

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel.	:	
ANTI-DISCRIMINATION CENTER OF	:	
METRO NEW YORK, INC.,	:	
	:	
Plaintiff,	:	
	:	No. 06 Civ. 2860 (DLC)
v.	:	
	:	
WESTCHESTER COUNTY, NEW YORK,	:	
	:	
Defendant.	:	
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**DECLARATION OF JAMES E. JOHNSON  
IN OPPOSITION TO MOTION TO INTERVENE**

JAMES E. JOHNSON, an attorney admitted to practice before this Court, declares, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am a partner at Debevoise & Plimpton LLP, and I serve as the court-appointed Monitor in this matter. I make this declaration in support of the Government’s opposition to the Motion to Intervene filed by the Anti-Discrimination Center (“ADC”) on May 31, 2011.

2. I make this Declaration to put before the Court certain facts and other information related to my activities as Monitor in furtherance of my duty to ensure compliance with certain goals and terms of the August 10, 2009 Stipulation and Order of Settlement and Dismissal (“Stipulation”).

3. After selection by the U.S. Department of Housing and Urban Development (“HUD”) and the U.S. Attorney’s Office for the Southern District of New York (“USAO”), I was appointed to serve as Monitor by this Court on August 10, 2009.

**Early Activities**

4. Immediately following the appointment and the entry of the Stipulation, I worked to gain a greater understanding of the development of housing in Westchester County, including learning about the physical and economic challenges and opportunities involved in implementing the Stipulation’s goals. To that end, I met with, and was briefed by, members of the County Executive’s Office, Planning Department and other County officials, and visited municipalities throughout the County that meet the locational criteria of paragraph 7 of the Stipulation. Within three months of being appointed, I had met in small and large groups with representatives of nearly all of the eligible communities. In most of these meetings, I discussed the terms of the Stipulation, learned about opportunities for growth and heard concerns about how the Stipulation would be implemented.

5. During the initial period, I also met with County officials in hopes of helping to secure approval of the Stipulation by the Westchester County Board of Legislators (“BOL”). I conducted several meetings and teleconferences with members of the BOL, and encouraged a meeting between County legislators and attorneys from the USAO.

6. On September 22, 2009, the BOL approved the Stipulation. Following this vote, I continued to meet with County and municipal officials, including an

October 2, 2009 meeting of the Council of Governments attended by representatives of most of the municipalities in the County.

7. On October 1, 2009, I met with HUD officials in Washington DC, including the General Counsel and the Assistant Secretaries for Community Planning and Development and Fair Housing and Equal Opportunity. The goal of these meetings was to gain a better understanding of HUD's institutional perspective on the Stipulation as well as HUD's internal processes.

8. On November 3, 2009, Robert P. Astorino won the election for County Executive, defeating the incumbent, Andrew J. Spano. Within days of his election, Mr. Astorino spoke with me by telephone and met with me in person, and also traveled to Washington, DC to meet with HUD officials. During these meetings, Mr. Astorino pledged to fulfill the County's obligations under the Stipulation.

9. To contribute to the continuity of the work already undertaken since the entry of the Stipulation, as well as that completed before its entry, on November 11, 2009, I directed the County to provide me, pursuant to Paragraph 13(b) of the Stipulation, copies of the work product of the teams developing the Implementation Plan ("IP") and planning the development of the Affordable AFFH Units, as that term is used in the Stipulation. I also facilitated the preservation and transfer of information from the outgoing administration to both the incoming administration and the BOL. Throughout this transition period, I received updates on the progress of meetings with municipal officials and the progress of the IP. Mr. Astorino was sworn in as the eighth Executive of Westchester County on January 1, 2010.

**Advisors to Monitoring Team**

10. In the fall of 2009, I selected a Housing Advisor, Rosemarie Noonan, in accordance with paragraph 13(f) of the Stipulation and with the approval of both HUD and the County. Ms. Noonan, who is a prominent expert in housing development in Westchester County, brought a wealth of ideas and experience to the task and provided valuable insight early in the process. As we began to work together, it became apparent that her work as a leading consultant to developers and the County presented the potential for actual or perceived conflicts with her work as Housing Advisor. Accordingly, Ms. Noonan and I agreed that she could best serve the goal of developing Affordable AFFH Units in Westchester County by stepping down from the role of Housing Advisor and continuing her efforts as advocate and consultant.

