U.S. Department of Justice

United States Attorney
Southern District of New York

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July 8, 2021

BY ECF
Honorable Denise L. Cote
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

[As noted below, this letter is nearly identical to one filed on Feb. 10, 2021. ADC's reply to that letter is here.]

Re: *United States ex rel. Anti-Discrimination Center v. Westchester County*, 06 Civ. 2860 (DLC) (GWG)

Dear Judge Cote:

This Office represents the United States (the "Government"), in the above-referenced case. We write in response to the Court's Orders of January 27, 2021, and July 1, 2021, requesting a response to the Monitor's assessment of Westchester County's compliance with the terms of the Consent Decree entered in this case on August 10, 2009 (the "Consent Decree"). For the convenience of the Court, this letter slightly revises and supersedes the letter initially filed by the Government on February 10, 2021. The opening and concluding paragraphs have been revised; Section II, the paragraph beginning "First," has been revised; and footnote 5 is new.

For the reasons stated below, the Government is in agreement with the Monitor that, due in no small part to the attention that the Court has devoted to this matter, "the County has substantially met its obligations" under the Consent Decree. (Monitor's Assessment of Westchester County's Compliance, Jan. 26, 2021 (the "Assessment"), at 3.)

I. Background

The background facts of this case are set forth in eight groups of opinions.[1]

A. The False Claims Act Action and Settlement: *United States ex rel. ADC v. Westchester County*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007); 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (together, "*Westchester I*").

From April 1, 2000, through April 1, 2006, the County applied for, and received, about $52 million in funds from HUD, a condition of which was that the County "affirmatively further fair housing," 42 U.S.C. §§ 5304(b)(2) and 12705(b)(15), and certify to HUD that it would do so. As this Court eventually held, these certifications were false. *Westchester I*, 495 F. Supp. 2d at 387-88; 668 F. Supp. 2d at 565. This Court reserved for trial whether the County's false certifications were presented knowingly. 668 F. Supp. 2d at 567-68.

[1] The Government sets forth a detailed statement of facts herein because the submission filed by the relator, the Anti-Discrimination Center ("ADC"), on January 29, 2021, omits necessary contextual information concerning the prior proceedings.

On August 10, 2009, the Government elected to proceed with the action, filing a complaint in intervention alleging violations by the County of the False Claims Act and the Housing and Community Development Act. Simultaneously, the parties agreed to, and this Court soon approved, the Consent Decree, in which the County agreed to extensive injunctive relief instead of paying over $150 million in damages. (A copy of the Consent Decree is attached to this letter.) *See also* Assessment at 3-4. The Court appointed James E. Johnson as Monitor on August 10, 2009, and Mr. Johnson served in that capacity until August 10, 2016.

B. The Government's Enforcement of the "Source of Income" Provision of the Consent Decree: *United States ex rel. ADC v. Westchester County*, 06 Civ. 2860 (DLC), 2012 WL 1574819 (S.D.N.Y. May 3, 2012), *aff'd*, 712 F.3d 761 (2d Cir. 2013) ("*Westchester II*").

The first major enforcement action by the Government following entry of the Consent Decree arose from the requirement that the County "promote, through the County Executive, legislation currently before the Board of Legislators to ban 'source-of-income' discrimination in housing." (Consent Decree ¶ 33(g)). On June 25, 2010, however, instead of "promoting" the source-of-income legislation passed by the Westchester County Board of Legislators, then-County Executive Robert Astorino vetoed the legislation. Ruling on the Government's application, the Monitor found on November 14, 2011, first, that the County breached its obligation to promote the "source of income" legislation; and second, that "the County should analyze zoning ordinances in connection with the AI." *Westchester II*, 2011 WL 7563042, at *1 (Monitor's report). The County appealed the determination on "source of income" to the Magistrate Judge, which reversed the Monitor, but this Court reversed the Magistrate Judge and concluded that the County had indeed breached the Consent Decree by failing to promote the legislation. *See Westchester II*, 2012 WL 1574819, at *11. On April 5, 2013, the Second Circuit affirmed. *See Westchester II*, 712 F.3d at 771. Because the County Executive continued to delay signing the legislation, the Government wrote to the County by letter dated April 19, 2013, demanding that the County take the necessary steps for the County Executive to sign the legislation, or the Government would seek to hold the County in contempt. The County Executive finally signed the legislation on June 26, 2013. *See also* Assessment at 5-6.

