

ANTI-DISCRIMINATION CENTER, INC.

“ONE COMMUNITY, NO EXCLUSION “

June 13, 2013

VIA EMAIL

David J. Kennedy, Esq.
Chief, Civil Rights Unit
United States Attorney for the Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007

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

Dear David:

Enclosed please find letters sent yesterday and today to the Monitor and to HUD's Deputy Secretary, respectively. I'd ask you to read and reflect on their contents. My question for you is whether the U.S. Attorney disagrees with any of the following propositions, and, if so, which ones.

1. The Consent Decree provides that one of Westchester's duties is the broad and equitable distribution of affordable housing that promotes sustainable and integrated residential patterns.

2. The Consent Decree required Westchester to acknowledge the existence, and agree to the applicability of, the *Berenson* doctrine, established by New York's Court of Appeals in 1975 (municipal land use policies and actions shall take into consideration the housing needs of the surrounding region).

3. The Consent Decree required Westchester to acknowledge the existence, and agree to the applicability of, the *County of Monroe* doctrine, established by New York's Court of Appeals in 1988 (the interests of a county can outweigh a locality's interest in zoning restrictions).

4. The Consent Decree required Westchester to acknowledge and agree that it was "appropriate for the County to take legal action to compel compliance" if municipalities hindered or impeded the County in the performance of duties such as the providing for the broad and equitable distribution of affordable housing that promotes sustainable and integrated residential patterns.

5. The zoning of many Westchester municipalities was exclusionary at the time of the Consent Decree and remains exclusionary today.¹

6. A principal objective of the Consent Decree — independent of any unit-specific requirements — is to affirmatively further fair housing (AFFH). *See, e.g.*, paragraph (7)(j) (referencing “the purpose” of the Consent Decree “to AFFH”); paragraph 15(a)(3) (again referencing “the purpose” of the Consent Decree “to AFFH”);

7. By failing to remove exclusionary zoning, many Westchester municipalities have failed to take the actions needed to promote the objectives of constructing Affordable AFFH units pursuant to paragraph 7 of the Consent Decree.

8. By failing to remove exclusionary zoning, many Westchester municipalities have left standing barriers to fair housing choice (that is, have impeded action to AFFH).

9. Paragraph (7)(j) of the Consent Decree obligated Westchester to use *all* available means to redress the circumstances described in paragraph 7, above, including pursuing legal action against offending municipalities.²

10. Paragraph (7)(j) of the Consent Decree obligated Westchester to initiate such legal action as appropriate to redress the circumstances describe in paragraph 8, above, and thereby accomplish the purpose of the Consent Decree to AFFH.³

11. Westchester has not taken any legal action against any municipality, and has an across-the-board policy of refusing to do so.

12. Westchester has violated both of its paragraph (7)(j) obligations.

13. As reflected in its conduct, Westchester does not have the elimination of *de facto* residential segregation as a goal of its housing policies and programs.

14. Westchester has violated its paragraph (31)(a) obligations.

¹ In this connection, note that 2010 Census data show that 19 Westchester municipalities have non-Latino, African-American populations of less than 2 percent. In contrast, 16.4 percent of households with income of \$75,000 or more in Westchester and New York City combined were non-Latino, African-American.

² Unlike the *analysis* requirement set out by paragraph 32 of the Consent Decree, this paragraph (7)(j) obligation is an *action* requirement.

³ Unlike the *analysis* requirement set out by paragraph 32 of the Consent Decree, this second paragraph (7)(j) obligation is also an *action* requirement.

15. Westchester has not completed an Analysis of Impediments (AI) deemed acceptable by HUD.⁴

16. Westchester has violated its paragraph 32 obligations.

17. All development under the Consent Decree was intended to proceed pursuant to an Implementation Plan (IP) that met the objective of the Consent Decree to AFFH.

18. Westchester did not submit such a plan.

19. Westchester has violated its paragraph 18 obligations.⁵

20. As discussed in some detail in the letter to HUD Deputy Secretary Jones, most of the units that have been “counted” for paragraph (7) purposes are either anti-AFFH or non-AFFH units that should not be counted.

21. Pursuant to 2010 Census data, there is significant overbuilding in paragraph (7)(b) and (7)(c) jurisdictions.

22. None or virtually none of the housing developments have included a market-rate component.

23. Westchester is behind in meeting the “interim benchmarks” set forth in paragraph 23 of the Consent Decree.

24. The Consent Decree contemplated the promulgation of additional benchmarks, incorporating AFFH elements of a Decree-compliant IP.

25. No additional benchmarks have been adopted.

* * *

This is not a pretty picture. It’s a result of an excessively passive and accommodationist posture on the part of HUD, the Monitor, and the U.S. Attorney. It’s exactly what we warned about in 2009 — just two weeks after the entry of the Decree — when we said “appeasement only emboldens resistance. It’s exactly what we warned about when we issued a report in 2010 entitled “Prescription for Failure.” It’s exactly

⁴ As you pointed out in court on April 26th, the County was supposed to complete an acceptable AI within 120 days; as of that court appearance, 1,200 days had elapsed without an acceptable AI.

⁵ In the face of two non-compliant submissions, the Consent Decree provided that “the Monitor *shall* specify revisions or additional items” that “the County *shall* incorporate into its implementation plan.” Consent Decree ¶ 20(d). The Monitor has failed to meet his mandatory obligations pursuant to ¶ 20(d).

why, independent of whether ADC was permitted to intervene, we made the 2011 motion to enforce the Decree that your office opposed.⁶

U.S. Attorney Bharara must surely appreciate the fact that Westchester's resistance to the rule of law has very serious consequences for civil rights both here in the New York region and throughout the country. Nearly four years after the entry of the Consent Decree, the process of holding Westchester to account for all of its violations of all elements of the Consent Decree should be delayed no longer.

Very truly yours,

Craig Gurian

⁶ At the June 7, 2011 conference on ADC motions to intervene and enforce, the representative from your office confirmed that the U.S. Attorney was not itself going to move to enforce the Decree "at the moment," and noted the following: "I will say that the premise of much of ADC's papers are essentially that the County has failed to meet certain obligations, the government and monitor together has failed to enforce that. I would anticipate by the middle of July, both because of the AI and I believe because of the progress of the implementation plan, that those premises may be undercut." Two years later, there is no acceptable AI and no Decree-compliant implementation plan, there is not the slightest hint that Westchester would ever comply with its paragraph (7)(j) obligations, and Westchester's failure to have the ending of segregation as a goal remain tucked firmly out of view of Judge Cote.