11. With the input of HUD and the County, I interviewed five candidates to serve as a replacement Housing Advisor. At the end of a process that involved the review of résumés, capacity, interviews, and written submissions reflecting each candidate's view of critical next steps, I selected a team from the Graduate Center for Planning and the Environment at the Pratt Institute. Profiles of the members of the Pratt team are included in my July 2010 report to the Court.

12. The Pratt team has provided, *inter alia*, rigorous review of the County's March 2010 and August 2010 IP submissions, analysis of the numerous development proposals presented by the County Executive's Office, and valuable input on a variety of other topics, including affirmative marketing and site selection.

13. In addition to Ms. Noonan and the Pratt team, I have also called upon the Furman Center for Real Estate and Urban Policy at New York University ("Furman

Center”) for assistance. The Furman Center has provided guidance on issues including the template for the County’s quarterly reports (which the Monitor was required to prepare pursuant to paragraph 28 of the Stipulation) and resources in support of the effort. For example, the Furman Center applied for and received a grant from the Ford Foundation, which has been used in part to pay for the engagement of experts from Forsyth Street Advisors and Orrick Herrington & Sutcliffe LLP regarding financing issues, particularly the establishment of a revolving loan fund. The Furman Center has also supported my efforts to work with the County and others to develop an acceptable affirmative marketing plan, as detailed in paragraphs 24-26 below.

#### **Implementation Plan**

14. When it executed the Stipulation, the County agreed to develop an IP “setting forth with specificity the manner in which the County plans to implement the provisions of” the Stipulation concerning the development of Affordable AFFH Units. Stipulation ¶ 18; *see also id.* ¶ 22 (specifying activities the County must undertake in developing the IP); ¶ 24 (requirement that the IP include benchmarks); ¶ 25 (listing other required components of the IP).

15. On October 8, 2009, the County Executive’s Office requested an extension of the time in which it was required to submit the IP from December 8, 2009 until January 30, 2010. After conferring with County and HUD officials, and receiving written consent from the USAO, I granted that request pursuant to paragraph 18 of the Stipulation. On January 29, 2010, in compliance with the extended deadline, the County submitted its first IP to HUD and to me.

16. The County's submission was not acceptable. In accordance with Paragraph 20 of the Stipulation, I detailed the IP's deficiencies, met with the County and HUD, and directed the County to submit a revised plan within the prescribed time period. My findings on the shortcomings of the January 2010 IP are set forth in the February 2010 report to the Court. As explained in that report, the primary deficiency of the January 2010 IP was a lack of specificity with respect to accountability, timeframes and processes.

17. I met with the County Executive and his team on February 16, 2010 to discuss my concerns regarding the January 2010 IP. Immediately after that meeting, I met with members of the BOL who expressed their continued support for the Stipulation and repeated their intention to remain engaged in the process and to continue to discharge their oversight and policymaking responsibilities.

18. The County submitted a revised IP on March 12, 2010. Although the March 2010 IP showed progress in a number of respects, I found that the revised submission still fell short of a true plan to comply with either the Stipulation's specific terms or its overarching goal of building a more integrated Westchester. A detailed assessment of the March 2010 IP is included in my July 2010 report to the Court, which includes as an exhibit a detailed report by my team of advisors from Pratt. I directed the County to submit a revised plan by August 9, 2010.

19. The County complied with the August 9, 2010 deadline, and submitted a further revised IP. In light of concerns raised by the County and Municipal leaders about the need for guidance on the model ordinance that the County was required to provide to municipalities under paragraph 25(a) of the Stipulation, I decided to address that part of

the IP first. In October 2010, I approved the model ordinance contained in the August 2010 IP. As revised, the model ordinance no longer includes impermissible preferences for local seniors, employees, and volunteers, representing a major improvement over the draft ordinances submitted with the earlier drafts of the IP.

