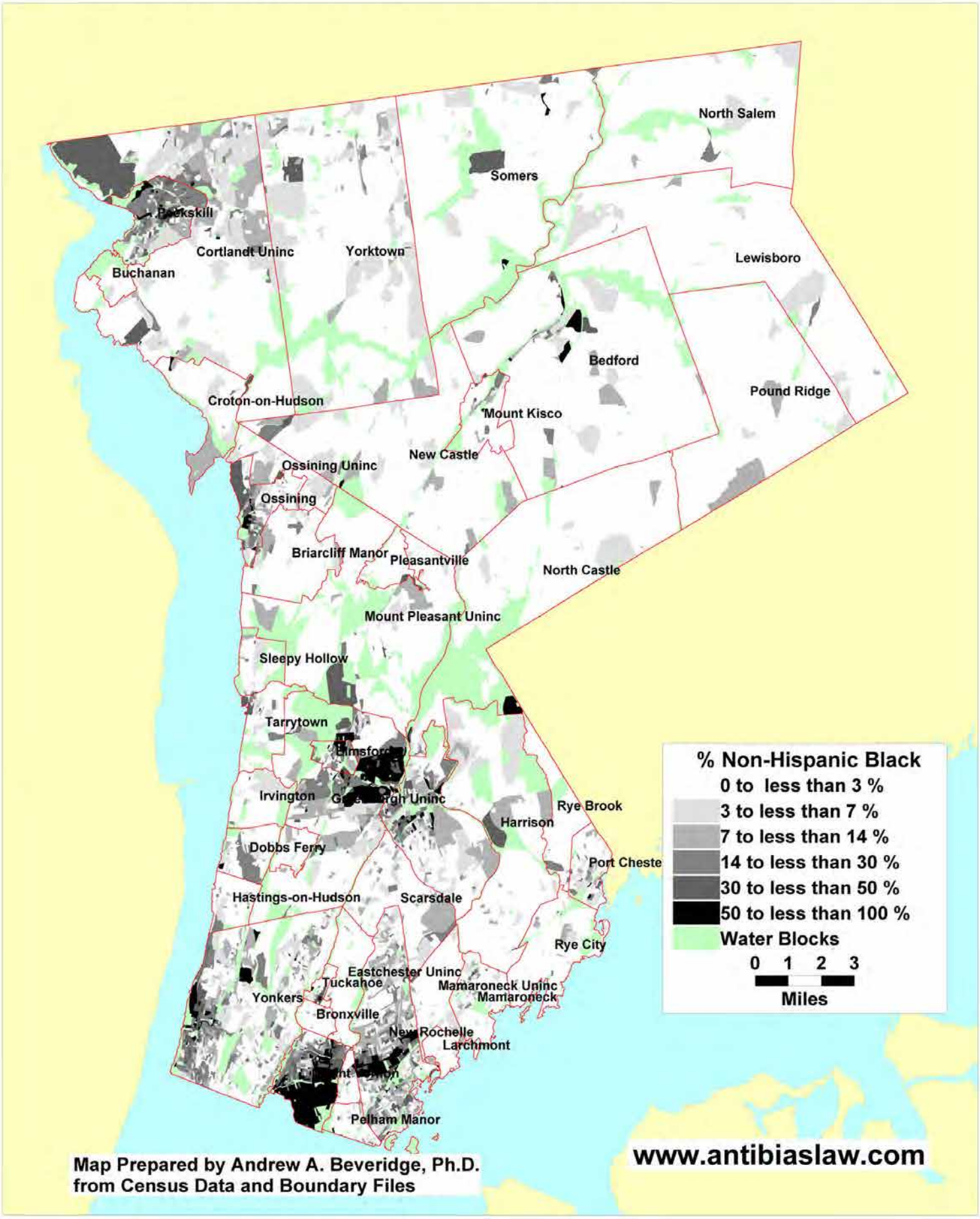
In 2006, ADC sued Westchester under the federal False Claims Act.[3] The False Claims Act is unusual in that it permits private actors, including not-for-profit entities like ADC – to bring suit on behalf of the federal government against government contractors that have obtained

[1] The map is also available at antibiaslaw.com/WestchesterSegregation.

[2] *See, e.g.,* Westchester Housing Opportunity Commission, *2004 Affordable Housing Action Plan.*

[3] The complaint is available at antibiaslaw.com/complaint.

Concentration of Non-Hispanic Black Population by Census Block, 2000 Census.



Map Prepared by Andrew A. Beveridge, Ph.D.
from Census Data and Boundary Files

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government funds fraudulently. In the course of intensive litigation, Westchester continued to insist, among other things, that the County was not segregated, that the County had no power to influence municipal zoning, and that a focus on "affordable housing" was an adequate substitute for a focus on "fair housing."

Early in 2009, the Honorable Denise Cote, a highly respected Federal Court Judge, granted ADC's motion for partial summary judgment against Westchester. She found that Westchester had "utterly failed" to meet its AFFH obligations throughout the period from 2000 to 2006 (the "False Claims period"), and that every single representation that Westchester had made during the False Claims period to the federal government that it had or would meet those obligations was "false or fraudulent."[4]

Despite Westchester's protestations that it was not residentially segregated, Judge Cote also noted that, "According to the 2000 census, over half of the municipalities in the Consortium had African-American populations of 3% or less."[5]

Judge Cote was very clear about the impropriety of Westchester's conflation of "affordable housing" with "fair housing." She found both that the AFFH regulation "requires an analysis of impediments to fair housing choice, not to affordable housing," and she found that the County had long known this to be true.[6] Indeed, she found:

> [T]he County had its own internal documents from before the false claims period relating to its AFFH obligations and the preparation of AIs. One such document, which is an outline of the County's Fair Housing Plan ("FHP"), sets forth the

[4] *U.S. ex rel. Anti-Discrimination Center v. Westchester County ("ADC Summary Judgment Decision"),* ___ F.Supp.2d ___, 2009 WL 455269 (S.D.N.Y.), at *14, 17, and 22; *also available* at antibiaslaw.com/sjdecision (Slip Op.) at 35, 43, and 54.

[5] *Id.* at *10; Slip Op. at 24.

[6] *Id.* at *5-6, and 9, fn.5; Slip Op. at 13-15 and 21, fn. 5.

> requirements that the County conduct an AI, set out actions to be taken, and maintain records. *The end of the outline contains the following reminder: "Remember: This [the FHP] is not a report on affordable housing, but FAIR HOUSING!!!"* (emphasis added).[7]

The Court's decision made just as clear the fact that Westchester had long collaborated with municipal resistance to affordable housing: "When the County considers where to acquire land for affordable housing, it seeks the concurrence of the municipality where the land is situated, and during the false claims period the County would not acquire any such land without the municipality's agreement."[8] The results of Westchester's "pretty please" approach were appalling: "The County set a goal in a 1993 Affordable Housing Allocation Plan to create 5000 affordable housing units; however, as of July 2005, at least 16 municipal units in the County had not created a single affordable housing unit."[9]

Westchester had improperly conveyed federal funds to municipalities despite the terms of "Cooperation Agreements" that it had entered into, by federal requirement, with each of the municipalities that participated in seeking federal funding (the "Consortium"). As Judge Cote found, "The agreements pertained to, *inter alia,* CDBG grants, and provided that the County is prohibited from expending community development block grant funds for activities in or in support of any local government that does not affirmatively further fair housing within its jurisdiction or that impedes the County's action to comply with its fair housing certifications."[10]

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[7] *Id.* at *6; Slip Op. at 15.

[8] *Id.* at *10; Slip Op. at 25.

[9] *Id.* at *10; Slip Op. at 26.

[10] *Id.* at *2-3; Slip Op. at 6.

Despite this, the Judge found, "the County has not withheld any funds or imposed any sanctions on any participating municipalities for failure to AFFH."[11]

After follow-on decisions whereby the Court rejected numerous additional positions that had been taken by Westchester, the County finally agreed to settle the case. In August 2009, a *binding Federal Court Order* was entered (the "Settlement Order").[12] In the Settlement Order, Westchester was required, among other things, to acknowledge that the development of affordable housing that achieved AFFH goals was an important County purpose; that the County had authority to overcome municipal resistance to such goals; that it was appropriate for the County to use such authority; that Westchester was, indeed, segregated; that all County housing policies had to act to eliminate segregation; that "affordable housing" and "fair housing" were not interchangeable terms; and that the goal of the Settlement Order was not simply causing some affordable housing to be developed, but rather causing affordable housing to be developed on the *census blocks* with the lowest percentages of African-Americans and Latinos.

In short, the heart of the Settlement Order is the frank requirement to deal with racial segregation and to overcome municipal barriers that stand in the way of developing affordable housing that would AFFH.

