UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 06 Civ. 2860 (DLC)(GWG)

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UNITED STATES OF AMERICA ex rel.
ANTI-DISCRIMINATION CENTER OF
METRO NEW YORK, INC.,

Plaintiff,

v.

WESTCHESTER COUNTY, NEW YORK,

Defendant.

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COUNTY'S REPLY TO THE GOVERNMENT'S RESPONSE TO THE OBJECTIONS TO THE MONITOR'S REPORT & RECOMMENDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

It is uncontested that this Court must conduct a *de novo* review of the Monitor's Report and Recommendation ("Report"), and no deference to the Monitor's Report is required. *See Greene v. WCI Holding Corp.*, 956 F. Supp. 509, 514 (S.D.N.Y 1997); Gov't Resp. ("Resp.") 7.

The instant dispute relates to the impermissible expansion by the Monitor and the Government of the terms of the August 10, 2009, Stipulation and Order of Settlement and Dismissal ("Settlement"). Notwithstanding that the County has complied with the express terms of the Settlement and is ahead of schedule in meeting the benchmarks set for construction of the required 750 units (Dkt. Entry No. 381, p. 2), the Government is refusing to release millions of dollars in Community Development Block Grant ("CDBG") funds necessary to fulfill the requirements of the Settlement.

The Government's references to actions allegedly taken by the County prior to the execution of the Settlement are of no consequence. Resp. 1-3. The Settlement specifically states that its existence "is neither an admission by the County of any liability or wrongful conduct nor a concession by the United States that its claims are not well-founded." Settlement 4. The Settlement was intended "to avoid the delay, expense, inconvenience, and uncertainty of protracted litigation" and to set forth "the mutual promises, undertakings, obligations and commitments" of the parties. Settlement 4. The Government's references to the County's alleged violations of the False Claims Act (Resp. 2, 9) and its liability for "over $150 million in damages" (Resp. 2) conflict with the Settlement provisions wherein the parties acknowledge that there is no admission of liability and the Government released the County from liability (Settlement 4; ¶41). As such, the Settlement provides the parties with a clean slate.

The Government refuses to submit to this Court's authority to consider the reasonableness of the Government's refusal to approve the County's Analysis of Impediments

submission dated July 2011 ("AI") annexed to the Objections as Exhibit F. Resp. 6. The issues relating to source of income and zoning are the only bases for the Government's continued refusal to approve the County's AI. In its July 13th letter, the Government specified the alleged deficiencies related to source of income legislation and plans to overcome exclusionary zoning as the reasons why the AI was rejected. *See* Obj., Ex. A (as Ex. A to County's October 7, 2011 submission). No other deficiencies were cited. The Government then placed these identical issues before the Monitor in its August 18, 2011 letter (Report Ex. 2). As such, by placing the resolution of these issues before the Monitor, the Government also placed the sufficiency of the AI before the Monitor.[1]

ARGUMENT

I. *Source of Income*

"[C]onsent decrees must be interpreted according to the plain meaning of the language and the normal usage of the terms selected" (Report 6) so as to give full meaning and effect to all the provisions. *Brookfield Asset Mgmt., Inc. v. AIG Fin. Prods. Corp.*, 2010 WL 3910590, at *8 (S.D.N.Y. 2010). Moreover, an interpretation that renders any provision superfluous or meaningless should be avoided. *Id.* The Government and Monitor ignore the plain meaning of the phrase "currently before" in contravention of these rules of construction.

The Government concedes that the "phrase 'currently before the Board' modifies the word 'legislation,' so that the parties know what the legislation in question provides." Resp. 11, n. 8. In choosing to tie the obligation to promote to a "specific piece of legislation" (Resp. 14), the parties were aware of the nature and duration of pending legislation. It is uncontested that

[1] Contrary to the Government's statement that the County "has simply dumped over [1,000] pages of material onto the docket" (Resp. 25), since the County has squarely placed the sufficiency of the AI before the Monitor and this Court, the AI was properly provided as part of the record before the Court pursuant to Rule 72(b)(2) of the FRCP. Moreover, for ease of reference, the portions of the AI cited throughout its Objections (at 16, 17, 20 and 22), were included separately as Ex. E.

said specific piece of legislation died at the close of the legislative session on December 31, 2009. Resp. 9. Any other reading of ¶33(g) would be contrary to the plain meaning of the phrase "currently before" and render the clause superfluous or meaningless.