20. Paragraph 20(d) of the Stipulation empowers the Monitor to direct such improvements to the IP as necessary to render it compliant. The Stipulation does not, however, define the process by which the Monitor should determine the substance of the improvements. In late 2010, after consultation with the USAO, HUD, the Office of the County Executive and members of the Board of Legislators, I established an approach to develop and complete the IP's remaining components. This approach involved obtaining input from major stakeholders in the Stipulation, not just the parties. I viewed this approach as appropriate because the ultimate success of the Stipulation will depend on more than the compliance of the named parties. It will also turn on the compliance and, if possible, the support of numerous local governments and non-governmental stakeholders. To the extent that many of these stakeholders expressed the strong desire to be part of the process, I considered it prudent to develop a systematic approach to incorporate their input.

21. Secondly, the success of the decree will also turn on the willingness of families, particularly African American and Hispanic families, to apply to live in the new homes. The Furman report showed that minority families are more inclined to move to areas where there is a sense of welcome, rather than areas in which there is a sense of hostility or strife. Conflict, in connection with most community change, is often inevitable and often productive. The collaborative approach adopted with respect to the

IP does not bury conflict. Instead, by getting key stakeholders around the table, it enables the working group to highlight issues before they become crises and enables transparency and mutual accountability, which are vital for progress as well. In circumstances such as this, where many key local actors, non-parties to the Stipulation, are both articulating a desire for progress and engaging in the steps toward progress, it is my judgment that this inclusive, collaborative approach to some key decisions is most appropriate.

22. This collaborative approach was first employed to develop an acceptable affirmative marketing plan. Over a period of several months, I convened meetings of a working group that included representatives of the following stakeholder groups:

- Westchester County Executive's Office;
- Westchester County Board of Legislators;
- Westchester County Department of Planning;
- United States Department of Housing and Urban Development;
- United States Department of Justice (including both Assistant U.S. Attorneys from the Southern District of New York and trial attorneys from the Civil Rights Division); and
- Municipal leaders from a cross-section of municipalities identified by the Westchester Municipal Officials Association.

23. The working group's initial discussions focused on the challenges to be faced in developing an affirmative marketing plan that would be the most effective in reaching the demographic groups determined to be the least likely to apply for the Affordable AFFH Units.



24. To support the working group's efforts, I asked the Furman Center to convene a roundtable of experts with relevant experience. These experts, selected by the Furman Center, included developers (both for-profit and not-for-profit), housing counselors, and representatives of organizations and community development corporations that work in the field of affordable housing. Before the roundtable meeting, members of the working group had the opportunity to comment on the proposed agenda and reached a consensus on the key questions to be asked of these experts.

25. The roundtable took place at the New York University School of Law on February 14, 2011 and the Furman Center delivered the results of that discussion, supplemented by additional research, in a report on affirmative marketing. The report contained both general and specific suggestions for Westchester to consider in developing its affirmative marketing plan. The Furman Center's findings and suggestions were summarized in the April 2011 report to the Court, and also attached as an exhibit thereto.

26. Next, my team took the lead in building upon the general and project-specific plans already developed by the County Executive's Office so as to incorporate the recommendations and findings of the Furman Center's report and the working group discussions. Members of the working group have had the opportunity to share concerns, questions, and suggested revisions. At this time, a final draft of the plan is very near to completion, pending final comments from the County Executive's Office. The final affirmative marketing plan will be included in a filing with the Court.

27. I have also met with the County Executive's Office, Department of Planning, members of the BOL, and attorneys from Orrick to refine and complete the

financing section of the IP. I have facilitated discussions regarding a number of other IP-related topics, including site selection criteria and the discretionary funding allocation policy.

28. It is my goal and expectation that a final, acceptable IP will be in place in the short term.

### **Analysis of Impediments**

29. Paragraph 32 of the Stipulation requires the County to submit an Analysis of Impediments to Fair Housing Choice (“AI”) that “must be deemed acceptable by HUD.”

