



U.S. Department of Housing and Urban Development

New York State Office
Jacob K. Javits Federal Building
26 Federal Plaza
New York, New York 10278-0068
<http://www.hud.gov/local/nyn/>

December 10, 2012

James E. Johnson, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022

Re: **United States *ex rel* Anti-Discrimination Center v. Westchester County, No. 06-CV-2860**

Dear Mr. Johnson:

Your letter to Deputy Secretary Maurice Jones, dated November 29, 2012, has been referred to me for a response. The Department of Housing and Urban Development welcomes the opportunity to provide our views on the various issues that you raise regarding the Westchester County's Quarterly Report for 3Q 2012.

I. Development and Concentration of AFFH Homes

The Department shares your concern regarding the County's approach towards the siting of AFFH units, in that 12 municipalities have no units in the pipeline, and some of the municipalities have less than a handful of units. As stated in the first page of the Stipulation and Order of Settlement and Dismissal in *United States ex rel. Anti-Discrimination Center of Metro New York v. Westchester County* ("Settlement"), "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 County] and the municipalities therein." To this end, in its policy adopted pursuant to paragraph 31, the County acknowledged 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."

To this date, the County does not appear to have developed a siting strategy that is consistent with the goals of the Settlement as expressed therein. The County's siting of proposed projects does not evidence the pursuit of the "broad and equitable distribution of affordable housing" within the County. And indeed, the County acknowledges in its 3Q Report, at page 9, in the same language that it has included in previous reports, that "[s]ites are evaluated based on

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their development potential, the proximity to schools and other community amenities including public transportation, the qualifications of the potential developer, potential environmental impacts, estimated cost, the timing on the availability of land and the ability of the applicant to obtain non-County subsidies.” Therefore, no consideration is being given to achieving a broad and equitable distribution of affordable housing opportunities. Accordingly, we recommend that you consider directing the County to incorporate in its Implementation Plan a siting strategy consistent with the requirements of the Settlement.

We appreciate your concern in ensuring the broad and equitable distribution of AFFH units, and look forward to seeing developments proposed in each of the 31 eligible municipalities.

Since you are now evaluating the County’s report that, by the end of the calendar year, it expects to have 272 housing units with financing in place, and 130 units with building permits, we wanted to take this opportunity to express concerns that the Department has with regards to three projects proposed by the County that it has included in its count of 272 units with financing in place. While the Department recognizes the progress being made in meeting the interim numerical benchmarks in paragraph 23 of the Settlement, and in that two projects are now complete and fully occupied (*i.e.*, 42 First Avenue, in Pelham, and Roundtop, in Cortlandt), the Department has concerns with the projects at 37 Wildwood Road, Katonah, Bedford (“Wildwood”); 240 Underhill Avenue, Yorktown Heights (“Underhill”); and 256 June Road, North Salem (“Bridleside”).

Wildwood is a 7-unit rental project which the County refinanced with Community Development Block Grant and other funding, and for which the County seeks to count 1 unit that was vacated, pursuant to paragraph 7(h) of the Settlement. As indicated in our letter dated November 5, 2010, the Department’s position is that an acquired existing housing unit should only count towards the County’s obligation under the Settlement when it creates a new affordable housing opportunity. (See November 5, 2010 letter attached). The Department does not consider an existing housing unit to be vacant, or to create a new affordable housing opportunity, if a previous tenant was displaced from the unit for a project that implements the provisions of the Settlement. (See, e.g. 24 CFR 42.375(b)(3); Settlement ¶7(d)(iii)). Assuming no tenant was displaced from the proposed unit by the recent rehabilitation, and that the County markets the unit through the approved Affirmative Fair Housing Marketing Plan, based on the information that we have at this time, HUD would have no objection to that unit being counted towards the benchmark. Further, the Department believes that this standard should consistently be applied to other acquired existing units in the future.

Underhill is a 60-unit rental project, initially financed with a Section 236 FHA-insured mortgage, which the County seeks to count towards the goals of the Settlement based on the commitment by the new owner to deepen the affordability restriction from 80% of AMI before acquisition, to 65% of AMI or below. The new owner pre-paid the Section 236 mortgage, and obtained financing through the Low Income Housing Tax Credit program, among other sources. (The project also receives income from two project-based Section 8 contracts covering 15 units.)

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The County seeks to count towards the benchmark 7 units that have been vacated. Since this project had a Section 236 mortgage, upon pre-payment, the non-project-based Section 8 tenants became eligible to receive enhanced vouchers. The project owner told the New York State's Division of Housing and Community Renewal not to issue the vouchers at the time of pre-payment, because he would not be immediately raising the rents. Pursuant to section 8(t) of the U.S. Housing Act of 1937, an enhanced voucher provides the tenant with a right to remain in the unit after conversion, thus creating an obligation for the owner to accept the voucher. It is our understanding that the tenants in the vacated units may not have been advised of their rights because of the owner's actions. In view of the above, we believe that the large turnover of units prior to any increase in rents warrants further investigation. As stated above, the Department believes that no unit should be counted as a new affordable housing opportunity if a previous tenant was displaced from the unit for a project that implements the provisions of the Settlement. Moreover, if any tenants were displaced from the Underhill project due to the rehabilitation, the owner should have complied with all applicable HUD rules and regulations, and their units should not be considered vacant for purposes of the settlement. (See, e.g., HUD Handbook 1378, ¶ 1-4(I)(4) (defining Displaced Person for purposes of the Uniform Relocation Assistance and Real Property Acquisition Policies Act in context of tenant's permanent move after initiation of negotiations); see also ¶ 1-4(I)(AA)(defining and explaining requirements for Notices of Nondisplacement)).