C. The Government's Enforcement of the "Analysis of Impediments" Provisions of the Consent Decree: *County of Westchester v. Dep't of Housing & Urban Dev.*, 06 Civ. 2860 (DLC), 2013 WL 4400843 (S.D.N.Y. Aug. 14, 2013), *aff'd in part, vacated in part, and remanded, County of Westchester v. Dep't of Housing & Urban Dev.*, 778 F.3d 412 (2d Cir. 2015) ("*Westchester III*"); *County of Westchester v. Dep't of Housing & Urban Dev.*, 116 F. Supp. 3d 251 (S.D.N.Y. 2015), *aff'd*, 802 F.3d 413 (2d Cir. 2015) ("*Westchester IV*").

The second major enforcement action by the Government arose from the County's obligation to submit the required analysis of impediments to fair housing ("AI"), which must be "deemed acceptable by HUD." (Consent Decree ¶ 32.) Because this enforcement action originated with HUD, which the County then sued, these matters were litigated not in this case (06 Civ. 2860), but rather two district court actions filed by the County (13 Civ. 2741; 15 Civ. 1992) which in turn led to three appeals to the Second Circuit (13-3087; 15-979; 15-2294). *See also* Assessment at 5.

The AI was one of the essential requirements for the receipt of funds. *See Westchester I*, 495 F. Supp. 2d at 387-88. From 2000 through 2006, however, the County's AIs lacked analysis of race-based impediments to fair housing, which led this Court to conclude that the County's certifications had been false. *See* 668 F. Supp. 2d at 561-62. The Consent Decree sought to remedy these years of false filings by requiring the County to include an identification and analysis of "impediments based on race or municipal resistance to the development of affordable housing," and actions the County would take to address the effects of those impediments. *Id.* Although the Consent Decree required the County to submit an adequate AI within 120 days, by December 2009, the County failed to do so. The effect of the County's continued failure to produce an AI acceptable to HUD jeopardized the availability of funds for other jurisdictions, so HUD sought to reallocate the funds. The County nevertheless waited until April 2013 to bring suit regarding FY2011 funds (*Westchester III*), and waited until March 2015 to bring suit regarding the funds for FY2012, FY2013, and FY2014 (*Westchester IV*).

The County finally submitted a revised AI on April 24, 2013, the day it filed *Westchester III*. The County's exclusionary zoning analysis, however, remained deficient in HUD's view. The County filed an application for a preliminary injunction, which this Court denied. *See Westchester III*, 2013 WL 4400843, at *2. The Government then moved to dismiss the complaint on the ground that the Court lacked subject matter jurisdiction, and the Court granted that motion on August 14, 2013. *See id.* at *5. The County appealed, and sought a stay and a temporary restraining order from the Circuit on August 20, 2013. The Second Circuit eventually denied the County's application for a stay on September 25, 2013. *See Westchester III*, 531 F. App'x 178 (2d Cir. 2013). Following the Second Circuit's orders, HUD reallocated the bulk of the FY2011 funds before the appropriation expired on September 30, 2013. *See Westchester III*, 778 F.3d at 416-17. By Opinion dated February 18, 2015, however, the Second Circuit affirmed this Court in part, vacated its ruling in part, and remanded. *See id.* Between the time of the Circuit's 2013 and 2015 rulings, the FY2012 funds were completely reallocated and obligated as of September 30, 2014, without any legal action by the County.

