ANTI-DISCRIMINATION CENTER, INC.
"ONE COMMUNITY, NO EXCLUSION"

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BY HAND

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Dear Mr. Johnson:

I write to offer some initial observations as you embark on monitoring Westchester's compliance with the letter and spirit of the Settlement Order that has been entered in this case.

A. Appeasement only emboldens resistance

There will undoubtedly be some who entertain the fantasy that a "patient" and "compromising" approach holds the promise of change without acrimony. There is no surer path to failed implementation.

1. The Settlement Order is a remedial order and must be enforced as such. Whatever the Department of Housing and Urban Development ("HUD") comes to decide on a go-forward basis with respect to affirmatively furthering fair housing ("AFFH") obligations of federal grantees generally, this settlement springs from a particular history and a particular context. Westchester not only remains remarkably segregated – a dozen of its municipalities have African-American populations under one percent – its longstanding wrongdoing is clear. When the presiding judge, the Hon. Denise Cote, examined the record in the light most favorable to Westchester, she still found as a matter of law that Westchester had "utterly failed" to meet its AFFH obligations. She also found as a matter of law that every single representation of compliance in the period 2000-2006 was "false or fraudulent."

A remedial order is not intended as a balancing act; rather, it is intended as a *counter-balance* to the consequences of past wrongdoing. As such, we respectfully submit that the task is not monitoring whether Westchester is doing "just enough" to stay within the letter of the agreement, but rather monitoring and insuring that Westchester is doing the maximum to undo the residential racial segregation that is has helped to perpetuate.

2. The lessons of history tell us unmistakably that resistance can be given no quarter. One of the hats I wear is that of an Adjunct Professor of Law at Fordham Law School,

where, *inter alia,* I lead a seminar in "Housing Discrimination: History, Demographic, Law, and Remedies." Among the materials we cover are Eric Foner's *Short History of Reconstruction* and Arnold Hirsch's article entitled *Massive Resistance in the Urban North: Trumbull Park, Chicago, 1953-1966.* I have enclosed a copy of both (the Hirsch article is Exhibit 1 to the Addendum to this letter). In those circumstances, as in countless others, the failure to meet resistance with overwhelming force did not engender hoped-for "reconciliation" or a "spirit of cooperation." On the contrary, the forces of resistance, alert to any sign of weakness, were only emboldened by the failure of the relevant government bodies to act promptly to squelch all such resistance.

3. Racism in Westchester is alive and well. I do not use the term "racism" lightly. Doing so would not only be gratuitously provocative, it would be an insult to all those who have suffered its effects. Thus, throughout the litigation, I never once referred to any person or practice as "racist." In the short time since the Settlement Order has been announced, however, there has been an outpouring of comment that must be named for what it is: vicious and racist stereotyping and hate-mongering. As one individual wrote to the Anti-Discrimination Center:

> You folks are complete idiots, and must really love destroying productive white communities. I find your actions TOTALLY disgusting and unconstitutional. Please take your fake "president", Obama, and fly off to the third world and live in the crap and poverty that you so obviously desire. Whites should, and can, segregate themselves AS MUCH AS THEY WANT TO DO SO. No social engineering is going to change that. In short, GET STUFFED!!

This was no isolated remark. I have included as Exhibit 2 to the Addendum a sample taken from the *hundreds* of comments reflecting baldly race-based and class-based stereotyping (most being comments to newspaper articles reporting on the settlement). As bad as those offering "commentary" may be, it is not those individuals that are of primary concern. It is *people of good will* (including some municipal officials) who, as an initial matter, may be willing to cooperate. If people of good will see that resistance is tolerated, some will begin to ask, "Why should we step up to the plate when others are being permitted not to?" In other words, tolerating resistance will yield only a cycle of declining cooperation.