Bridleside is a 65-unit rental project in a fairly rural area. It would consist of five 3-bedroom units, forty 2-bedroom units and twenty 1-bedroom units affordable to those at or below 50 and 60% AMI. This is a large project for this area, which raises the question whether there is sufficient demand for this large number of one- and two-bedroom units. While the Department is pleased to see five 3-bedroom units included in the plan, we believe this is a missed opportunity for housing for larger families.

Regarding the need for larger units for families, the Department was pleased to see the County go forward with twenty-six 3-bedroom homeownership units at Crompond Crossing. We are encouraged by Yorktown's commitment to provide affordable homeownership opportunities to larger families. The County should urge other municipalities to follow Yorktown's example.

II. Adoption and Promotion of Model Ordinance

As indicated in our December 16, 2011 letter, the Department is very concerned about the County's delays and slow progress in the promotion and adoption of the model inclusionary zoning ordinance, required under paragraph 25(a) of the Settlement. While the County distributed the Model Ordinance to municipal officials with a letter dated January 26, 2011, and has engaged in other promotional activities, it does not appear that the County's efforts to date have yielded a single unit, though we understand that there are potential units currently at the pre-development stage. The model inclusionary zoning ordinance is a critical step to facilitate the development of the Affordable AFFH Units and advance fair housing in the County. Its

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success depends on the County taking meaningful and effective steps to encourage eligible municipalities to adopt the model inclusionary zoning ordinance.


The Department has consistently stated that promoting entails a continuing duty to move the objective to fruition. This includes adapting and modifying strategies when, as the case appears here, prior actions have proved ineffective. We strongly urge the County to re-evaluate its current strategy in light of the stagnation.

III. Financing

The Department shares the concerns raised in your letter with respect to the County's current financing strategy. The County's new financing strategy does not appear to have yielded any additional funds for the development of AFFH units. This makes it all the more important for the County to make additional progress in the promotion of the model ordinance, as it will yield additional units without the expenditure of County funding. The County should examine whether its current financing strategy needs to be revised to take these practical realities into account.

Thank you for the opportunity to provide the Department's views on areas of concern. We stand ready to continue to assist you and the County in this regard.

Sincerely.


Mirza Orriols
Deputy Regional Administrator

c: Robert Astorino, County Executive
Kevin J. Plunkett, Deputy County Executive
Mary J. Mahon, Special Assistant to the County Executive
Kenneth W. Jenkins, Chairman of the Westchester County Board of Legislators
David J. Kennedy, Chief, Civil Rights Unit (S.D.N.Y.)
Benjamin H. Torrance, Assistant U.S. Attorney (S.D.N.Y.)
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GENERAL COUNSEL

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

November 5, 2010

James E. Johnson
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Dear Mr. Johnson:

The Department of Housing and Urban Development received your letter dated October 8, 2010 regarding Inquiries 5 and 8 and the County's request for further guidance. HUD appreciates the opportunity to provide its position as to when housing units that are currently occupied should count towards the County's obligation to develop 750 new affordable housing units, assuming such units would otherwise meet the requirements set forth in the Stipulation. As explained further below, it is HUD's position that an acquired existing housing unit should only count towards the County's obligation when it creates a new affordable housing opportunity.

This question primarily arises when the County is seeking to acquire units under Paragraph 7(h) of the Stipulation, which provides that twenty-five percent of the new affordable housing units required may be achieved through the acquisition of existing housing units. This provision allows the County to take advantage of opportunities when existing housing units can provide new affordable housing units by converting market rate units into affordable housing or, as provided for in subsection (iii) of Paragraph 7(h), if such units "are affordable to households with incomes at or below eighty (80) percent of AMI, they shall be made affordable, after acquisition, through deed restrictions . . . that ensure that they remain affordable to . . . households with incomes at or below sixty-five (65) percent of AMI for a period of no less than fifty (50) years." (Stipulation, ¶7(h)(i).) Under either circumstance, "all such units shall meet the terms and conditions set forth in [Paragraph 7]." (Stipulation, ¶7(h)(i).)


The provisions of Paragraph 7(h) are not a stand-alone obligation but rather a subset of the obligation to "ensure the development of at least seven hundred fifty (750) *new* affordable housing units" required under the Stipulation. (Stipulation, ¶7 (emphasis added).) As such, acquired units must provide new affordable housing opportunities to count towards the County's obligation. Accordingly, it is HUD's position that an existing acquired housing unit should only count towards the County's obligation when the unit becomes vacant and there is an opportunity affirmatively to market the unit under the standards set forth in Paragraph 33(e). This position is bolstered by the Stipulation's purpose, which sets forth an Affirmatively Furthering Fair Housing strategy of providing new affordable housing opportunities in the eligible communities that will be marketed to a broader and more diverse set of potential residents.

HUD shares the County's concerns about displacement and does not want its position to be misconstrued as a position that any residential tenants should be evicted or otherwise displaced for projects that will implement the provisions of this Stipulation. Indeed, the Department does not consider an existing housing unit to be vacant, or to create a new affordable housing opportunity, if

such a tenant has been displaced. (*See, e.g.*, 24 CFR 42.375(b)(3); Stipulation ¶7(d)(iii).) Similarly, here, a unit should only count as a new affordable housing unit that meets the terms of Paragraph 7 when it becomes vacant absent any residential displacement.

We appreciate your attention to this issue and consideration of our views.

Sincerely,



Helen R. Kanovsky

Cc: Kevin J. Plunkett, Deputy County Executive, Westchester County
Benjamin Torrance, Esq., Assistant U.S. Attorney for the Southern District of New York