The Government urges that the "only reasonable reading of the duty to 'promote' [source of income] legislation was to promote it until it was enacted." Resp. 12. However, the Settlement as executed by the parties clearly does not require the County to adopt source of income legislation (¶33(g)). Nor does the Settlement mandate all future County Executives to "sign or adopt" source of income legislation.

The Government also states that the County's promotion of the source of income legislation by the former County Executive was insufficient. Although characterized as a "limited effort at compliance," the Monitor does not make any finding that the prior acts of promotion by the former County Executive violated the Settlement (Report 8). In fact, the Monitor acknowledges that the former County Executive promoted the legislation. Instead, the Monitor's recommendation focuses on the 2010 veto of a "*version* of that legislation"[2] (Resp. 6 (emphasis added)) by County Executive Astorino which the Monitor views as having "vitiated any prior act of promotion and placed the County in breach of the Settlement." Report 8.

The Settlement does not mandate the promotion of just *any* version of source of income legislation. Rather, it obliged the former County Executive to promote the source of income legislation pending in August 2009. Indeed, the Government recognizes this limitation by adopting the Monitor's recommendation "that the County Executive be enjoined to request that the legislature *reintroduce the prior legislation*, provide information to assist in analyzing its

[2] The Government inconsistently argues that "[t]he phrase 'currently before the Board' modifies the word 'legislation,' so that the parties know what the legislation in question provides" (Resp. 11, n.8), then concedes that it was a different version of source of income legislation that was passed by the Board of Legislators ("Board") in June 2010 and vetoed by the County Executive (Resp. 9), and yet still argues the veto violated the Settlement.

impact, and to sign it. (Report at 10.)" Resp. 18 (emphasis added). However, the Settlement does not require the reintroduction of legislation. In sum, the County's interpretation of ¶ 33(g) is fully consistent with the plain meaning of the phrases "currently before" and "promote." Therefore, the County has fulfilled its obligation under the Settlement.

Additionally, the Government's claim that the County has waived its unmistakability, reserved powers, and Guarantee Clause arguments is wrong. Consenting to the Court's jurisdiction and acknowledging authority to enter into the Settlement does not preclude the County from raising these arguments in opposition to overbroad Settlement interpretation. Furthermore, the substance[3] of these arguments was raised before the Monitor and acknowledged by the Government.[4]

Moreover, Supreme Court precedent shows that the reserved powers doctrine applies to protect against the contractual infringement of "essential governmental duties" delegated to a municipality. *See Contrib. to Pa. Hosp. v. Philadelphia*, 245 U.S. 20, 23-24 (1917) (applying reserved powers to a city). Although inapplicable to "purely financial" promises, the doctrine applies to an exercise of the "police power." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23-25 (1977). Further, the unmistakability doctrine also applies to essential government duties of a municipality. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).

Article IX of the N.Y.S. Constitution delegates broad police power to the County over the protection, order, conduct, safety, health and well-being of its citizens. N.Y.S. CONST. art. IX, § 2(c)(10). Thus, the County is an independent, general-purpose unit of government that exercises

[3] The County was required to expand upon those arguments in its Objections, to respond to the Monitor's far-reaching interpretation of the term "promote." Merely reiterating the arguments made before the Monitor would serve as a perfunctory rehash, and be altogether insufficient to invoke *de novo* review. Even if the arguments were new, the Court should exercise its discretion and consider the arguments as there is no prejudice to the Government.