On March 17, 2015, the County filed a second suit over the FY2013 and FY2014 funds. This Court immediately requested responsive briefing and heard argument on March 27, 2015. After this Court denied the application for a preliminary injunction and ordered an expedited briefing schedule, the County appealed and filed an application for emergency injunctive relief pending appeal. On April 10, 2015, the Second Circuit denied the County's application for an emergency stay, but on April 20, 2015, the Circuit granted the same application. The Circuit heard argument on April 28, 2015, and issued an order on May 1, 2015, enjoining HUD from obligating any of the FY2013 or FY2014 funds at issue, during the pendency of the County's appeal from the denial of the preliminary injunction.

In an 87-page opinion and order dated July 17, 2015, this Court considered and rejected all of the County's arguments, and granted the Government's motions to dismiss the complaints in both 13 Civ. 2741 (regarding the remaining FY2011 funds), and 15 Civ. 1992 (regarding the FY2013 and FY2014 funds). *See Westchester IV*, 116 F. Supp. 3d 251. The Second Circuit ordered expedited briefing, held expedited oral argument on September 22, 2015, and affirmed this Court again, in a 52-page opinion issued on September 25, 2015. *See Westchester IV*, 802 F.3d 413. The Circuit affirmed the efforts of the Government to insure that the County addressed exclusionary zoning, reasoning that, "[b]ecause exclusionary zoning can violate the [Fair Housing Act], and because HUD is required to further the policies of that statute, it was reasonable for HUD to require the County to include in its AI an analysis of its municipalities'

zoning laws." *Id.* at 432. The consequence of the Government's enforcement action was that the County lost approximately $25 million in federal funds for FY2011 through FY2014 for its failure to adequately analyze or take action regarding exclusionary zoning.

D. The Government's Enforcement of the "All Available Means" Provisions of the Consent Decree: *United States ex rel. ADC v. Westchester County*, 06 Civ. 2860 (DLC), 2016 WL 3004662 (S.D.N.Y. May 24, 2016), *aff'd*, 689 F. App'x 71 (2d Cir. 2017) ("*Westchester V*").

The third major enforcement action by the Government to vindicate the goals of the Consent Decree arose from the Monitor's determination on May 8, 2015, that the County had failed to adequately address opposition to the Chappaqua Station project from the Town of New Castle. The County objected to the Monitor's conclusions, and filed objections with the Magistrate Judge. Opposing the County, the Government argued in its brief filed on July 21, 2015, that the Chappaqua Station units did not meet the benchmarks of Consent Decree ¶ 7, which requires that the County "ensure the development of at least 750 new affordable housing units," consistent with the timeline in Consent Decree ¶ 23. The Government also argued that the County failed in its duties to "use all available means" to meet the benchmarks (citing Consent Decree ¶ 7(i)) and to address municipal inaction or resistance to the development of AFFH units (citing Consent Decree ¶ 7(j)). Finally, the Government argued that the County should be penalized and held in contempt for its violations of paragraphs 23, 7(i), and 7(j), unless the County took remedial action. (ECF No. 529, at 28-35.)

The Magistrate Judge, however, disagreed with the Government's arguments and, in a Report and Recommendation dated November 19, 2015, concluded that the County had not violated either the benchmark provisions of Consent Decree ¶ 23, nor the "all available means" provisions of Consent Decree ¶¶ 7(i) and 7(j), and rejected the Government's applications for contempt. The Government appealed the Magistrate's determination to this Court, renewing its application for penalties and contempt in a filing dated January 22, 2016 (ECF No. 552, at 18-19, 23-25.) In a thorough 61-page opinion on May 24, 2016, this Court affirmed the Magistrate Judge in rejecting the Government's argument that the County had missed certain benchmarks under Consent Decree ¶ 23, *Westchester V*, 2016 WL 3004662, at *14-15, but reversed the Magistrate Judge and agreed with the Monitor and the Government that the County had violated its obligations to, first, "use all available means" to promote the units under Consent Decree ¶ 7(i), and, second, "use all available means" to address municipal resistance or inaction under Consent Decree ¶ 7(j), *see id.* at *16-18. The Court reserved decision on the Government's contempt application. *See id.* at *21.

The County appealed this Court's decision and on April 28, 2017, in an opinion consolidating the County's appeals in *Westchester V* and *Westchester VII*, the Second Circuit affirmed this Court's orders, as discussed fully below. *See* 689 F. App'x 71 (2d Cir. 2017).