4. Municipal resistance has not gone away. Municipal resistance to affordable housing construction in Westchester has long been widespread and intense. As pointed out by Westchester's own Housing Opportunities Commission ("HOC") in 2004, progress in taking steps to facilitate the production of affordable housing "has been minimal in most municipalities," and that "it is the municipalities who will determine whether the affordable housing crisis will be eased or whether it will continue to worsen for another decade."[1]

An article in the August 23rd Real Estate Section of *The New York Times* (Addendum, Exhibit 4) begins to give the flavor of the continuing nature of this resistance. Listen to the Mayor of Scarsdale. She says that the village remains an unlikely place for affordable housing

[1] The HOC's 2004 Action Plan is Exhibit 3 to the Addendum.

because "it has no room" and because "most residents would likely resist it." Harrison, like Westchester, has developed *none* of the housing allocated by the HOC. Yet its supervisor is quoted as saying the town "already had enough low-cost housing."

As George Raymond, HOC's Chair is quoted as saying in response, ""All the zeros on our allocation plan represent communities that don't want to try." The problem, of course, is that the lesson that these municipalities have learned from years of resistance is that simply reciting the "we can't do it" incantation is an effective means to ward off any change.

5. County officials are already undermining the Settlement Order. The County Executive has described the 750 units as a maximum (not the minimum, as set forth in the Settlement Order). Indeed, at his appearance before the Budget and Appropriations Committee of the County Legislature on August 17th, he estimated that the funds being provided under the settlement would provides somewhere between only 150 and 750 units.[2] His deputy, Susan Tolchin, has suggested that the County's obligations could be watered down "if local zoning or property prices prove to be barriers."[3] Her comments echo that of the County's August 10th press release on the Settlement Order, which also linked modifications to the assertion that "the county does not control local zoning."[4]

Other officials have received and are channeling this wrong-headed message. The Lewisboro housing committee chair has asserted that "the settlement requires that the county respect individual towns' zoning laws"; the County Legislator whose District includes Lewisboro has said that, notwithstanding the provisions of the Settlement Order, "It makes no sense for the county to litigate," and that he did not expect litigation to occur.[5]

B. Overcoming zoning barriers is the linchpin of successful implementation of both the County's unit-specific and broader Settlement Order obligations. We need not speculate about the efficacy of an approach that tries to work within the constraints of existing zoning. That has been Westchester's policy, the County's AFFH obligations notwithstanding. The policy has been an abysmal failure. The Settlement Order recognizes that a different path is required. That is, one must take the objectives of the agreement as the starting point (not existing zoning), and then determine the steps that are necessary to achieve the Settlement Order's objectives. It is this reorientation – acknowledging the primacy of the broad public

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[2] *See* http://www.westchestergov.com/news_spanohsgtestimony.htm.

[3] *See The New York Times,*"In Westchester, an Open Plea to Accept a Housing Accord" (online edition only), attached as Addendum Exhibit 5. Tolchin chose to ignore the actual terms of the Settlement Order. Those terms intentionally require extraordinarily difficult showings for the County to make before the Monitor could properly reduce the County's obligations. *See, e.g.,* Settlement Order ¶15(a)(vi).

[4] The County press release is annexed as Addendum Exhibit 6.

[5] The article in the *Lewisboro Ledger* is annexed as Addendum Exhibit 7.

interest in AFFH and no longer subordinating that interest to an exclusionary status quo – that must drive implementation planning.

1. Without confronting local zoning barriers, neither the County's obligation to place units on the Census blocks with the lowest concentrations of African-Americans, nor the County's broader obligation to eliminate *de facto* residential segregation will be achieved. Westchester is obliged in the implementation plan to 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).

As a matter of land and demographics, the task is easy. Attached to the Addendum as Exhibits 8 and 9 are a map and accompanying Excel table.[6] What we have done is demonstrate that the County has a massive amount of land available where, on the Census Block level, the percentage of African-Americans is less than 3% and the percentage of Latinos is less than 7%. Indeed, the data show just how much land is available on Census blocks where the percentage of African-Americans is less than 1% and the percentage of Latinos is less than 3%.