On February 2, 2010, Westchester publicly released what it describes as an "Implementation Plan."[13] But, just like putting the label "Analysis of Impediments" on a document that failed to look at race or municipal resistance did not transform the document into

[11] *Id.* at *10; Slip Op. at 25.

[12] The Settlement Order is available at antibiaslaw.com/settlementorder. A collection of documents relating to the case and the Settlement Order are available at antibiaslaw.com/wfc.

[13] The "Implementation Plan" is available at westchestergov.com/housingsettlement.

a real Analysis of Impediments, so, too, putting the label "Implementation Plan" on a series of documents that reprise Westchester's litigation arguments and attempt to avoid the obligations of the Settlement Order does not constitute a *real* Implementation Plan.

ADC believes that Westchester decided on an approach whereby its initial submissions would serve as a tool of negotiation. That is, Westchester would submit a set of documents that are entirely inadequate with the hope that the Monitor would agree to a "compromise" position. All parties well know, of course, it is the actual terms of the Settlement Order that control. As a preliminary review demonstrates, Westchester's submission: (1) fails to meet the requirements for an Implementation Plan; (2) tells the Monitor that Westchester does not intend to comply with the substantive requirements of the Settlement Order; and (3) tells HUD that Westchester is still not meeting the AFFH obligations that exist separate from and independent of the Settlement Order.

II. Westchester Seeks to Undermine Both the Letter and Spirit of the Settlement Order

Westchester's submission is designed to look like an Implementation Plan. Many provisions of the Settlement Order are referenced, and there are dozens of attachments included. But it does not take long to see that the submission entirely fails to provide a plan "setting forth with specificity the manner in which the County plans to implement the provisions of [the] Settlement Order," as was required by Settlement Order, ¶ 18. Worse, the submission reveals a consistent and deliberate design to ignore the principles of the Settlement Order in favor of the discredited policies that Westchester pursued prior to the litigation and that the County was unsuccessful in defending during the litigation.

A. Westchester continues to purposefully conflate "affordable housing" with "fair housing"

The terms "fair housing" and "affirmatively furthering fair housing" are intended to have some meaning. Indeed, the Court ultimately found that, contrary to Westchester's attitude, "the AFFH certification was not a mere boilerplate formality, but rather was a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring the County to conduct an AI, take appropriate actions in response, and to document its analysis and actions."[14] During the litigation, however, Westchester came up with what it thought was a clever idea. It took it affordable housing programs and actions and dressed them up with a new title: "fair and affordable housing." Nothing substantive had changed – the actions and programs did not have any fair housing component. There was simply a relabeling.

Westchester's rhetorical effort did not help it during the litigation, but the months since the entry of the Settlement Order have seen this sleight-of-hand tried anew. The phrase is now faithfully repeated as an incantation. The problem is a serious one. In terms of Westchester's unit-specific obligations under the Settlement Order (the 750 housing units described not as a cap but as a *minimum* in Settlement Order, § 7), those obligations arise in a very specific context. Westchester was required to spend funds to assist in the "development of new affordable housing units *that AFFH…"* Settlement Order, § 5 (emphasis added). That is, the housing units, referred to in Settlement Order, ¶ 7 as "Affordable AFFH Units," are not *random* or *interchangeable* affordable housing units; they are affordable housing units that must *affirmatively further fair housing.*

It was essential, therefore, for an Implementation Plan to give substance and definition to the AFFH element of the housing – specifically, identifying the housing as that which would

[14] *ADC Summary Judgment Decision, supra,* 2009 WL 455269 at *20; Slip Op. at 50-51.

reduce segregation and other barriers to fair housing choice. Instead, **Westchester has simply taken its definition of affordable housing and, as before, simply labeled that definition "fair and affordable housing."** This is not a matter of guesswork. The County sets out three "Guiding Principles & Objectives" for its "fair and affordable housing" units.[15] **Not one has anything to do with fair housing or with AFFH at all.** The guidelines reference only design criteria and issues of timelines, cost, and efficiency.[16]

The consequences are profound. If AFFH plays no part in Westchester's "guiding principles and objectives," then all that follows will be empty of the required AFFH perspective. For example, Settlement Order, ¶ 25(a) requires Westchester to promote a "model ordinance" relating to zoning and development review "to advance fair housing." A fuller discussion of the inadequacy of the "model ordinance," and its incorporation of terms that violate both the Settlement Order and Fair Housing Act, follows later this report. But here it is important to highlight the fact that **Westchester's definition of a "fair and affordable housing unit" is simply the definition of an affordable housing unit.**[17] Thus, for example, even though Westchester was forced to acknowledge as new County policy that "the location of affordable

[15] Westchester's submission consisted of a main document and a series of appendices. Numbered references preceded by "MS" shall refer to pages of the main document. The "Guiding principles & Objectives" appear at MS 14.

[16] *Id.* Sadly, Westchester's desire to maintain the status quo is embedded even in these seemingly neutral criteria. For example, the qualification that the housing be compatible with "the character of the community in which it is located" – has over the decades been used as nothing more than a code phrase to signal that no development that disturbs an exclusionary status quo will be attempted). Likewise, what development is and is not "cost effective" depends significantly on how a property is zoned, and, as discussed extensively later in this report, Westchester clearly has no intention to use its authority to act as a catalyst to lower costs by challenging exclusionary zoning.

[17] *See* Appendix D-1 at p. 1.

housing is central to fulfilling the commitment to AFFH because it determines whether such housing will reduce or perpetuate residential segregation," Settlement Order, ¶ 31(c), **the "model ordinance" provides no guidance whatever as to where in a municipality such housing should be encouraged and where it should be discouraged.**

Just as startlingly non-compliant is Westchester's statement of priorities for site selection.[18] There is a list of nine priorities, and the conflicts between these priorities and the Settlement Order will be discussed extensively later in the report. For now, the point is that the few references to "fair and affordable housing" once again cannot be understood to have any fair housing content – the County is simply talking about "affordable housing," despite the label. Had Westchester been trying to implement the Settlement Order, it would, of course, have had as a first priority the demographic composition of the census blocks in relevant municipalities that best served the Order's AFFH purposes (*i.e.,* focusing on causing development on the census blocks with the lowest concentrations of African-Americans and Latinos). **Demographic composition, unfortunately, is not amongst any of the nine priorities listed.** Moreover, fair housing considerations fail to make an appearance in the rest of the "process and approach" that Westchester describes in a page-and-a-half of its submission.[19] By failing to incorporate AFFH criteria, Westchester could not be clearer in saying that it is stuck in the mode of thinking about affordability and maintenance of the status quo only.[20] That does not and cannot implement the Settlement Order.

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[18] MS 16.

[19] MS 16-17.

[20] Another good illustration of Westchester's semantics is the "Flow chart of traditional fair and affordable housing development process," Appendix H-2(i). The flow chart identifies more than 60 steps in the process. Not one has a *fair housing* component.

B. Westchester continues to ignore fundamental impediments to fair housing choice

As Westchester notes, it has been given an extension of time to produce an analysis of impediments to fair housing choice. That extension, however, does not excuse Westchester's failure to identify or plan to overcome key impediments in the context of its submission. The dictionary defines "implement" as "put into effect," and defines "plan" as a "detailed proposal for doing or achieving something."[21] If one does not take account of the obstacles one can reasonably expect to encounter, there can be no detailed plan for putting the Settlement Order into effect. That is why, for example, the Settlement Order demands not simply benchmarks, but demands that Westchester "*specify steps and activities* that will be needed to meet those benchmarks." Settlement Order, ¶ 24 (emphasis added).[22]

Front and center in the litigation, in the ultimate Court decisions ruling against Westchester, and in the Settlement Order is the stark fact of residential racial segregation in Westchester. Yet **Westchester's submission fails entirely even to acknowledge the existence of segregation, let alone discuss its scope.**[23] There is no discussion of where the most

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[21] *The New Oxford American Dictionary,* pp. 853 and1304, respectively (Oxford University Press, 2001).

[22] Westchester's unilateral decision to omit relevant benchmarks is discussed later in this report.

[23] The Settlement Order required Westchester to acknowledge the existence of residential segregation in the County, demanding that Westchester adopt policy to eliminate that segregation. Settlement Order, ¶ 31(c). Westchester has since sought to backtrack by changing the requirement from "elimination of de facto residential segregation," to the "elimination of *any* de facto residential segregation." *Cf.* Settlement Order, ¶ 31(c) *with* legislation adopted by the Westchester Board of Legislators (Appendix C-1 at p. 4). The stubborn resistance to confronting the reality of segregation is disturbing; as a practical matter the language change only emphasizes the fact that the obligation requires elimination of 100% of residential segregation.

segregated Census Blocks are located. What is the specific plan to counter that segregation? There is no discussion.