[4] *See* County's July 28, 2010 letter to the Monitor which referenced the curtailment of the County Executive's ability to respond to the priorities and concerns of his constituents, as well as his ability to fulfill his duties as a democratically elected official; *see also,* Gov't submissions dated Oct. 7 at 4, n. 3, (Obj. Ex. C) and Oct. 21 at 1 (Obj. Ex. D).

its own powers in relation to local matters. As such, when the County legislates, it exercises the sovereign police power delegated to it by the people of the State of New York. *See Avery v. Midland County*, 390 U.S. 474, 480-81 (1968). The fundamental feature of an effective local government is a locally-accountable legislative process, which is guaranteed by the N.Y.S. Constitution. N.Y.S. CONST. art. IX, § 1(a) (entitled: "Bill of rights for local governments"); *see also Avery*, 390 U.S. at 480-81. In sum, an essential duty of the County (*via* the *combined* legislative process of the Board and County Executive) is to exercise its police power responsibly.

The County never agreed to prospectively limit its power to legislate in the best interests of its citizens. The County Executive's veto power is a critical aspect of the bipartite legislative process. The County Charter *requires* that the passage of any act or local law be subject to the approval or disapproval of the County Executive. Laws of West. Co. § 107.71 (Ex. A annexed hereto); § 209.151 (Obj., Ex. G). The Monitor's interpretation of the word "promote" directly interferes with the County's legislative process in two important ways. First, removing the County Executive's veto power, practically speaking, eliminates the process of presentment altogether, and impermissibly transforms the County's bipartite legislative system into a unitary one. *See I.N.S. v. Chadha*, 462 U.S. 919, 942 n.13, 957 (1983) (striking legislative veto, based on separation of powers, even though President consented to the infringement of executive powers). Second, the Monitor's interpretation effectively forces the current County Executive to sign any source of income legislation, thereby impairing the County's ability to properly exercise its delegated sovereign police powers of legislative home rule. Thus, the Monitor's interpretation of "promote" violates the reserved powers doctrine and would render ¶33(g) of the Settlement void *ab initio*. Moreover, because this "essential government duty" was not surrendered in

unmistakable terms, such a construction violates the unmistakability doctrine of contractual interpretation. *See Doe v. Pataki*, 481 F.3d 69, 79 (2d Cir. 2007) ("[A] clear statement of intent to surrender a state's legislative authority is even more appropriate when the alleged restrictions on future law-making power are part of an agreement authorized and enforced by a federal court.").[5]

"[S]ome questions raised under the Guaranty Clause are nonjusticiable . . . ." *Reynolds v. Sims*, 377 U.S. 533, 582 (1964). However, the County has alleged a justiciable claim (*see* Obj. 10-12) in that none of the six factors in determining whether an action is nonjusticiable[6] apply. *See Baker v. Carr*, 369 U.S. 186, 216 (1962).

Additionally, the Supreme Court has recognized the County's interest in principles of federalism, particularly in the context of its reluctance to enjoin officials of local governments. *See Rizzo v. Goode*, 423 U.S. 362, 380 (1976) (citing *Mayor v. Edu. Equal. League*, 415 U.S. 605, 615 (1974)). By citing *Horne v. Flores*, 129 S. Ct. 2579 (2009), and similar cases, the County is not trying to unilaterally annul the Settlement. Rather, the County merely asks the Court to recognize the unique concerns embodied in those cases (*e.g.*, federalism and the impermissible binding of successor officials) in interpreting this lone clause of the Settlement.

Finally, the Government fails to squarely address the arguments regarding the County's authority to contractually waive the veto power of the County Executive, absent a referendum. The Government's first argument, that the veto power was not affected generally, is of no moment because the reserved powers doctrine applies even where the power is restricted in a

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[5] Additionally, where a contractual provision is susceptible to two constructions, and one raises constitutional concerns and the other does not, a court should adopt the latter. *N.L.R.B. v. Local 32B-32J Service Employees Intern. Union*, 353 F.3d 197, 202 (2d Cir. 2003); *see also, Jones v. U.S.*, 529 U.S. 848, 857 (2000). The Monitor's interpretation raises such concerns and the County's does not.