Just looking at the more than 20 jurisdictions that, on the municipal level, have African American populations of less than 3% and Latino populations of less than 7%, one finds the following:

Census Block Type	Number of Blocks	Number of Acres	Population
LT 1% AA and LT 3% Latino	438	**40,222**	58,939
1% to LT 2% AA and 3% to LT 5% Latino	330	**24,843**	38,067
2% to LT 3% AA and 5% to LT 7% Latino	2,366	**73,851**	116,799
Total	**3,134**	**138,915**	**213,805**

In other words, leaving aside "no population" Census blocks, and leaving aside low minority concentration blocks in higher concentration municipalities (the 60-unit-maximum sets of municipalities), there are Census Blocks encompassing more than 138,000 acres where the Settlement Order's command to find means to develop on the blocks with "the lowest concentrations of African American and Hispanic residents" can be satisfied.

Nevertheless – as day follows night -- the naysayers (be they in municipal or County government or elsewhere) will surely try to come up with excuses as to why this acreage –

[6] I have also enclosed a disk containing the map in PDF format, and suggest printing it out in its full size (36" x 48") to see block-level detail best.

probably more than 500,000 times the total acreage needed – should not be used (or else used only sparingly), and why Census Blocks with higher concentrations of African-Americans or Latinos should be selected. The fallacy of the expected claims of "no land" and "too costly development" lies in the shallow assumption "that which is, must be."

In fact, any sober evaluation recognizes development ability and land cost is dynamic. Up-zoning acts a critical factor in facilitating moderate-density development and in lowering the cost of such development.[7] That is one of the key reasons that the Settlement Order requires the County to overcome municipal barriers with legal action. *See, e.g.,* Settlement Order, ¶7(j). Moreover, the difference between *working around* existing zoning and *causing existing zoning to be modified* is substantial. The "work around" method has no multiplier effect: the affordable housing and AFFH yield is one unit for each unit developed. By confronting and overcoming zoning barriers, by contrast, one achieves an enormous multiplier effect. Latent developer interest in affordable housing development will be unleashed, and much greater number of affordable AFFH units will be able to be created.

Crucially, only by proceeding by promptly acting to overcome zoning barriers will one of the key *broader* commands of the Settlement Order be able to be satisfied. While public attention has focused on the minimum 750 units of affordable housing to be developed, Westchester is also required to enact a policy by which the County seeks to achieve "the elimination of discrimination, including present effects of past discrimination, *and the elimination of de facto residential segregation…"* Settlement Order, ¶ 31(a). That obligation, amplified, *inter alia,* by the obligation to take the actions necessary to "facilitate the implementation of this Stipulation and Order" (Settlement Order, ¶ 32(a)) is ongoing, relates to *all* County housing policies and programs, and operates as a supplement to the County's prospective obligations to affirmatively further fair housing in respect to all of it and its sub-recipients activities.

There is a clear bottom line: if the over 138,000 acres of Census Blocks with low concentrations of minority residents were perceived to be insufficient to develop a mere 750 units of affordable housing, then any effort to engage in a serious program of affordable housing development – let alone any effort to end *de facto* residential segregation – would be doomed.[8] As such, prompt action to overcome zoning barriers is essential, and, as discussed next, is both contemplated by the Settlement Order and amply supported by many sources of County

[7] In highlighting up-zoning, we do not mean to suggest that other tools (such as taking advantage of the cross-subsidy of mixed-income and mixed use development, and of incorporating the multiplier effect of a revolving fund) would not be extremely useful adjuncts to the up-zoning process.

[8] Note that the *unmet* HOC-defined obligations of the just set of municipalities where the minimum of 630 units may be developed under the Settlement Order is well over 6,000. Thus, the County had conservatively allocated more than eight times the number of these units for these municipalities than is the minimum 750 units that are to be developed under the Settlement Order.

authority.