The other critical impediment to fair housing choice at the center of ADC's false claims case and its resolution is the municipal resistance to the development of segregation-reducing affordable housing. As noted previously, Westchester's own Housing Opportunity Commission has long recognized the existence of the problem. A letter from Westchester's Planning Department included in its current submission even makes passing reference to the fact that, "The major limiting factor in implementing County funds for fair and affordable housing development, used either alone or with other funding is the ability for the developer to gain building approvals from the city, town or village."[24]

Yet the submission refuses to grapple with municipal resistance at all. Where has that resistance been expressed? How has that resistance been manifested? How will the County meet its obligation pursuant to Settlement Order ¶ 7(j) to "use all available means" (including legal action) to overcome municipal resistance? A submission that fails to address these fundamental questions is no Implementation Plan at all.

C. Westchester continues to ignore the need to achieve residential desegregation

Subparagraphs (a), (b), and (c) of paragraph 7 of the Settlement Order set forth *municipal-level* criteria for where it is permissible to develop Affordable AFFH Units pursuant to the unit-specific obligations of the Settlement Order. But the Settlement Order goes beyond this baseline. First, it is clear from the structure of the Settlement Order itself that the goal is to

[24] Memorandum from Deborah DeLong to Susan Gerry, December 15, 2009, Appendix H-4 at p. 2.

create units in what are currently the least-integrated areas. That, for example, is why the number of units designated for municipalities with African-American populations of less than three percent and Latinos populations of less than seven percent is designated as a *minimum* (specifically a minimum of 630 units), whereas the number of units permitted in municipalities with somewhat higher percentages are designated as *maximums* (specifically, two groupings of no more than 60 units each).

Critically, however, the Settlement Order contains additional provisions relating to desegregation. These include the requirement that all of Westchester's housing policies and programs have as a goal the elimination of de facto residential segregation, Settlement Order, ¶ 31(a) and the provision that the Implementation Plan specifically assess the means by which the County can "*maximize* the development of Affordable AFFH Units in the eligible municipalities and census blocks with *the lowest concentrations of African American and Hispanic residents,"* Settlement Order, ¶ 22(f) (emphasis added).

Thus, the Settlement Order is not satisfied with having housing developed in "eligible" municipalities and census blocks – paragraph 22(f) takes that as a given. The point of the provision is to say that, within the overall universe consisting of "eligible" blocks, Westchester has to identify the means by which to maximize development on a particular type of block. **Westchester completely ignores it obligation to plan to achieve maximum desegregating effect with the development of the units in question.**

What the County does instead is engage in two transparent dodges. First, Westchester answers the question of what definitions are to be used in handling Census data, but fails to analyze the data and present information specifying the Census Blocks with the lowest

percentages of minority residents.[25] **Had Westchester been interested in compliance, it would, for example, have identified the fact that, within "first tier" eligible municipalities (African-American population of under three percent and Latino population of under seven percent) there are over 3,000 Census Blocks comprising over 130,000 acres and populated by more than 200,000 people where the population of each block is less than three percent African-American and less than seven percent Latino.** Indeed, within that total, over 40,000 acres are comprised of Census Blocks with an African-American population of less than *one* percent and a Latino population of less than three percent.[26]

Westchester's second dodge is to pretend that the Settlement Order only demands that municipalities and blocks be *identified* for the purpose of determining whether percentages of minority residents exceed the percentages allowed under Settlement Order, ¶ 7. Indeed, the appendix specifically entitles its discussion "Determining *eligibility* of municipalities and blocks" (emphasis supplied).[27]

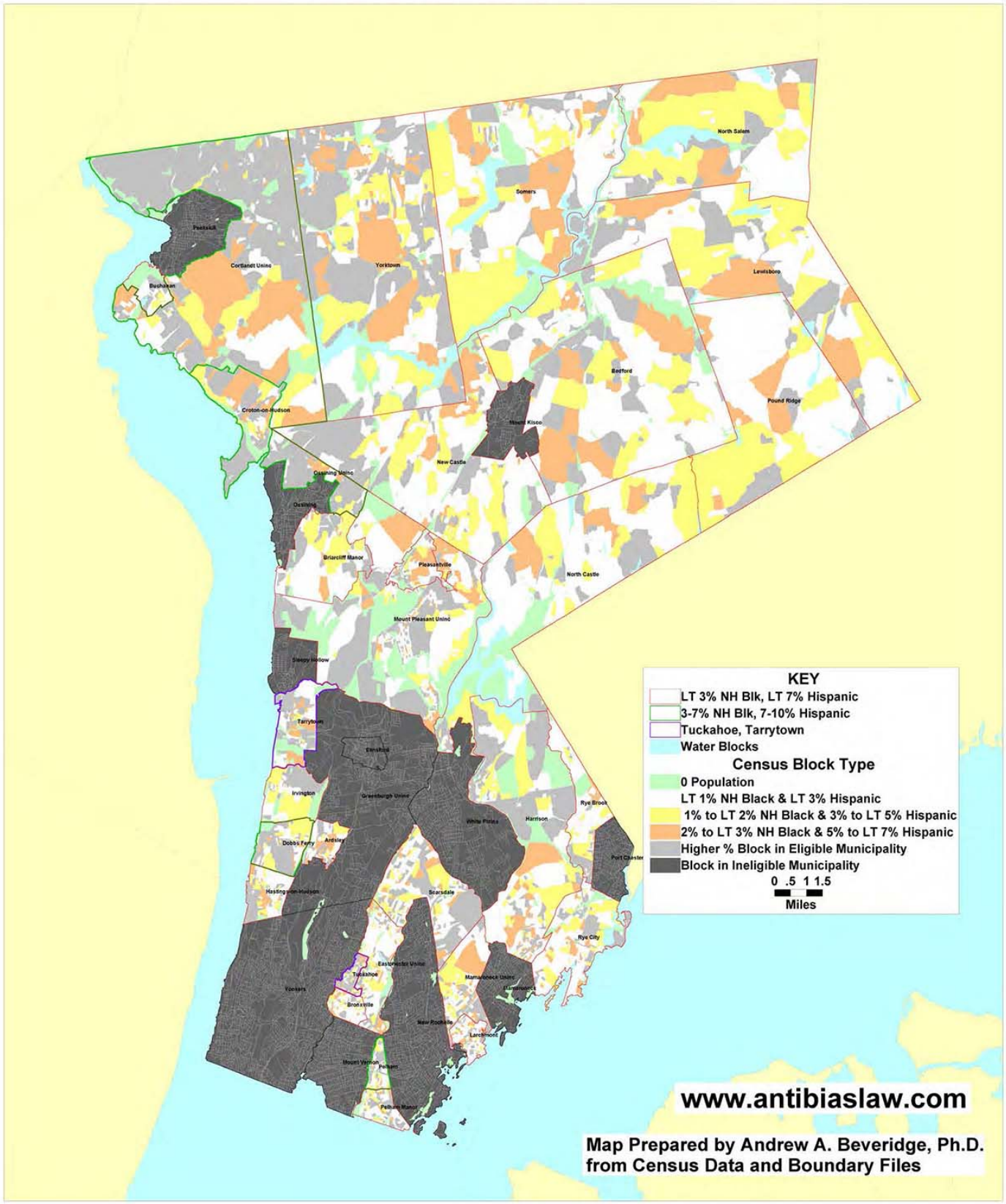
In fact, Settlement Order, ¶ 22(f) demands that Westchester set forth the *means* by which to maximize development on blocks with the lowest concentrations of African-Americans and Latinos. Thus, **a good faith submission could not have failed to identify salient barriers to the development of housing that maximizes desegregation** (*e.g.,* the blocks involved tend to have multi-acre zoning for even a single dwelling unit, tend only to permit single family homes,

[25] Appendix H-1.

[26] A map identifying both eligible municipalities and the demographic composition of Census Blocks appears on page 14 of this report, and is also available online at antibiaslaw.com/classification. The three types of "eligible" municipalities are indicated by the use of different colors (white fill indicates a Census Block with a population of under one percent African-American and under three percent Latino).

[27] Appendix H-1 at p. 4.

Classification of Blocks in Settlement Based Upon Census Data and Boundary Files



etc.), **and could not have failed to identify the means by which to overcome those barriers** (*e.g.,* the County purchasing an interest in land of some representative exclusionary blocks, contracting with a developer to develop Affordable AFFH Units despite the barriers, and using all the tools available to the County to overcome such barriers as the municipality might interpose). Westchester did none of these things.

In sum, Westchester's claim in its submission to have addressed its Settlement Order, § 22(f) obligations is false. There is no discussion whatsoever of *what* (as a definitional matter) Westchester considers to be the subset of eligible Census Blocks with the "lowest concentrations" of African-Americans and Latinos; of *where* those Census Blocks are located; or of *how* (*i.e.,* by what means) Westchester intends (*i.e.,* plans) to accomplish the goal of maximizing development on such blocks.