E. The Government's Enforcement of the Public Education Provisions of the Consent Decree: *United States ex rel. ADC v. Westchester County*, 06 Civ. 2860 (DLC), 2016 WL 3566236 (S.D.N.Y. June 27, 2016), *aff'd*, 674 F. App'x 82 (2d Cir. 2017) ("*Westchester VI*").

The fourth major enforcement action by the Government to vindicate the goals of the Consent Decree arose from the Monitor's determination on March 17, 2016, that the County Executive had repeatedly made misleading statements concerning the Consent Decree, in breach of his public education obligations under Consent Decree ¶ 33(c). In support of the Monitor's determination, the Government, in its brief filed May 9, 2016, sought a variety of remedial relief from the Court. (ECF No. 585, at 22-25.)

By Order dated May 23, 2016, the Court directed the County to retain a public relations consultant to develop the One Community Campaign. In a decision dated June 27, 2016, the Court set forth the basis for its conclusion that the County had breached its obligation to conduct a public information campaign as required by paragraph 33(c), noting that not only were the County's efforts inadequate, but also that then-County Executive Robert Astorino had made multiple false statements about the Consent Decree that undermined the meager efforts that the County had made:

> Astorino intentionally generated fear that increasing available affordable housing and modifying exclusionary zoning laws would change neighborhoods for the worse. These statements reveal a concerted effort to influence public opinion *against* the Settlement and its stated goal of improving communities by increasing racial and ethnic diversity. This coordinated effort both evinces bad faith and exposes the deficiencies of the delayed Campaign.

2016 WL 3566236, at *8. This Court further held that it was appropriate to permit the public release of the videos and transcripts of depositions conducted by the Monitor because "the videotapes thus may be an important tool for public evaluation of the accuracy and reliability of Astorino's prior assertions concerning the Consent Decree. The public will have an opportunity to evaluate the witnesses' statements and credibility in a way that a cold transcript cannot provide to them." *Id.* at *10.

The County appealed the Court's decision in *Westchester VI* to the extent that it found the County in breach and ordered the release of deposition video and transcripts, including of Astorino. The Second Circuit affirmed, concluding among other things that "the record supports the district court's finding that the County acted in bad faith." 674 F. App'x at 83.

Consistent with the Court's orders, the parties met and conferred regarding an initial survey to assess the potential audience's receptiveness to the messaging of the One Community Campaign, as well as the budget and duration for the campaign. On March 11, 2017, the County rolled out the One Community Campaign, which, based upon the evidence that the County has provided, consisted of dozens of print, radio, television, and digital ads. HUD had no objection to the content of the campaign.

F. The Government's Enforcement of the AI Requirement of the Consent Decree: *United States ex rel. ADC v. Westchester County*, 06 Civ. 2860 (DLC), 2016 WL 3945679 (S.D.N.Y. July 18, 2016), *aff'd*, 689 F. App'x 71 (2d Cir. 2017) ("*Westchester VII*").

On April 28, 2016, the Monitor submitted his Third Biennial Assessment of compliance with the Consent Decree and described two notable failures of compliance. First, nearly seven years after entry of the Consent Decree, the County had still failed to submit an AI acceptable to HUD. Second, the Monitor concluded that the County had not provided economic incentives or brought necessary litigation to encourage eligible municipalities to adopt its model zoning ordinance. *See* 2016 WL 3945679, at *1.

This Court held that with respect to the failure to complete an AI, "[t]his breach is clear and cannot credibly be questioned." 2016 WL 3945679, at *7. The Court adopted the Monitor's suggestion that the County should be ordered to retain a consultant to prepare the AI, the County evidently being unwilling to do so on its own. *See* 2016 WL 3945679, at *12. The Court reserved decision with respect to the model ordinance until completion of the AI. *See* 2016 WL 3945679, at *13-14.