2.The County's authority to override local barriers. While the Settlement Order is notable in recognizing, bolstering, and requiring the use of County authority to overcome local zoning and other barriers, that authority has long-existed. The Settlement Order required Westchester to acknowledge several components of that authority. The first "whereas" clause of page 2 of the Settlement Order provides that the County acknowledges and agrees that "pursuant to New York State law, municipal land use policies and actions shall" act in two ways. First, those land use actions and policies "shall take into consideration the housing needs of the surrounding region," a recitation of the *Berenson* doctrine.[9] Under that doctrine, any party that owns or controls land may challenge a municipality's restrictive zoning on the grounds that such zoning does not take sufficient account of regional housing needs for multi-family housing.

Second, the Settlement Order provides that municipal land use actions and policies "may not impede the County in its performance of duties for the benefit of the health and welfare of the residents of the County," a recitation of the *County of Monroe* doctrine.[10] Under this doctrine, 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.[11]

Third, the Settlement Order, in the same "whereas" clause referenced above, provides that it is incumbent upon municipalities "that are parties to the Urban County Cooperation Agreement to comply with that agreement, including the commitment to AFFH…" Judge Cote's decision granting the Anti-Discrimination Center's motion for partial summary judgment specifically referenced the Urban County Cooperation Agreement:

> Westchester entered into Cooperation Agreements with municipalities participating in the Consortium. The agreements

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[9] *Berenson v. Town of New Castle,* 38 N.Y.2d 102, 107 n.1, 110; 378 N.Y.S.2d 672 , 677 n.1, 681 (N.Y. 1975).

[10] *Matter of County of Monroe (City of Rochester)*, 72 N.Y.2d 338, 341, 343; 533 N.Y.S.2d 702, 703-04 (N.Y. 1988).

[11] *See also Matter of Crown Communication, N.Y., Inc. v. DOT,* 4 N.Y.3d 159, 791 N.Y.S.2d 494 (N.Y. 2005) (applying the *County of Monroe* balancing test to hold that even a project that provided some benefit to private parties was exempt from a municipality's zoning because the project's public benefits to New York State outweighed the municipality's interests). Note that, prior to the false claims period, Westchester itself successfully argued in *Westhab, Inc. v. Village or Elmsford*, 151 Misc.2d 1071, 574 N.Y.S.2d 888 (Sup.Ct., Westchester County, 1991) that the *County of Monroe* doctrine should permit the County to be exempt from local requirements in connection with housing it sought to build independent of local regulation (the Court permitted development to go forward, holding that the County's interests outweighed the locality's interests).

> 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.*

United States ex. rel. Anti-Discrimination Center v. Westchester County, 2009 WL 455269, *2-3 (S.D.N.Y. February 24, 2009) (emphasis added).

There is another powerful and longstanding doctrine of law relating to exclusionary zoning that was not explicitly acknowledged in the "whereas" clause, but which is available to Westchester. The Fair Housing Act itself allows for challenges to municipal restrictions on housing where those restrictions perpetuate segregation or otherwise have a disparate impact on the basis of race or other protected class status. *Huntington Branch, NAACP v. The Town of Huntington,* 844 F.2d 926 (2nd Cir. 1988).

As anyone who has been involved in real estate development knows, there are myriad ways by which development can be structured, many of which would involve Westchester having an ownership, option-to-buy, or other legal interest in property intended for affordable AFFH development. In following the Settlement Order's command to develop affordable AFFH units in municipalities *and on the Census Blocks* with the lowest concentrations of African-Americans and Latinos, Westchester can and should acquire an interest in property meeting those criteria (*see* page 4, *supra),* and then vindicate its rights through the various means described above.