Tellingly, the date set forth on Appendix H-1 is August 12, 2009. In other words, Westchester is presenting work product completed two days after the entry of the Settlement Order. The County did not take the opportunity to do more on this question in the ensuing five months.[28] The only reasonable conclusion is that Westchester *has no intention* of maximizing development on such blocks, a conclusion consistent with multiple other indicia of non-compliance reflected both in what is contained in the submission and what is not.

[28] The focus on "eligibility," not lowest concentration Census Blocks or the means on which to maximize development on those blocks, is reflected as well in Appendix H-2. That Appendix, also prepared last July, only outlines "eligible" political units, and contains no priorities for development. Note that ADC has not reviewed Appendix H-2 for accuracy.

D. Westchester continues to deny its authority over municipalities

For years, Westchester claimed that it was powerless do anything in relation to municipal zoning and development policies. That was a lie, a lie that gave aid and comfort to exclusionary municipalities. At the heart of the Settlement Order, therefore, were provisions designed to make certain that Westchester would no longer disclaim its authority and would no longer refuse to act to overcome municipal resistance to AFFH-promoting affordable housing.

The Settlement Order began with the recognition of two facts:

First, that "the development of affordable housing in a way that affirmatively furthers fair housing is a matter of significant public interest";[29] and

Second, that "the broad and equitable distribution of affordable housing promotes sustainable and integrated residential patterns, increases fair and equal access to economic, educational, and other opportunities, and advances the health and welfare of the residents of Westchester. . . and the municipalities therein."[30]

In other words, developing affordable housing that was AFFH-promoting was clearly identified as – and acknowledged by the County to be – an important County purpose.

The County was then required to acknowledge two things about "municipal land use actions" pursuant to state law:

First, that such policies and actions "shall take into account the housing needs of the surrounding region";[31] and

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[29] Settlement Order, p. 1, para. 1.

[30] Settlement Order, p. 1, para. 2.

[31] Settlement Order, p. 2, para. 1. The reference is to the *Berenson* doctrine, a state law doctrine that dates back to 1975. Under the *Berenson* doctrine, any party that owns or controls land may challenge a municipality's restrictive zoning on the grounds that such zoning does not take

Second, that such 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,"[32] the development of affordable AFFH housing having just been described as something that advances the health and welfare of the residents of the County.

The Settlement Order, finally, is unequivocal in stating that "it is appropriate" for the County to "take legal action to compel compliance" with state law doctrine if "municipalities hinder or impede the County in the performance of such duties" (*i.e.*, duties such as the development of AFFH-promoting affordable housing). The fact that legal action is contemplated is further underlined and directed by Settlement Order, ¶ 7(j). That provision states that where a municipality either hinders the development of Affordable AFFH Units or fails to take action needed to promote the development of Affordable AFFH Units, "the County *shall* use *all* available means as appropriate to address such action or inaction, including, but not limited to, pursuing legal action" (emphasis added).

The provision goes on to state an even broader, second requirement for Westchester to take legal action: "The County *shall* initiate legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH" (emphasis added). In other words, **the initiation of legal action is reemphasized as a required response to non-cooperation, and is done so in a manner that deals not only with unit-specific obligations but also with *any* action or**

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sufficient account of regional housing needs for multi-family housing. *Berenson v. Town of New Castle,* 38 N.Y.2d 102, 378 N.Y.S.2d 672 (N.Y. 1975).

[32] Settlement Order, p. 2, para. 1. The reference is to the *County of Monroe* doctrine, a state law doctrine that dates back to 1988. Under *County of Monroe*, 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. *Matter of County of Monroe (City of Rochester)*, 72 N.Y.2d 338, 533 N.Y.S.2d 702 (N.Y. 1988).

inaction on the part of a municipality that stymies or fails to promote the overall purpose of the Stipulation Order to AFFH.[33]

Even beyond the state law doctrines referenced in the Settlement Order, Westchester had another way to influence municipalities that refused to AFFH or that interfered with Westchester's efforts to do so. As one of the requirements for receiving federal housing funds, Westchester was required by HUD to enter into cooperation agreements with its municipal grant-receiving partners. As the Court found, the agreements provided that "the County is prohibited from expending community development block grant funds for activities in or in support of any local government that does not affirmatively further fair housing within its jurisdiction or that impedes the County's action to comply with its fair housing certifications."[34]

With all this attention in the Settlement Order and from the Court to Westchester's rights and responsibilities in relation to municipalities, and with the certainty that at least some

[33] Some Westchester officials have tried to take refuge in what was actually a failed 11th hour effort to change the terms of the Settlement Order. Members of the County Legislature sought in September 2009 (prior to final legislative approval) to limit the universe of situations where the Settlement Order required the County to take legal action. This attempt was rejected, with the U.S. Attorney's Office for the Southern District of New York properly noting that the Settlement Order is a fully-integrated document that speaks for itself." Letter from James Cott to Stuart Gerson, September 21, 2009. The letter goes on to make the unexceptional point that it is Westchester that makes judgments in the first instance about its Settlement Order ¶ 7(j) litigation obligations (*i.e.,* what particular circumstances in respect to what particular municipalities merit the initiation of litigation). *Id.* The letter is just as clear that the County's decisions are subject to the assessment of the Monitor as to whether those decisions are compliant with the Settlement Order. *Id.* The letter does nothing to change either the mandatory nature of the requirement on the County to use all tools, including litigation tools, as appropriate, and does nothing to alter or amend the acknowledgment in a different part of the settlement (Settlement Order, p. 2, para. 1) that "it *is* appropriate" to take legal action against resistant municipalities (emphasis added). Finally, it is important to understand that only those acting in bad faith would use the phrase "as appropriate" to be a license for an *a priori* decision *never* to act *regardless* of circumstances. The phrase "as appropriate" properly recognizes that, in connection with dozens of municipalities, there will be some circumstances where legal action will be appropriate, and other circumstances where it will not.

[34] ADC, supra, at * 2-3. Slip. Op. at 6.

municipalities will continue to resist AFFH-promoting affordable housing, one would think that an Implementation Plan would both discuss these rights and obligations extensively.[35] Part of that discussion would be roadmap of how Westchester was going to take steps to acquire interests in land and how, while it preferred cooperation from municipalities, the County needed to put municipalities on notice that Westchester would indeed use all available means, including legal action, to see that AFFH-promoting affordable housing was going to get built where it needed to get built – with or without municipal cooperation.

Nothing.

No discussion; no planning.

Nothing.

In truth, Westchester's submission is in this respect actually worse than nothing. Westchester is back to claiming that it does not have any authority over municipalities, a claim in direct contravention of its Settlement Order representations and obligations. Under "Policy and Planning Tools," Westchester states flatly that, "The County of Westchester has no independent land use control or authority. Rather, pursuant to the New York State Constitution, the authority to impose zoning and land use controls resides in the local municipalities."[36] Likewise, a similar claim appears in an appendix: "pursuant to New York State Law, zoning is a matter of local authority for which the County currently has no jurisdiction." [37]

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[35] Such a discussion would of necessity include the fact that Westchester, like any entity that had or that acquired an interest in land, had the authority to challenge exclusionary zoning and other local development barriers as having a disparate impact on the basis of race under the federal Fair Housing Act. *See, e.g., Huntington Branch, NAACP v. The Town of Huntington,* 844 F.2d 926 (2nd Cir. 1988).

[36] MS 6.

[37] Appendix H-4 at p. 4.

No one, or course, has ever stated that an entity other than the locality has *in the first instance* the power to zone and impose land use controls. But Westchester presents this as the whole story, when, in fact, this initial power is *limited* by the various state and federal doctrines previously discussed in this section.

Indeed, Westchester is even beating a retreat as to the fact acknowledged in the Settlement Order that AFFH-promoting affordable housing is a County purpose, and an important one at that. The Settlement Order requires Westchester to eliminate a municipality's right of "first refusal" with respect to Fair Housing or Affordable Housing land purchases by the County."[38] Legislation introduced this year to comply with the provision initially had a provision designed to clarify and confirm the fact that "furthering fair and affordable housing constitutes a county purpose."[39] Ultimately, however, the confirmation of County purpose was dropped. *See* Appendix C-2, with the Chair of the Committee stating at the February 1, 2010 meeting that, "We're sidestepping the "county purpose' question."[40]

Westchester's refusal to acknowledge its authority (or appropriate County purposes), let alone begin to plan to use its authority, fatally compromises the integrity of its entire submission.

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[38] Settlement Order, ¶ 25(c). Note that the provision is another instance where the Settlement Order is contemplating that Westchester will indeed be making such purchases.