[6] The Government relies on *New York v. U.S.*, 971 F. Supp. 789 (S.D.N.Y. 1997), which is clearly distinguishable, and certainly not dispositive, as the case dealt with federal preemption on immigration issues.

specific circumstance. *See Philadelphia,* 245 U.S. at 23-24 (eminent domain power restricted in limited circumstance). The Government also argues that: "if requiring the County Executive to take a specific action can be recharacterized as an invasion upon his veto power, . . . then absent a county-wide referendum the County Executive is free to opt out of any contracts at his whim." Resp. 14. It is only where the contract contains a provision, such as one which would curtail the veto power of an elected official, that the requirement of a referendum is triggered. N.Y.S. CONST. art. IX, § 1(h)(2); N.Y. MUN. HOME RULE LAW §§ 23, 34(4); Laws of West. Co. § 209.161. The County is not trying to opt out of the Settlement, but merely demonstrating that the Monitor's interpretation renders *a lone provision* of the Settlement void *ab initio* because the parties did not intend, and could not have intended, "promote" to mean "sign."

II. *Zoning*

It is undisputed that the terms of ¶¶ 7(i) and (j) of the Settlement expressly apply to the "objectives" of ¶ 7. *See* Obj., Ex. B, 8-10. In fact, the Government acknowledges that the County is not required to consider legal action unless and until municipalities fail to take action "to promote the development of housing units pursuant to the Settlement, 'or undertake[] actions that hinder' that development . . . ." Resp. 19.

Throughout its opposition, the Government grossly expands the Settlement's requirements with respect to zoning. For example, at page 4, the Government states that:

> the Settlement requires the County to identify specific zoning practices within the County that hinder the development of Affordable AFFH Units (as that term is used in the settlement) that the County will challenge; and also requires the County to establish a process for notifying the municipalities in which such practices exist of the changes that must be made and of the consequences of their failure to do so.

(citing Settlement ¶¶ 7(i), 7(j), 15.)[7] However, neither ¶¶ 7 nor 15 require the County to identify specific zoning practices that hinder the development of AFFH units that it will challenge. Nor is there any requirement that the County establish a process for notifying the municipalities in which such practices exist of the changes that must be made and of the consequences of their failure to do so.

The Government focuses on the fact that ¶ 7(i) requires that the County use "all available means" to achieve the objective of developing AFFH Units and to encourage municipalities to promote that objective. Resp. 20. However, the Government consistently leaves out the phrase "as appropriate". Paragraph 7(i) actually requires the County to "use all available means *as appropriate* to achieve the objectives set forth in" ¶ 7. The Government also claims that ¶ 15 of the Settlement provides that " '*all possible actions*' will be taken by the County 'to meet its obligations …includ[e][sic]… promoting inclusionary *and other appropriate zoning* by municipalities.' " Resp. 20. However, the Government has taken these selective quotes completely out of context. The introductory language of ¶ 15 describes the manner in which the Monitor will evaluate the County's progress, rather than mandating affirmative action to be taken by the County.[8] The Government claims that the County is precluded from arguing that the Settlement does not require the remedial measures recommended by the Monitor because of the County's purported agreement to use "all available means" and take "all possible action." Resp. 21. Taking this illogical argument to its end, the County would have no choice but to follow any

[7]Further examples of misstatements are: "the County was also obliged to establish a process for notifying the municipalities in which exclusionary zoning practices exist of the changes that must be made to such policies, and of the consequences of their failure to do so." (Resp. 6); "the Settlement requires [the County] to seek to change exclusionary [zoning] practices, and specify a strategy to overcome exclusionary zoning practices." (21); the "Settlement obliges the County to identify these potential vulnerabilities in local zoning ordinances as part of the County's obligation to [AFFH]" (22); and " 'identify the "types of situations that would lead to litigation" ' " (24).