<u>C. Mt. Pleasant and the moral of the story.</u> In these last two weeks, there have been some who have taken the line that the moral to be taken from the *Anti-Discrimination Center's* success in bringing Westchester's fraud against the federal government to light is that jurisdictions should simply disdain participating in federal community development programs. This view was explored in a recent column in the *Westchester Journal News,*[12] which featured an interview with the Town Supervisor of Mt. Pleasant (the unincorporated part of Mt. Pleasant was the one jurisdiction that chose not to participate in the Urban County Consortium).

Meehan explained that he turned down the opportunity for CDBG funds because "there were certain conditions that he couldn't agree to in principle." The article reports Meehan as seeing that there were "clear warning signs that if a municipality accepted the money, it would lose control over its destiny," but that, "I was assured many times by different officials that, 'Oh, don't worry about it. That's never going to happen,' " he recalled. "But I said, 'Well, that's what it's saying, so we're not signing. We're not participating.'"

On one level, of course, the comments are devastating confirmation of the fact that the County, at the same time it was certifying AFFH compliance to the federal government, was letting municipalities know that the County had no intention of actually enforcing the terms of

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[12] Attached as Addendum Exhibit 10.

the Cooperation Agreement. More importantly at this stage, however, is that the false notion that non-participation can insulate exclusionary zoning from challenge. The only tool *not* available to the County in respect to a jurisdiction like Mt. Pleasant is that of a federal funds cut-off. All the other legal tools described above in Section (B)(2) are fully applicable to all jurisdictions, and it is important for that point to be illustrated.

D. Real affirmative marketing Too frequently, "affirmative marketing" has consisted of no more than token efforts (*e.g.,* thinking that the placing of an advertisement in the *Amsterdam News* is sufficient to meet the affirmative marketing obligation). Not surprisingly, these types of efforts tend to fail.

These efforts are completely different from those that are made by those seeking to market virtually any consumer product in the United States. Those marketers recognize that consumer preference is dynamic, not static, and is influenced by external variables. What do these marketers do when they find a group that seems to be resistant to or inhibited from purchasing its product? *These marketers go and find out why.* They then make substantive and/or presentation changes in the product to encourage the inhibited group to buy the product in question.

The fundamental recognition that is needed for the requirement that affordable AFFH units be marketed to persons of color in New York City and elsewhere is that *neighborhoods are consumer products, too.* Rather than making facile assumptions about housing "choice," it is incumbent on Westchester – prior to the development of a single unit – to apply well-proven market research techniques to the tasks of determining *why* some potentially eligible persons of color may be reluctant to move to Westchester and of *how* that reluctance may be overcome.[13]

E. Effective use of carrots and sticks. Carrots often fail to provide the intended incentive to act because the person or entity sought to be influenced retains an assumption that the "non-

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[13] You will notice that people almost universally think of neighborhoods as entities that developed "naturally" or "organically," with an emphasis on the idea that those who are in a neighborhood are those who "deserve" to be there. As we know, nothing could be further from the truth. Post- World War II suburban residential patterns were created in significant part by *intentional* discrimination practiced both on the governmental level (*see, e.g.,* Ken Jackson's *Crabgrass Frontier),* and by private actors in the real estate market (brokers, landlords, homeowners, neighborhood associations, etc.). And patterns, once created, can themselves send a message of exclusion. The resort to "economics" as the sole explanation for segregation fails as well to come to grips with one of the demographic realities demonstrated by Professor Andrew Beveridge in the course of the litigation: the level of segregation for African-American households in Westchester earning $150,000 per year and up is actually higher than the level of segregation for African-American households in Westchester earning less than $50,000 per year. For a thorough debunking of the "personal choice" or "preference" argument, and a recognition that, more many African-Americans, the neighborhood of choice is an integrated one, *see* Krysan and Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation,* Social Forces, March 2002 80(3): 937.

cooperation" option will remain a viable option. Change the viability of the non-cooperation option, and you change the calculus of the person or entity deciding on a course of conduct.