[39] Memorandum accompanying draft legislation considered at January 25, 2010 meeting of the Housing and Planning Committee of the Westchester Board of Legislators.

[40] The memoranda accompanying the drafts contained an identical, and telling, error. Each quotes Settlement Order, ¶ 25 (c) as required the elimination of the right of first refusal in respect to "fair and affordable" housing land purchases by the County. *See, e.g.,* Appendix C-2 at p. 2. In fact, Settlement Order, § 25(c) does not reference "fair and affordable" housing land purchases, it references "Fair Housing" *or* "Affordable Housing" purchases. The Settlement Order has no problem recognizing two separate categories; Westchester is so committed to its concept-conflating strategy that it misquotes the Settlement Order to maintain its fiction.

Local zoning is consistently taken as a given, something to be adapted to, rather than something to overcome. As such, the submission avoids seeking to develop in the most segregated blocks (the blocks where exclusionary zoning tends to be most ubiquitously in place), and municipal resistance is encouraged ("the County is not prepared to take us on"). Finally, Westchester loses the leveraging effect that decisive County action would stimulate.[41] In sum, Westchester's refusal to acknowledge its authority reflects the fact that its submission, as noted earlier, is a plan for maintaining the status quo, not for implementing the Settlement Order.

E. Westchester continues to encourage the perpetuation of segregation

The Settlement Order is devoted to remedying Westchester's past abuses and insuring genuine implementation of AFFH policies. Accordingly, the last thing that Settlement Order would tolerate would be the licensing or encouraging of any conduct that perpetuated segregation. Westchester knew this when it was developing a model inclusionary housing ordinance [as required by Settlement Order, § 25(a)(1)], and knew this when it was developing a policy to limit public funds to those municipalities that committed to banning "local residency requirements and preferences and other selection preferences that do not AFFH [as required by Settlement Order, ¶ 25(d)(1). In fact, Westchester frankly acknowledges that the Settlement Order "provides largely unequivocal guidelines as to the content of both the model zoning ordinance and the discretionary spending policy."[42]

[41] Were private developers to see that Westchester overcoming zoning barriers, pent up interest from those developers in building context-sensitive affordable housing would be released.

[42] Letter of Deputy County Executive Kevin J. Plunkett to Westchester County Municipal Officials, January 29, 2010, p. 3 [Appendix D-1(ii) at p. 2].

Despite this, Westchester has gone ahead and presented a model zoning ordinance that provides for two types of preferences.[43] The preferences are incorporated as well into Westchester's "Discretionary Spending Policy,[44] and into the "Fair and Affordable Housing Affirmative Marketing Plan."[45]

One preference is a specialized senior citizen preference. The Settlement Order itself specifically provides that a maximum of 25% of all units may ultimately be "senior units." Settlement Order, ¶ 7(f).[46] But that is not what Westchester has done. Westchester wants each municipality to write into their zoning ordinances the ability to condition approval on a developer granting preference for *all* senior units to a current resident of the municipality (or to an immediate family member of a current resident of the municipality). **This is a particularly brazen attempt to violate the Settlement Order (and the Fair Housing Act).**

First, the ability to reserve units for seniors (without reference to residency) is an exception to the general Settlement Order rule of no preferences. The 25% maximum was a negotiated cap. To change a general senior preference into a residency preference in connection with senior units would violate principles of construction of agreements even absent additional Settlement Order language.

Second, there *is* additional Settlement Order language. As specified in Settlement Order, ¶ 25(d)(i), Westchester's policy is supposed to condition the receipt of a variety of County funds

[43] Appendix D-1(i) at p. 1.

[44] Appendix D-2 at p. 1.

[45] Appendix E-1 at p. 10.

[46] Note, however, that, pursuant to the same provision, no such units may be funded until at least 175 non-senior units have received building permits.

on a municipality's acting to "ban local residency requirements and preferences…" The preference proposed is a local residency preference directly in violation of this language.

Third, even if the foregoing language did not exist, the municipalities are supposed to ban "other selection preferences that do not AFFH." Settlement Order, ¶ 25(d)(i). A preference for seniors residing in a municipality over those who do not reside in the municipality simply does nothing to AFFH.

Fourth, there is the little matter of complying with the Fair Housing Act. Where a municipality is segregated, a preference for residents invariably perpetuates segregation to a greater extent than would an open selection process that did not have such preferences. The resulting disparate impact (based on race, for example) violates the Fair Housing Act.

The second preference that Westchester seeks to insert fares no better than the first. This is a preference (available for one in every three units) for households that have a member who is employed or who volunteers for the municipality in question or for a contiguous municipality.[47]

Here again, Westchester had the opportunity to seek to have such preferences placed in the Settlement Order; there is no warrant to allow their importation now.

Moreover, as with the resident senior preference, this preference runs afoul of Settlement Order, ¶ 25(d)(i). A ban on preferences that "do not AFFH" is more than a ban on preferences that perpetuate segregation. A preference must be banned unless it is shown that the use of that preference itself is AFFH-promoting more than the absence of the preference. This Westchester does not attempt to do in its submission, and this Westchester cannot do. The African-American and Latino populations of Westchester as a whole (not to mention the population of New York City) is in general much higher than the African-American and Latino workforces of the most

[47] Appendix D-1(i) at p. 1.

highly-white municipalities where housing is supposed to be developed (a fact not discussed in Westchester's submission). Thus, a rule of open selection is actually the course that maximizes the AFFH potential of the units being made available.

Finally, it is quite likely that in many cases (not necessarily all) that the application of the workforce preference will operate to create a disparate impact based on race in violation of the Fair Housing Act. Westchester gives no indication in its submission that is has considered this question, provides no data on it, and sets forth no plan to study it. Notably, Westchester, disdaining an interest in its own workers, did not bother to propose a preference of any type for County workers. The reason is clear: a preference for County workers regardless of their current residence does not satisfy the desire to exclude "outsiders," particularly in view of the fact that the percentage of County workers who are African-American or Latino is higher than that of the workforces of most or all of the exclusionary communities.[48]

As Westchester admits, coming up with its scheme was a "challenging task" in view of the "largely unequivocal guidelines" set forth in the Settlement Order. Why then did Westchester take this course? The County itself admits that it was not simply engaged in the process of *implementing* the Settlement Order, but claims to have been trying *balancing* the commands of the Settlement Order with "the home rule rights and interest of the local municipalities."[49] **Leaving aside the fact that Westchester's "balancing" tilted heavily against the Settlement Order, federal court orders are not, in any event, supposed to be "balanced." They are supposed to be obeyed.**

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[48] Note, however, that a County worker preference also does not AFFH in comparison to an open selection rule.

[49] Letter of Deputy County Executive Plunkett, *supra,* at p. 1 [Appendix D-1(ii) at p. 2].

F. Other problems with Westchester's inclusionary zoning and funds-withholding proposal

Westchester limits the reach of the Settlement Order requirement that new development contain a percentage of affordable units; completely ignores the fact that inclusionary zoning relates not only to a required minimum percentage of affordable units within a particular project, but relates as well to *where* such projects can be developed; and both limits and fails to set forth with specificity the circumstances under which the County will, as required, withhold funds from AFFH non-compliant municipalities.

Westchester did recognize that it had a Settlement Order obligation to "develop a model ordinance to advance fair housing in the local municipalities."[50] That model ordinance was supposed to include a requirement that new development projects, without limitation, include a percentage of affordable units. Settlement Order, ¶ 25(a). In Westchester's submission, however, the requirement is turned into a requirement only applicable to projects of 10 or more units. As such, a variety of potential smaller projects would contain no requirement.

One reason for Westchester's addition of a restriction not mentioned in the Settlement Order is that Westchester has pegged the minimum percentage of affordable units in a development at a paltry 10% of the total. In other words, using Westchester's model, even if developments smaller than 10 units had an obligation to include affordable units, the 10% rule would not yield a unit. Westchester could have easily crafted a proposal that tracked the 80/20 program (20% affordable), or have made specific provision for an absolute number of affordable units regardless of the small size of a development, or even been more bold and required a higher percentage. Westchester did none of these things.

[50] MS 6.

In combination with the County's efforts to import improper preferences into the process, the "model" is a model of inadequacy. Take, for example, a 40-unit development that operated with Westchester's proposed preferences and minimum. Only four units would have to be affordable units. Of these four, one could be designated a senior unit, and that unit would go to the existing resident of an overwhelming white municipality. Of the other three units, one could go to a municipal worker of that same overwhelmingly white town, a person more likely to be white than an income-eligible person drawn from the broader New York metropolitan area generally. Even if one assumed minority participation in a lottery of as much of 50 percent,[51] we are now talking about the odds of a 40-unit development yielding one affordable housing unit that actually made demographic change on the ground.