As noted above, the County appealed this Court's decision as to the AI and the appeal was consolidated with the appeal in *Westchester V*. Affirming this Court's rulings in all respects in both *Westchester V* and *Westchester VII*, the Second Circuit sternly warned the County against further lack of compliance:

> We note that these consolidated appeals are the sixth and seventh appeals by the County from the district court's ongoing efforts to ensure the County's compliance with its obligations under the Consent Decree. All of these appeals have been rejected, and it is apparent that the County is engaging in total obstructionism. The County would be well–advised to stop making excuses, and to complete its obligations under the Consent Decree with diligence and dispatch.

United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester County, New York, 689 F. App'x 71, 74–75 (2d Cir. 2017). The County has not appealed any of this Court's orders or decisions to the Circuit since.

G. The Government's Enforcement of the Monitor Provisions of the Consent Decree: *United States ex rel. ADC v. Westchester County*, 06 Civ. 2860 (DLC), 2017 WL 728702 (S.D.N.Y. Feb. 23, 2017) ("*Westchester VIII*").

As noted above, James E. Johnson completed his term as Monitor on August 10, 2016. This Court noted, and the Government agrees, that Mr. Johnson "worked diligently and creatively with the County, local government officials, organizations within Westchester County, and experts to assist the County to fulfill its obligations under the Consent Decree." 2017 WL 728702, at *2. To ensure that the County completed its obligations under the Consent Decree, the Government posted a notice for a replacement Monitor on July 22, 2016, and received applications from six applicants, three of whom were former judges who expressed a concern about the cap upon the Monitor's fees, a not unreasonable concern in light of the extensive and uncompensated work performed by Mr. Johnson. Accordingly, the Government moved on December 30, 2016, for the appointment of the Honorable Stephen C. Robinson, a former United

States District Judge for the Southern District of New York, and under Fed. R. Civ. P. 60(b) to modify the Consent Decree by lifting the fee cap. The County opposed both prongs of the application. By decision dated February 23, 2017, this Court modified the Consent Decree to eliminate the fee cap, and appointed Judge Robinson as Monitor. *See* 2017 WL 728702, at *5.

On November 8, 2017, George Latimer defeated Robert Astorino to become the next County Executive. With Astorino's departure, the County's approach to compliance with the Consent Decree improved significantly, and this case entered a considerably more harmonious period. As the Assessment puts it, and the Government agrees, "[a]s a general matter, under the leadership of Mr. Latimer, the County has demonstrated a renewed commitment to satisfying its obligations under the Settlement." Assessment at 6.

II. The Monitor's Assessment

The Assessment is careful and thorough, and the Government respectfully submits that the Court should accept it, with one proviso as described below. As the Assessment explains, there are five major subjects for evaluation.

First, a primary obligation under the Consent Decree is the creation of 750 Affordable AFFH Units in municipalities that meet specific demographic criteria. (Consent Decree ¶ 7; Assessment at 10-11.) Throughout the implementation of the Consent Decree, the Monitor and the County have consulted with HUD to ensure that units are appropriately counted and sited, and the County has now created 751 units, as of June 1, 2021. Accordingly, the Government does not object to the County's claim that it is in substantial compliance with this obligation.

Second, the Consent Decree required the County to develop and promote a model zoning ordinance. While the County has met its obligation to develop the ordinance, not all of the 31 designated municipalities have adopted it — 21 have adopted the ordinance in part, or similar provisions, leaving 10 municipalities with zoning that arguably fails to encourage integration or leaves segregated housing patterns in place. Assessment at 14-16. The failure to adopt the model zoning ordinance, moreover, is particularly problematic in municipalities whose zoning may fall afoul of *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975), and *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd sub nom. Town of Huntington v. Huntington Branch*, 109 S. Ct. 276 (1988). As the Assessment notes, however, the Government began preliminary inquiries into zoning in Harrison and Pelham Manor, among others, and may be better positioned to bring enforcement litigation should such litigation prove necessary and appropriate. *See* Assessment Exh. 21. Accordingly, the Government does not object to the Monitor's conclusion that the County has met its obligations with respect to the model zoning ordinance.