30. While the submission of an AI approved by HUD is a requirement of the Stipulation, the AI development and approval process has rested in the hands of the parties. HUD has repeatedly rejected the County’s proposed AI. On July 13, 2011, HUD provided notice that it was rejecting the County’s FY 2011 certification and disapproved the County’s FY 2011 Action Plan. HUD took the position that it had made its objections clear in a letter dated May 13, 2011 and in technical assistance meetings held June 2, 3, and 29 of this year. HUD indicated that, notwithstanding its efforts to work with the County to correct the AI, the submission was unacceptable. HUD therefore rejected the County’s certification and disapproved the FY 2011 Action Plan as substantially incomplete. In letters dated July 20, 2011 and July 21, 2011, both the Office of Robert P. Astorino and the Chairman of the Board of Legislators, Kenneth W. Jenkins, informed me that there was a dispute between the parties, and requested that I establish a process for resolving the dispute, as anticipated in paragraph 14 of the Stipulation. I understand that County Executive Astorino met with HUD Secretary

Shaun Donovan recently in Washington and that the parties are discussing ways to resolve their dispute. I await notice from the government on the question of whether there are issues it would want submitted to me for resolution.

**Site Selection and Inquiries Regarding Specific Developments**

31. Paragraph 23 of the Stipulation sets forth certain interim benchmarks for the development of AFFH housing, as provided below:

<b>By end of calendar year</b>	<b>Sites with financing in place (number of units)</b>	<b>Units with building permits</b>
2010		
2011	100	50
2012	200	125
2013	300	225
2014	450	350
2015	600	525
2016	750	750

32. Since June 2010, the County Executive's Office has submitted to the Monitor funding advisories and inquiries regarding specific proposed developments, as well as questions that relate to interpretation and application of Stipulation provisions.

33. Many of the proposed units described in these inquiries appear to comply with the provisions of the Stipulation, and I have indicated conditional approval subject to the development of an acceptable affirmative marking plan for the units. The total number of proposed units is well ahead of the benchmarks set forth above.

34. I have also communicated a number of concerns. For example, a proposed development of single-room occupancy units highlighted the Stipulation's lack of a definition of the term "unit." Two other developments with existing tenants have raised questions regarding turnover, the preservation of existing affordable housing, and compliance with the overarching integrative goals of the Stipulation.

35. In several responses, I have urged the County to be proactive rather than opportunistic in its approach to identifying and developing sites, some of which have been technically compliant but have not been ideal representations of the goals and spirit of the Stipulation. For example, in a July 13, 2010 letter to the Deputy County Executive, I noted two serious concerns regarding a proposed development in the City of Rye: (1) that the property is physically cut off from the City of Rye by a major highway, and (2) that while the municipality had formally lifted an age restriction on the units in the development, the fact that it is entirely made up of one-bedroom units would most likely lead the eventual residents of this units being seniors rather than families.

36. I have also reminded the County that pursuant to paragraph 15 of the Stipulation, the biennial compliance assessments beginning December 31, 2011 will be comprehensive in nature, reviewing the County's steps to "take[] all possible actions to meet its obligations" under the Stipulation. As part of those assessments, the Monitor will evaluate the County's efforts to "promote[] sustainable and integrated residential patterns" and "increase[] fair and equal access to economic, educational and other opportunities" through the "broad and equitable distribution of affordable housing." *See* Second "Whereas" Clause.

37. In pursuit of promoting the development of Affordable AFFH Units that go beyond marginal compliance with the Stipulation's technical requirements, I requested that the Pratt team prepare a set of best-practices criteria to be used in evaluating potential developments and sites in order to best achieve the Stipulation's integrative goals. I have discussed these criteria with the County and HUD teams, and included them in my April 2011 report to the Court. No inquiries regarding new projects have been submitted to me since that report was filed.

#### **Source of Income Veto**

38. Paragraph 33(g) of the Stipulation requires the County to "promote, through the County Executive, legislation currently pending before the Board of Legislators to ban 'source-of-income' discrimination in housing." Other than letters sent by former County Executive Spano to the BOL and fair housing advocates in 2009, I am not aware of any other steps the County Executive has taken to promote this legislation. On or about June 23, 2010, I learned that County Executive Astorino was contemplating vetoing the Source of Income legislation. I convened a conference call including HUD and the County Executive and his team. Along with HUD, I expressed the view that a veto would be inconsistent with the County's obligation under paragraph 33(g). The County Executive did not commit to a particular course of action during the call.