Clearly, this is not the scope of headway contemplated by a Settlement Order that required Westchester to commit to the ending of de facto residential segregation throughout the County. Other tools are obviously required. **Anyone who has ever worked on inclusionary zoning issues recognizes that inclusionary zoning in a suburban context has at its core the expansion of areas in which multiple dwellings can be built.** Westchester could have built in this type of inclusionary zoning provision into its "model ordinance" (*e.g.,* a provision that permitted, for development that included a significant percentage of affordable units, higher density in what are now zoning districts that only permit one single family dwelling on an acre or more). The Settlement Order not only contemplated that the model ordinance would have additional provisions relating to inclusionary zoning (those specified were described as being "among others things" that the model ordinance would have), Settlement Order, § 25(a)(i), the

[51] An unduly optimistic assumption given the problems in the Affirmative Marketing section of Westchester's submission, discussed *infra* at pp. 33-36.

Settlement Order requires the County to condition the use of public funds on municipalities agreeing to actively implement the Settlement Order "through their land use regulations and other affirmative measures to assist development of affordable housing." Settlement Order, ¶ 25(d)(iii). Thus, a model ordinance that dealt with promoting specific land use changes was an obvious and essential tool.

Westchester just did not use this tool. That is to say, even in the face of multiple indicia all pointing to the need to do so,[52] and even in the face of the Settlement Order requirement that Westchester adopt a policy recognizing that "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 [Settlement Order, ¶ 31(c)]…in the face of all of this, and in the face of the Settlement Order provisions previously discussed in this section, **Westchester refused to propose a tool that would widen the areas where Affordable AFFH Units could be built as-of-right.**

The Settlement Order requirement that Westchester condition funding for municipalities on those municipalities actively furthering implementation of the Settlement Order "through their land use regulations and other affirmative measures to assist the development of affordable housing," Settlement Order, ¶ 25(d)(iii), has also not been properly satisfied by the submission.

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[52] *E.g. ADC Summary Judgment Decision, supra,* 2009 WL 455269 at *10, Slip Op. at 25 ("The County admits that it did not undertake an analysis of whether the production of affordable housing between January 1, 1992 and April 1, 2006, had the effect of increasing or decreasing racial diversity in the neighborhood in which the housing was built"; Report of Professor Andrew A. Beveridge, June 16, 2008 ("Beveridge Report"), p. 12, *available online* at antibiaslaw.com/beveridgereport (the placement of affordable housing in the County "serves to intensity and perpetuate the patterns of segregation in the County"); and Report of Professor Andrew A. Beveridge, August 13, 2008, p. 1, *available online* at antibiaslaw.com/beveridgefollowup ((a follow-up analysis finding that "the location of County-funded affordable housing is disproportionately in census tracts with high concentrations of African Americans and Hispanics").

The provision includes, but is not limited to Westchester funding involved beyond CDBG and Open Space funding.[53] Settlement Order, ¶ 25(d). Westchester's submission tracks this language, but fails to specify, plan for, or otherwise disclose the specifics of other funding intended to be withheld from resistant municipalities. Moreover, by failing in its "model ordinance" to promote the expansion of where multiple dwellings may be zoned when they include an affordable housing component, Westchester either intends (or at the very least has conveyed to municipalities) that the term "inclusionary zoning" is intended to have only the limited meaning set forth in the "model ordinance" (*i.e.,* including a requirement for a minimum percentage of affordable units where developments of at least 10 units can already be built). This policy does not adequately capture the intended broad mean of inclusionary zoning and does not implement the Settlement Order.

III. Additional major deficiencies in Westchester's submission

There are so many ways that Westchester's submission is inadequate that it is impossible for a preliminary report to identify all such inadequacies, and this report does not purport to do so. On the contrary, ADC urges HUD, the Monitor, and civil rights organizations to examine Westchester's submission closely because more examples of defiance of the Settlement Order will undoubtedly be found. There are, however, several more areas of major concern that must be discussed now.

[53] Appendix D-2; MS 6.

A. Accepting and embracing barriers to fair housing choice rather than fighting them

Westchester's AFFH obligations did not end with the resolution of ADC's lawsuit. The County continues to receive CDBG and other federal housing grants, and, separate from and supplemental to its Settlement Order obligations, the County remains under an obligation to take the steps necessary to overcome barriers to fair housing choice.

Westchester's submission reflects the fact that the County is still operating from the premise that the existence of a barrier to fair housing choice is an excuse *not* to act. Westchester should have recognized that the existence of such a barrier is, by contrast, an urgent call for an action plan to promptly and forcefully overcome that barrier. Westchester's failure to recognize that need infects its entire submission; the failure is the opposite of what an Implementation Plan requires.

Westchester's "process and approach" to "ensure" required development is set forth in less than two full pages of its submission.[54] Part (a) of the "process and approach" section sets forth site identification priorities. One crucial aspect of the deficiency here has already been discussed: maximizing desegregation potential – the goal of the Settlement Order – does not form any part of the priority system. There are no AFFH priorities. But the priorities that are delineated paint an even bleaker picture. **Westchester's priorities actively avoid the kinds of impediment-overcoming actions that are necessary. The fundamental premise is: "Don't do anything that will upset the locals."**

[54] MS 16-17.

Thus, vacant properties are considered based, *inter alia,* on "existing land use [and] zoning,"[55] a consideration that validates rather than challenges policies of exclusion. Improved properties likewise bow to existing land use and zoning.[56]

Westchester was specifically required to, "Assess the availability of vacant land suitable for development and adaptive reuse opportunities…" Settlement Order, ¶ 22(a). Westchester did submit a map of the County showing the existence of over 11,000 vacant parcels of 5,000 square feet or larger, including **close to 10,000 vacant parcels that are currently zoned for residential use.**[57] **The vacant residential parcels include 205 over 10 acres each.**[58] Nevertheless, Westchester resorted to its reflexive excuse to refuse to conduct this assessment seriously: because of what is described as a "vast array of impediments to development," including zoning and land use restrictions," Westchester characterized the "exercise" (a curious way to describe a Settlement Order obligation) as not "instructive."[59]

To be clear: **Westchester is taking the position that not a single parcel of vacant land in the County is suitable for the development of housing.**[60] Westchester does not provide any details about any parcels or identify those parcels that have the most significant desegregation

[55] *Id.* at para. (a)(iii).

[56] *Id.* at para. (a)(iv).

[57] Appendix H-6. Note that the parcels exist throughout the County, so that the subset of parcels appropriate for development in the areas with the lowest concentrations of African-Americans and Latinos is somewhat smaller.

[58] *Id.*

[59] MS at 16, para. (b).

[60] *Id.*

potential. It is simply impossible to square this posture with a credible belief that Westchester is operating in good faith.

There is yet more evidence of brazen non-compliance when one examines what Westchester had to say about its "[a]ssessment of existing housing and other development opportunities which could be adapted to fair and affordable housing."[61] **Westchester says nothing – the section is blank.**

When Westchester comes to its "Post Site-Identification Property Evaluation Process/Criteria,"[62] the County again validates rather than challenges impediments. As a preliminary matter, we note that desegregation potential is not among the 10 listed criteria.[63] Moroever, "local zoning/density/set back requirements" and "local municipal master planning" are listed considerations, without any indication of how or when those considerations need to be overridden.[64]

Finally, Westchester's discussion of financial considerations reflects its refusal to recognize that the cost of development is greatly influenced by what the zoning rules are. Cost is not immutable – particular zoning generates particular costs; upzoning (*i.e,* permitting greater density) lowers the cost per unit, often significantly. To ignore this basic fact of development life is to ignore a critical means by which Affordable AFFH Units could more easily be developed. In a real Implementation Plan, Westchester would have (at least through illustration)

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[61] MS at 17, para. (c).

[62] *Id.,* para. (d).

[63] *Id.*

[64] *Id.,* para. (d)(ii) and (iii). The section also lists "land use (history/legal concerns)," a particularly opaque characterization that ought to be explored. *Id.,* para. (d)(viii).

identified development with high desegregation potential that could be achieved if the County either secured municipal cooperation or else proceeded, using its authority, in the absence of such cooperation. Instead, **Westchester treats current zoning (and hence current costs) as a given,[65] constricting substantially the number of potential sites that will be perceived as "realistic."**

This section is one of a number where Westchester references "municipal and community input"[66] and "municipal concerns."[67] As another example, every parcel, whether County-owned or recommended to the County," will be "vetted" for issues including "municipal cooperation."[68] ADC recognizes that municipal input is desirable, but also recognizes that **the goals of the Settlement Order cannot be achieved if municipalities that come to the table in good faith are treated identically to those who do not.** Westchester's submission does not even begin to suggest that it recognizes this point, and unmistakably conveys the message that Westchester has no intention to overcome, let alone have a plan to overcome, municipal resistance.