[8]"[T]he Monitor may consider any information appropriate to determine whether the County has taken all possible actions to meet its obligations under this Stipulation and Order, including, but not limited to, . . . promoting inclusionary and other appropriate zoning by municipalities by offering incentives, and, if necessary, taking legal action." Settlement, ¶15.

remedial measures put forth by the Monitor, regardless of their nature or scope. This would obviate the need for the Settlement's provisions for a review of the Monitor's decisions.

The Government also claims that the Monitor "correctly concluded that the County failed to meet its obligations to address exclusionary zoning practices, including through litigation." Resp. 21. However, nothing in the Settlement obliges the County to address *exclusionary zoning* through litigation. The plain meaning of ¶ 7 details the timing of potential lawsuits (*see* Obj. 18). Contrary to the Government's arguments, resort to ¶ 7(j) is premature until a municipality has hindered or impeded the County in its development of the 750 housing units.

The Government claims that "the County's passive approach to challenging exclusionary zoning ordinances has resulted in a failure to overcome these obstacles, such that projects may not be going forward due to exclusionary zoning." Resp. 22. Such a claim is purely speculative and completely unsupported by substantive facts. Moreover, contrary to both the Monitor and the Government's position, neither the Settlement, nor the regulations or statutory scheme underlying an "Analysis of Impediments" requires a proposed litigation strategy. In arguing that the Government is not asking the County to engage in a hypothetical litigation strategy, the Government, in fact, uses a hypothetical to explain what it actually requires.[9] As noted by Judge Cote, "[t]he statutory and regulatory framework described above imposes *no duty on the County to undertake any particular course of action . . . .*" *U.S. ex rel. Anti-Discr. Cent. of Metro New York, Inc. v. Westchester County*, N.Y., 668 F. Supp. 2d 548, 565 (S.D.N.Y. 2009) (emphasis added). Nor is there such a requirement in the Settlement. (¶32). The County is only required to identify and analyze the appropriate actions that it will take.

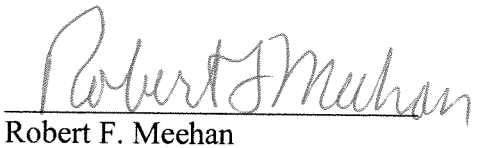
[9] "For example, if Town X in Westchester County has a local zoning ordinance that limits multifamily housing, particularly in a predominantly white neighborhood, then Town X is vulnerable to litigation." Resp. 22.

The County has agreed to comply with the Monitor's recommended timeframe and to provide the Government, by February 29, 2012, with an *analysis*[10] as specifically detailed in the Monitor's Report 13-14. Obj. 15, n.11. As the Monitor explicitly stated in his Report, the County may state why an analysis of the identified zoning practices would not be helpful in understanding the impact of zoning ordinances taken as a whole. *See id.* As such, until there is a finding by the County that said zoning practices are actually an impediment, the County cannot identify and analyze the appropriate legal strategy it will take.

CONCLUSION

The County has fully complied with the requirements of the Settlement regarding the promotion of the source of income legislation and the required actions to be taken with regard to local land use regulations. As such, the Monitor's Report should be rejected as argued herein.

Dated: January 6, 2012
White Plains, New York



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[10] The Government further misstates the County's position in footnote 12 on page 23, by asserting that the County "will limit its *analysis* to ordinances 'that clearly violate the Fair Housing Act. (Obj. 21.)'" (emphasis added). However, the County never stated that its analysis would be so limited – the County stated that should it "encounter municipal opposition that hinders or impedes its development of the 750 AFFH units and which blocks a particular project under circumstances *that clearly violate the Fair Housing Act,* . . . the County itself, not just the developer, would then have a basis to *challenge the discriminatory zoning practice.*" Obj. 21 (emphasis added). Clearly, the County was indicating the manner in which it could legally challenge a zoning practice, and not describing how its analysis would be limited.