Third, the Consent Decree required the County to submit an analysis of impediments to fair housing, which must be "deemed acceptable by HUD." (Consent Decree ¶ 32.) As detailed above, this particular requirement was the subject of extensive litigation. *See also* Assessment at 27-31. After years of litigation, revisions to the AI, and retention of a consultant pursuant to an Order of this Court, HUD accepted the AI on July 14, 2017. Assessment at 31. This obligation is therefore completed, as the Monitor concludes.

Fourth, the County has issued a lengthy Affordable Housing Needs Assessment, dated November 2019, even though it was not required by HUD to do so in connection with HUD's

acceptance of the AI in July 2017. As the Monitor concludes, "[t]he Needs Assessment can fairly be seen as a sign of the County's renewed commitment to fulfilling both the letter and spirit of the Settlement and good faith effort to further affordable housing." Assessment at 41. The Government therefore has no objection to the Monitor's conclusions on this point.

Fifth, the Consent Decree required the County to conduct a public information campaign under paragraph 33(c). This provision was also the subject of litigation, as detailed above. *See also* Assessment 49-56. In the end, however, HUD advised the Court that it was satisfied with the County's One Community campaign, and the Monitor notes additional public information efforts that have supported the goals of the Consent Decree. The Government therefore has no objection to the Monitor's conclusions on this point.

Finally, the Assessment appropriately notes some areas of continuing concern, particularly with regard to municipalities whose zoning codes may conflict with *Berenson* or *Huntington*. Assessment, at 57-58. The Government shares these concerns and will continue to consider inquiries into these municipalities.

III. ADC's Submission

Although ADC played no role in the litigation of *Westchester II*, *Westchester III*, *Westchester IV*, *Westchester V*, *Westchester VI*, *Westchester VII*, or *Westchester VIII*, it has from time to time sought to intervene in this matter or otherwise urge this Court to follow a particular course of action. This Court previously rejected ADC's application to intervene to "enforce" the Consent Decree, holding that "ADC has no greater status than any other stranger to this litigation." *U.S. ex rel. Anti-discrimination Ctr. of Metro New York, Inc. v. Westchester County, N.Y.*, 06 Civ. 2860 (DLC), 2012 WL 13777, at *6 (S.D.N.Y. Jan. 4, 2012). Next, at a hearing on May 2, 2014, the Court permitted ADC to speak but cautioned:

> But I want to make clear that letting [ADC] be heard does not change my analysis at all about their right to intervene and does not suggest at all — and I'll describe this in more detail later when I speak — that I believe that the government has failed to act responsibly here such that ADC must step up to the plate to bring to this Court's attention issues of importance with respect to contempt.

(Dkt. No. 472, at 3:17–24.) On May 11, 2016, ADC submitted a letter with numerous attachments (dkt. no. 592). The Court ordered the parties to address whether it should accept ADC's submission as an amicus brief (dkt. no. 597), and ultimately denied ADC's request to be heard as amicus on July 6, 2016 (dkt. no. 654). ADC's submission of January 29, 2021 is thus the fourth time it has sought to insert itself into this case.

Although the above recitation of the lengthy history of the Government's enforcement efforts ought by itself to dispel ADC's misconstruction of that history (particularly its unfounded assertion that there has been a "lack of enforcement," Letter at 1), the Government respectfully submits a brief response, to correct the record.

First, the bulk of ADC's Letter consists not of specific objections, but lengthy reiterations of points that the ADC made in 2012, 2014, and 2016 — none of which proved to be particularly relevant or helpful. On the first page of the Letter, ADC quotes from an amicus brief that this Court denied leave to file, *see* Letter at 1, and later quotes itself, at great length, from reports and

submissions relating to its prior failed applications to intervene or file *amicus* briefs, *see* Letter at 3-4 & n.11, *id.* 6 n.18. As these arguments have been considered and rejected before, the Government will not address them again.