Westchester's "process and approach" could have been written before or during ADC's litigation. It represents an effort to preserve the status quo, not to turn the page.

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[65] *Id.,* para. (e).

[66] *Id.,* para (d)(ix).

[67] *Id.,* para. (e).

[68] Appendix H-3(vi).

B. The Affirmative Marketing described in the submission is non-compliant

Lots of people in Westchester County do not like the fact that, pursuant to the Settlement Order, affordable housing in Westchester County has to be affirmatively marketed to people living outside of Westchester, especially people in places like New York City (where the number of African-Americans far exceeds the total population of Westchester, as is the case with the number of Latinos in New York City).[69] To combat that resistance, and to comply with the Settlement Order, **any real Implementation Plan would be especially careful to make sure that affirmative marketing *effectively reached* income-eligible households in New York City, and helped create the conditions whereby individuals in such households felt that they would be welcome *anywhere* in Westchester County**. Westchester's does not do this; moreover, Westchester's submission fails even to recite accurately what its Settlement Order obligations are in connection with affirmative marketing.

The obligations of Settlement Order, ¶ 33 are *not* unit-specific. On the contrary, they are part of what is described as Westchester's "additional obligations to AFFH." Settlement Order, ¶ 33. Several mandatory obligations are set forth; one of those obligations is that *Westchester* shall

> affirmatively market affordable housing within the County and in geographic areas with large non-white populations outside, but contiguous or in close proximity to, the County, and include in all agreements between the County and a developer requirements that the developer meet these same affirmative marketing requirements and hire consultant(s) to carry out outreach activities where appropriate.

Id. Thus, separate and apart from what Westchester has developers do, it – the County – must affirmatively market affordable housing outside Westchester in areas like New York City.

[69] If one has any doubt about the present-day existence in Westchester of hostility to "outsiders" that is race- and or class-based, then one should examine a sample of the comments made about the Settlement Order just in the two weeks after it was announced. ADC sent such a sample to the Monitor in August 2009, and that sample is annexed to this Report as Appendix A.

Westchester's submission contains no plan for Westchester to do this. The "Fair and Affordable Housing Affirmative Marketing Plan" says what it is: "a guide to assist Developers who are applicants for Westchester County housing funds…"[70] Westchester itself is not undertaking affirmative marketing of affordable housing outside the County.[71]

Reinforcing the problem are additional elements that will also undercut the desegregation potential of the marketing, even where the underlying concept is sound. For example, the use of a web-based centralized intake and housing outreach mechanism[72] does have excellent AFFH potential. But asking participants to identify geographic areas of interest[73] *without having educated "outsiders" to the features and amenities of different areas* will invariably mean that "insiders" are more likely to request a geographic area, particularly an exclusionary one. This is a problem that an Implementation Plan is supposed to address.

If the Settlement Order had intended to limit affirmative marketing outside of Westchester to areas contiguous to Westchester, it would have said so. In fact, the Settlement Order includes geographic areas with large non-white populations that are "in close proximity" to Westchester in the affirmative marketing obligations. That means first and foremost New York City. Yet, somehow, the publications listed in the commercial media section of the Affirmative Marketing Plan do not include any New York City publications, and the requirement to identify general circulation publications conspicuously omits New York City as a whole,

[70] Appendix E-1 at p. 1.

[71] *See* MS 9; Appendix E-2 "Centralized Intake &Housing Outreach Plan"; Appendix F(ii) ("Fair Housing Outreach & Education Plan")

[72] Settlement Order, ¶ 33(f); Appendix E-2.

[73] Appendix E-2 at p. 1, para. (a)(5).

referencing instead only areas contiguous to Westchester (the four areas named are the Bronx, Connecticut, Rockland County, and Putnam County).[74]

This omission would be of less concern if it were not indicative of a **general disregard of obligations as they relate to marketing to residents of New York City.** Westchester could easily have planned for intergovernmental cooperation, including, for example, asking New York City to include a link to Westchester's informational website on New York City's widely used housing information site.[75] It did not do so.

Westchester also neglects to grapple with a critical problem in connection with any consumer product, including residential neighborhoods: how to overcome inhibitions that members of some demographic groups might feel about the product. The way producers of consumer products try to overcome these inhibitions (*i.e.,* causes for underutilization of the product) is *to ask.* Once the inhibitions are understood, both substantive and marketing changes can be made to encourage greater use. It is not an unreasonable hypothesis to suppose that, for a variety of reasons, some African-Americans and Latinos might entertain some qualms about living in (or may not have sufficient information about) one the 12 Westchester municipalities where the African-American population and Latino population is less than one percent each, or in one of the 10 Westchester municipalities where the African-American and Latino population is under two percent each.[76] **Westchester's submission does not address the question of how to identify the existence of inhibitions, let alone the methods to overcome such inhibitions that are confirmed to exist.**

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[74] Appendix E-1 at p. 6, para. (a).

[75] *See* www.nyc.gov/html/housinginfo/html/home/home.shtml.

[76] These figures are from the 2000 Census.

Finally, it is not enough that developers make notice of available housing opportunities online; developers should also be required to make the applications themselves available online (the anomalous method of having people read online that they have to send in a postcard to a developer to get an application (as many people have told ADC over time) is not reliable method. Westchester's "homeowner/tenant selection procedures" only require a developer to identify how applications will be made available, but do not specify online availability.[77]

We need to be blunt: in a world where everyone was trying to do the right thing, more affirmative marketing plans would actually work. But there is a long history of affirmative marketing being mere window dressing, and, as specified above, there are particular concerns about Westchester's lack of planning in respect to out-of-County income-eligible households. This concern is magnified by the fact that there will be a continuing and intense urge in many quarters to cheat (*i.e.,* undermine affirmative marketing using a variety of devices designed to put existing residents of a segregated town in a privileged position in relation to the application process). The Monitor must demand an actual plan "setting forth with specificity" (Settlement Order, ¶ 18) how broad-based affirmative marketing, including that for prospective out-of-County applicants, will be more than a fig leaf.

C. Westchester's obligations beyond the unit-specific

The obligation to affirmatively market is one example of Westchester's Settlement Order obligation that goes beyond the "750 units" that have been the most discussed feature of that document. There are many others. Among those that are especially important to be integrated into implementation planning is the one discussed in this section.

[77] Appendix E-1 at p. 10, para. (6).

Westchester's housing policies and programs all must incorporate as goals "the elimination of discrimination, including the present effects of past discrimination, and the elimination of de facto residential segregation." Settlement Order, ¶ 31(a). Westchester's submission goes as far as saying that a policy consistent with this language has been adopted, but no farther. The problem is obvious. The creation of 750 Affordable AFFH Units is not a process that exists in a vacuum; rather, it is a process that is supposed to exist in an environment where all efforts are being made on all fronts to eliminate de facto residential segregation. Westchester's submission does not discuss what it plans to do, if anything, specifically to implement this overarching policy. **Just like an Analysis of Impediments is supposed to represent a substantive obligation and not be mere boilerplate, so, too, is a policy to eliminate residential segregation.**

One very conspicuous omission from Westchester's submission is the state of, and plans for, the goals of the Housing Opportunity Commission. During the litigation, ADC assessed where municipalities were in terms of the affordable housing units they were supposed to see developed within their borders by 2015. It turns out that the municipalities that are "eligible" for development under the terms of the Settlement Order collectively have an unmet obligation of *more than 6,000 units.* In other words, the minimum number of Affordable AFFH Units required by the Settlement Order is less than one-eighth the number that Westchester had believed these municipalities should have developed (but have not). Westchester's treatment of the development of 750 units as a difficult challenge is clear evidence that it has no intention to see that the more than 6,000 units gets built. And walking away from the larger number of units is directly contrary to the obligation to try to end housing segregation using all of the County's housing policies and programs. An Implementation Plan simply must talk to these issues.

IV. Westchester's submission is intentionally evasive and non-specific

As demonstrated in this Report, the non-compliant essence of Westchester's submission is easy to discern (as is the County's non-compliant intentions). It is clear, in other words, what Westchester is *not* going to do (most notably, either grapple with municipal resistance or maximize desegregation as contemplated by the Settlement Order). This non-compliance is made even more clear by approaching Westchester's submission from another direction: that is, **"How much more does Westchester's submission tell us about the *specifics* of what the County *is* actually going to do than we knew prior to the submission?" The answer, unfortunately, is "not much."**

Westchester blithely *declines* to provide benchmarks as required by the Settlement Order with the argument that the Settlement Order itself "provides very specific and ambitious benchmarks for the development of the required housing units…"[78] This posture is disingenuous in the extreme.