No carrot will work unless all municipalities see that a non-cooperation posture means *losing the opportunity to influence the County* as the County decides the location, manner, scope, and timing of affordable AFFH development in particular jurisdictions. If that stick is in place, then influencing the County on these issues itself becomes a carrot. It is a carrot that should be offered *selectively,* with preference given to the first five or 10 municipalities that step forward and enact *comprehensive* inclusionary zoning. Because of the vast amount of land that is available for affordable AFFH development, because comprehensive rezoning will ultimately yield more units that the unit-specific provisions of the Settlement Order possibly could, and because the County and its municipalities will continue to have AFFH obligations independent of the Settlement Order, it is sensible to weight the placement of Settlement Order units towards those jurisdictions that fail to cooperate promptly.

Put another way, the idea that one would offer either equivalent input or equivalent result to a municipality regardless of whether that municipality is cooperating or not is naïve and counterproductive.

F. Transportation, infrastructure, and jobs. Unsurprisingly, proponents of the status quo will pick up any shibboleth close to hand in order to forestall the changes contemplated by the Settlement Order. These shibboleths need to be exposed for what they are. First, they reflect remarkably frank race-based and class-based assumptions about the people who are prospective residents of affordable AFFH units. One thing we know is that it is preposterous to assume that a family with household earnings of $50,000 or $75,000 per year will not have an automobile is not reality-based. We know as well that there are programs (like Wheels to Work) that can assist families with lower household earnings.

We know – or should know – that some infrastructure concerns are wildly exaggerated: in the context of a modest-density, mixed affordable and market-rate development, *it is not difficult for the developer to enhance the infrastructure.* It is done throughout the country. To the extent that the "infrastructure" concern is an influx of children needing schooling, municipalities should recognize that the Fair Housing Act, specifically 42 U.S.C. § 3617, makes it unlawful to interfere with a person in the exercise of rights protected by the Act (including the right to occupy housing without discrimination, through intent or impact, on the basis of familial status).

Perhaps most importantly from an AFFH point of view, every hurdle that has been mentioned is precisely among the factors that *are properly to be characterized as barriers to fair housing choice in an analysis of impediments to fair housing choice*. Like other impediments, they are not to be accepted as a reason not to act, they are properly the subjects of County action to remove them as impediments.

G. A revolving fund.

The Settlement Order sensibly recognizes the importance of a revolving fund: rather than having precious Settlement dollars being "used up" in the first round of subsidy, a revolving fund would insure that some of those dollars were returned to a fund to be used to create follow-on rounds of subsidy of more affordable AFFH units. We urge you to be skeptical of any argument that there are legal or other barriers to the creation of a revolving fund.

H. Conclusion

In yesterday's article on the case in the Week in Review Section of the *New York Times* ("Integration Faces a New Test in the Suburbs"), attached as Addendum Exhibit 11, I was quoted as saying that "I think we may be at the beginning of the first sustained commitment to open, inclusory communities that we have seen." The article also referenced my applauding the call by the HUD Deputy Secretary for a "fully integrated society," and my statement that the success of the agreement would depend on how aggressively the government enforced it, particularly in the most affluent and least diverse communities. I believe all of those things, and I believe that this is an important moment to put our task in perspective.

In the aftermath of the assassination of Medgar Evers, one of the true heroes of the civil rights movement, there were a number of songs written, the most famous of which is Bob Dylan's *Only A Pawn In Their Game.* Another song, by Donal Leace, was entitled *Death of Medgar Evers.* That song is less-well known today, but is well worth thinking about. We live in relative privilege and affluence. We are not required to summon the profound courage needed to face down violence. In the end, we need only resist the importuning of those who, for the sake of political expediency, would have you allow the promise of this Settlement Order to be squandered. As you begin your work, I can think of no better place to do so than with Leace's composition (I have enclosed a CD with the song).

The Anti-Discrimination Center stands ready to assist you in any way you wish.

Very truly yours,

[signed]

Craig Gurian
Executive Director