ADC's main specific contention is that the County has purposefully failed to place AFFH units in its most segregated areas. ADC notes that under paragraph 7(a) of the Consent Decree, 630 of the 750 units must be located in municipalities with a Black population of less than 3% and a Hispanic population of less than 7%. According to ADC, however, only 368 of the 750 units are located in such jurisdictions "per 2010 Census data." Letter at 2. ADC's use of 2010 Census data, however, does not track the terms of the Consent Decree, which instead calls for such calculations to be performed under 2000 Census data. Indeed, the Consent Decree was signed in 2009, and 2010 Census data became available over the course of 2011, while AFFH units entered the pipeline to completion. Instead, ADC attacks the Monitor and the Government for failing to "shift to the 2010 data." Letter at 2. But the Consent Decree strictly limits the ability to "shift to the 2010 data." Paragraph 15(a)(iii) provides that "no municipality included under the calculations set forth in paragraphs 7(a), 7(b), or 7(c) shall be excluded after modification or refinement to those subdivisions."[2] In other words, even if the Monitor were to exercise his authority under Paragraph 15 to "shift to the 2010 data," he could only add eligible municipalities, not "un-count" units in municipalities that were eligible at the time the Consent Decree was signed.[3]

Next, ADC attacks the Monitor and the Government for failing to adequately address exclusionary zoning. ADC avers that "[i]t is, of course, a shocking breach of its basic duty that the Government — charged with enforcing the decree — has never in 11 years provided *its own analysis* of which municipalities failed to take sufficient action to remove exclusionary-zoning barriers so as to promote the objectives of building AFFH units." (Letter at 5.) But under the Consent Decree, it was the County's (not the Government's) "basic duty" to conduct this analysis in its AI, *see* paragraph 32, such that the Government's "enforcing the decree" meant compelling the County to do so. And the Government spent years in litigation to compel the County to do exactly that, in *Westchester III*, *IV*, and *VII*. In any event, the Monitor's Assessment details the extensive and painstaking work of persuading 21 municipalities to change

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[2] Notably, the Letter quotes paragraph 15(a)(iii) in footnote 6, but cuts off the quote when it contradicts ADC's argument. As the County put it in its December 8, 2020 letter to the Monitor, "Paragraph 15(a)(iii) is meant to apply in a prospective manner, so as to not place the County in a situation where it has invested time and money into developments which count under the 2000 Census, only to have those units become excluded by a later calculation." (Dkt. no. 731-25, at 2-3.)

[3] In support of this point, ADC points to an analysis by Prof. Andrew Beveridge, dated May 11, 2016, and docketed as ECF No. 592-1. The Government previously had no objection to the Beveridge Report, and still has none. But the fact remains that even if the Monitor were to adopt the Report as his own, the Monitor cannot "un-count" the units that were located in eligible paragraph 7(a) municipalities under 2000 Census data, even if these municipalities are not eligible any longer.

provisions of their zoning codes, *see* Assessment at 13-27,[4] and the Government has the ability to bring enforcement actions against municipalities independent of the Consent Decree.[5]

ADC's Letter closes with a list of demands. Letter at 10-11. These demands should be rejected as substantively meritless for the reasons set forth above, procedurally deficient as proposals from a "stranger to the litigation," *Westchester County*, 2012 WL 13777, at *6, and improper as an effort to render the Government's enforcement authority beholden to ADC's satisfaction.

IV. Conclusion

For the reasons stated above, the Government respectfully suggests that the Court accept the Monitor's Assessment. The Government greatly appreciates the extensive consideration the Court has devoted to this matter.

Respectfully,

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Cc: Counsel of record (via ECF)
Monitor Stephen C. Robinson (via email)

[4] The Monitor notes that this Court's opinion in *Westchester V* on May 24, 2016 suggests that the County is not obliged to sue municipalities for failing to adopt the model ordinance, pointing out the prior Monitor's statement that "[t]he Court has made clear that Paragraph 7(j) is only triggered with the 750-units requirement." Assessment at 20.

[5] On June 1, 2021, the Government wrote to two of the municipalities identified by the Assessment as having potentially problematic zoning codes, requesting information and a response to the Monitor's analysis, and the Government anticipates making additional similar requests.