It is not for nothing that the Settlement Order requires that the Implementation Plan "set forth *with specificity* the *manner* in which the County plans to implement its Affordable AFFH Unit obligations. Settlement Order, ¶ 18 (emphasis added). The very next paragraph of the Settlement Order requires "proposed timetables and benchmarks for the first six-month and one-year periods and for each year thereafter." Settlement Order, ¶ 19. This requirement cannot fairly be read as simply a requirement for when specific numbers of units have financing in place or have building permits, the subject of Settlement Order, ¶ 23. The various aspects of the steps Westchester must take to achieve compliance *themselves* need benchmarks established, with appropriate time frames linked thereto. Likewise, the Settlement Order requires that Westchester

[78] MS 19.

"specify steps and activities that will be needed" to meet the unit creation benchmarks. Settlement Order, ¶ 24. Indeed, the Settlement Order contemplates that those steps and activities will be specific enough and sufficiently time-specific to be able to be designated by the Monitor as additional benchmarks enforceable like any other term of the Settlement Order. *Id.* Westchester has just opted not to provide such specificity about steps and activities.[79]

Westchester's decision to take this approach is particularly troubling given its assertion that there are "anticipated challenges" in meeting the "basic compliance deadlines" (*i.e.,* those Settlement Order, ¶ 23 benchmarks including having a minimum of 100 units with financing in place by 2011 and having a minimum of 750 units with building permits in place by 2016). **If there are anticipated challenges, it is especially important to plan to overcome those challenges.** For example, it is always the case that a significant percentage of developments initially planned do not reach fruition. Given that basic fact, the only way to plan to wind up with at least 750 completed units is to plan to have many more than 750 enter the pipeline. As another example, the chances that there will be significant municipal resistance to the Settlement Order are 100% (as already demonstrated in comments from municipal officials over the last several months). The only way to plan to succeed is to incorporate means by which to overcome such resistance. Westchester's submission has not a hint of a trace of a plan to deal with either of these examples; does not identify the other "anticipated challenges," and does not plan to overcome those unspecified anticipated challenges.

Westchester is likewise vague and non-compliant when it comes to the issue of a revolving fund. The Settlement Order requires Westchester to "[e]xplore and implement

[79] Westchester does not even distinguish between its site selection priorities for existing units that need to be converted to affordability (a maximum of 25% of the total units) and new construction, let alone specify time-specific benchmarks for conducting site selection.

mechanisms by which the monies made available pursuant [to the Settlement Order], and proceeds from the expenditure of those funds, can be placed in a revolving fund dedicated to the development of Affordable AFFH Units. To the extent there are obstacles to doing so, the County shall identify the obstacles in writing to the Monitor and any steps that can be taken to overcome the obstacles." Settlement Order, ¶ 22(e).

Westchester's submission contains a Planning Department letter relating to the use of Revolving Funds,[80] but the submission does not comply with the Settlement Order requirements. The letter asserts an "understanding" that "there is a NYS Constitutional prohibition on the gift of loan or public funds to private entities,"[81] but does not either explain why this provision would bar a Revolving Fund, does not identify "any steps that can be taken" to overcome that perceived obstacle, and does not discuss ways to structure a revolving fund that would not run afoul of the perceived obstacle.

Westchester's submission might leave the impression that the County is, in fact, committed to the use of a revolving fund for some portion of the Settlement Order monies. In fact, an examination of submission shows that **Westchester is not committing to set aside a single dollar in a *dedicated* Revolving Fund, but rather is reserving to itself a future decision as to whether *any* funds will be used for revolving purposes.**[82] Having all funds comingled in a single account is not the same as creating a revolving fund, and making a vague statement that funds will be used "as appropriate" on a "project-by-project" basis is not the same as engaging in implementation planning.

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[80] Appendix H-4.

[81] *Id.* at p. 1.

[82] MS 15.

Westchester's strategy of playing its cards close to the vest is not *always* wrong. For example, Westchester notes some legitimate concerns that "site specific inquiries and preliminary transactional terms" potentially impairing "the viability of potential projects."[83] **But Westchester does not narrowly tailor a concern about release of information – it tells us nothing about what it expects from municipalities or about what commitments (if any) it has gotten from municipalities.** Westchester's submission tells us nothing about the Census Blocks on which development would maximize the desegregation goals of the Settlement Order. Westchester's submission tells us that it met with developers, as required by Settlement Order, ¶ 22(b), in order to "determine their interest in furthering developments that will AFFH"), but incorporates nothing about what it learned into the plan. There are further examples too numerous to list here. Suffice it to say: "If you have a question about the specifics of implementation, Westchester's submission most probably does not answer it."

Westchester's submission was supposed to be a complete and comprehensive roadmap for implementation (subject, of course, to revision as more is learned over time). Instead, **the County has just pushed things down the road, effectively taking an additional extension of time without getting permission to do so.** That attitude does not augur well for Settlement Order success.[84]

[83] MS 18.

[84] We note as well another disturbing and consistent pattern: Wherever the Settlement Order (as with a model inclusionary zoning ordinance) is framed as having to "include" certain elements (phrasing which contemplates that there will be other elements as well), Westchester does not provide any additional elements.

V. Additional Observations

The obligations imposed on Westchester by the Settlement Order do not *replace* but rather *supplement* Westchester's ongoing AFFH obligations under federal law and regulation. As Westchester has been continuing to received CDBG and other federal housing funding, it has been continuing to certify that it has and will AFFH, including that it has and will take the steps necessary to overcome barriers to fair housing choice. As Westchester's submission has confirmed, it is still refusing – just as it refused during the false claims period – to take actions appropriate to the circumstances to confront and overcome the key barriers to fair housing choice in the County (not taking action against even a single municipality, no matter how AFFH-resistant). Furthermore, the "Discretionary Funding" Policy, which is defined to include CDBG funds, contemplates continuing to provide CDBG funds over the course of the coming year to municipalities that fail to AFFH.[85] HUD, therefore, is obliged to explore how to respond to the fact that, as of the date of its submission last week, Westchester was: (a) not meeting its underlying AFFH obligations; and (b) continuing to submit false certifications that it was meeting those obligations.[86]

[85] *See* MS 7, setting forth a January 2011 effective date for the start of the funding limitations. In so doing, Westchester implicitly acknowledges that municipalities have *not* been held to account over the course of the past year.

[86] The Court held that requests for payment of CDBG and other federal housing funds constitute implied certifications that the jurisdiction submitting payment has in fact met its AFFH analysis and action obligations. *ADC Summary Judgment Decision, supra,* 2009 WL 455269 at *17-18, Slip Op. at 43-45.

VI. Lessons Learned to Date; Pitfalls Ahead

Two weeks after Judge Cote signed the Settlement Order in August, ADC sent the Monitor a letter.[87] In that letter, ADC warned that, "Appeasement only emboldens resistance."[88] Unfortunately, that advice was not heeded, and Westchester was given the impression over the last several months, intentionally or unintentionally, that *structural* change would not really be required, that the Settlement Order would be looked at "flexibly," and that Westchester could progress towards unit-specific targets by focusing on "low-hanging fruit" (*i.e.,* the kinds of projects that minimize municipal or other opposition). Not surprisingly, Westchester has understood these signals to mean, "Let's see what we can get away with."

Westchester is banking on an old strategy: adopt an extreme position, and hope that you can negotiate a middle ground. In this case, the extreme position is a woefully non-compliant submission that bears a striking resemblance to Westchester's pre- Settlement Order positions. The risk, of course, is that the Monitor will take the bait…and negotiate. The terms of the Settlement Order, however, are non-negotiable. Negotiating away either portions of the letter or spirit of the Settlement Order would be improper and impermissible.

Thankfully, the Settlement Order, however, is very clear that **the Implementation Plan shall ultimately contain precisely what the Monitor wants it to contain.** The Monitor has authority not only to reject the submission in the first instance (Settlement Order, ¶ 20), but, should a revised submission continue to be "insufficient to accomplish the objectives and terms set forth in [the Settlement Order]," the Monitor "*shall* specify revisions or additional items that

[87] The letter ("ADC-Monitor Letter"), exclusive of attachments, is attached as Appendix B to this Report.

[88] ADC-Monitor Letter, *supra,* at p. 1.

the County *shall* incorporate into its implementation plan." Settlement Order, ¶ 20(d) (emphasis added). As such, a final Implementation Plan will be the Monitor's Implementation Plan. The Court, of course, retains jurisdiction to enforce Westchester's compliance with its obligations. Settlement Order, ¶ 58.

VII. Conclusion

The documents that Westchester has submitted to the Monitor constitute neither planning nor implementation. The documents ignore or contradict several fundamental principles and requirements of the Settlement Order, and are clearly designed to maintain the status quo to the maximum extent possible. If the Monitor is to fulfill his job of insuring that the letter and spirit of the Settlement Order be complied with, he must reject this *faux* "Implementation Plan" out-of-hand.