39. County Executive Astorino vetoed the Source of Income legislation on June 25, 2010. In a June 28, 2010 letter, I directed Mr. Astorino to explain how this action complied with his specific obligation under paragraph 33(g). I found the lack of a reference to this requirement—or to the Stipulation at all—in Mr. Astorino's veto

message to be quite troubling, and in the July 2010 report to the Court, I noted concerns with the “tone at the top.”

40. In his response dated July 28, 2010, Mr. Astorino took the position that the efforts by the Spano administration had already fulfilled the requirement of the Stipulation that the County Executive promote source-of-income legislation. With respect to steps taken during his own administration to promote any source-of-income legislation, Mr. Astorino stated: “None by the undersigned for several reasons, including among other things, that I considered that requirement of the Stipulation to have been fulfilled by the actions of the former County Executive Andrew Spano and a prior County Executive and prior County Board of Legislators cannot bind the thought process and discretion of a newly elected County Executive in this circumstance.”

41. At the time of the veto, I discussed with HUD and the USAO whether it was appropriate at that time to move to hold the County in contempt. I did not believe a contempt motion was appropriate given progress that was being made on other fronts. Significantly, then-Governor David Paterson was considering similar legislation at the state level, and I believed (based on conversations with members of the BOL) that he would sign it, rendering the Westchester bill superfluous. That hope was misplaced and the legislation failed in Albany as well.

42. In any event, given that the County had made some progress on significant aspects of the Stipulation, and in light of consultations with HUD, I did not consider the time appropriate to urge the government to seek judicial intervention.

**Input from Advocates and Other Third Parties**

43. Throughout the implementation process, I have sought to learn about the approaches of other communities focused on housing desegregation, and have spoken to and received comments from a wide range of not-for-profit groups focused on fair housing, civil rights, and government reform, including an April 16, 2010 meeting with the Executive Director of the Lawyers' Committee for Civil Rights Under Law, and the May 19, 2010 annual meeting of the League of Women Voters of New Castle.

44. I have also met with not-for-profit groups, including developers and others focused on the development of affordable housing in Westchester County. For example, on September 8, 2010 and December 20, 2010, I met with the Westchester Not-for-Profit Housing Coalition, and participated in a panel discussion at the annual meeting of non-profit developer A-HOME on September 13, 2010. In early 2011, I sought comments from area developers as part of the collaborative process to arrive at an acceptable affirmative marketing plan.

45. In addition, I have received or been copied on correspondence from nearly one hundred organizations expressing concern about the pace of Westchester's implementation of the terms of the Stipulation, and have spoken with other advocates by telephone.

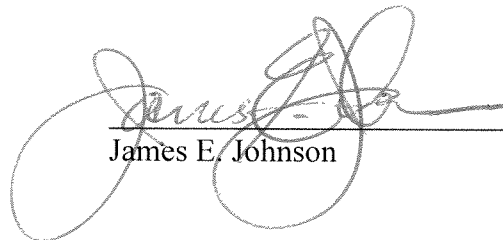
46. Notably, on April 23, 2010, I met with Craig Gurian of the ADC to discuss the detailed written reports he had provided earlier, and to receive a briefing conveying the ADC's perspectives on the County's efforts to date. Since the entry of the Stipulation, I have carefully reviewed the ADC's submissions and public statements. Generally, I have found them to be informative despite our differing approaches.

**Other Challenges**

47. On July 14, 2011, I met with HUD and County officials to discuss financing and the current estimates of costs per Affordable AFFH Unit as part of a series of conversations on these issues. I was concerned that the current rate of spending might compromise the County's ability to reach the requirement of developing at least 750 Affordable AFFH Units. During the discussion, I received data concerning the total number of residential building permits issued in the County, including both market-rate and affordable housing. The number of permits issued in the past three years was substantially lower than the figures for each year since at least the late 1990s. Going forward, an additional focus of my activities will necessarily involve watching the pipeline of housing units and taking appropriate steps to encourage stakeholders, including those already brought into the process described above, to enhance development.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 29, 2011

  
James E. Johnson