

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 SUPPORT OF MOTION
TO COMPEL WESTCHESTER COUNTY TO COMPLY WITH THE COURT-
APPOINTED MONITOR’S REQUESTS FOR INFORMATION AND
PROCEDURES FOR FUTURE REQUESTS**

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 serve as the court-
appointed Monitor in the above captioned matter. I was appointed to serve as Monitor by
this Court on August 10, 2009.

2. I make this declaration to put before the Court certain facts regarding
Westchester County’s compliance with the August 10, 2009 Stipulation and Order of
Settlement and Dismissal (“Settlement” or “Stipulation and Order”), in support of the
Motion of plaintiff the United States of America (“the Government”) for a court order
that will: (a) compel the County’s compliance with the Monitor’s outstanding
information requests, and (b) compel the County’s compliance with all future requests

and with a procedure that will both ensure timely and complete compliance with the Monitor's requests for information and resolve disputes about requests in a prompt and definitive manner.

3. To date, the County's compliance with the Monitor's requests for information, reports and analysis has been all too frequently marked by delay, incomplete production and, at times, wholesale failure to respond. This conduct has limited the Monitor's ability to: (a) assess the County's compliance with the requirements of the Settlement; (b) recommend actions that would bring the County into compliance; and (c) facilitate the development of housing solutions consistent with the clearly stated purposes of the Settlement.

I. Responsibilities and Authority of the Monitor

4. Paragraph 13 of the Settlement grants the Monitor certain responsibilities and authority necessary to achieve the purposes of the Settlement. These include, among other things, the authority to:

- (a) Review all County programs, policies, and procedures to ensure compliance with this Stipulation and Order.
- (b) Take reasonable and lawful steps to be fully informed about all aspects of the County's compliance with this Stipulation and Order. Specifically, the Monitor shall have access to all books, records, accounts, correspondence, files and other documents, and electronic records of the County and its officers, agents,

and employees concerning the subject matter and implementation of the Stipulation and Order.

- (c) Identify, recommend, and monitor implementation of additional actions by the County needed to ensure compliance with this Stipulation and Order.
- (d) Make recommendations, if needed, to the County and the Government of any remedies to foster compliance with applicable laws and regulations.

Settlement ¶ 13.

5. Under paragraph 16 of the Settlement, the County must “direct all County officers, employees, agents, and consultants to cooperate fully with the Monitor concerning any matter within the Monitor’s jurisdiction as set forth in this Stipulation and Order, including providing any documents requested by the Monitor and submitting to interviews by the Monitor.”

6. Periodically, the Monitor is also required to “conduct an assessment of the County’s efforts and progress related to the obligations set forth in this Stipulation and Order.” *See* Settlement ¶¶ 15, 39-40.

II. The County’s Failure to Respond to the Monitor’s Requests Regarding Zoning

7. For nearly three years, the County has had a duty, among others, to identify impediments to fair housing within its jurisdiction, including impediments based on race or municipal resistance to the development of affordable housing; to analyze

local zoning ordinances; and to implement strategies for changes to local zoning ordinances in order to affirmatively further fair housing. *See* Settlement ¶ 32(b) (describing the County’s obligation to conduct an Analysis of Impediments to Fair Housing Choice (“AI”).

8. On February 11, 2010, the Monitor issued his first report to the Court as required by paragraph 39 of the Settlement. In that report, the Monitor directed the County to develop strategies, including both “carrots” and “sticks,” to ensure that municipalities identify and remediate specific zoning practices that may have exclusionary impacts. *See* Monitor’s Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal, at 8-9 (ECF No. 328).

9. Between February 11, 2010, and July 20, 2011, the County did not present such a strategy. Rather, on July 20, 2011, the County, and on August 18, 2011, the Government, asked the Monitor to resolve disputes concerning: (a) the County’s duty to identify specific zoning practices that acted as impediments to affirmatively furthering fair housing; and (b) the time within which the County was to analyze the zoning practices and put in place strategies to encourage municipalities to change zoning practices that tended to thwart the purposes of the settlement.¹ *See* Exs. 1-2 to Monitor’s Amended Report and Recommendation Regarding Dispute Resolution (“Monitor’s Report”), filed November 17, 2011 (ECF No. 384).

¹ The parties also asked the Monitor to determine whether the County Executive’s veto of source-of-income legislation passed by the Westchester County Board of Legislators violated paragraph 33(g) of the Settlement.

10. In its initial October 7, 2011, Statement of Position regarding the dispute, the County conceded that it had a duty to identify and analyze specific zoning practices, but clung to its position that it could only do so by December 31, 2012. *See* Monitor's Report Ex. 3, at 8. This proposed deadline would have been nearly 18 months after the submission of the County's latest iteration of the AI. *See* Monitor's Report Ex. 6 (Government's Response), at 3 n.5. The Monitor noted that the County's proposed deadline would be more than three years after the entry of the Settlement. Monitor's Report, at 13.

11. Accordingly, the Monitor directed the County, pursuant to paragraph 14 of the Settlement, to conduct an analysis of municipal zoning ordinances in Westchester County by February 29, 2012, and to provide a strategy for overcoming zoning practices deemed exclusionary. Monitor's Report at 13-16.

12. The County filed objections to the Monitor's Report in the U.S. District Court for the Southern District of New York. *See* County's Objections to the Monitor's Report & Recommendation, filed December 7, 2011 (ECF No. 386). On March 16, 2012, Magistrate Judge Gabriel W. Gorenstein affirmed the Monitor's authority to make the specific requests concerning zoning as described in the Monitor's Report. Judge Gorenstein's Decision & Order at 16-17, filed March 16, 2012 (ECF No. 396). Judge Gorenstein stated that "the Settlement vests considerable power in the Monitor as to the information he may seek from the County" and that the Monitor's specific zoning requests were "within the scope of the Settlement." *Id.* at 16.

13. Specifically, the court held that “the Monitor could properly require the County to identify the types of municipal zoning practices that would, if not remedied by the municipality, cause the County to pursue legal action,” since the request was “tailored to the County’s obligation in the Settlement to pursue litigation where necessary.” *Id.* at 17 (citing paragraph 7(j) of the Settlement). The Court explicitly rejected the County’s argument that it was “premature” for the Monitor to make this request where the situation requiring legal action had not yet occurred. *Id.*

14. The County did not object to Judge Gorenstein’s findings. The issue nevertheless reached this Court when, on April 2, 2012, the Government filed an objection on the separate issue of whether the County Executive’s veto of source-of-income legislation violated the Settlement. *See supra* note 1. This Court sustained the Government’s objection regarding the veto of the source-of-income legislation; this Court also adopted the portion of Judge Gorenstein’s opinion that resolved the zoning dispute. *See* Opinion & Order at 27-28, filed May 3, 2012 (ECF No. 402) (Cote, J.).

15. Although it had filed an objection, on February 29, 2012, the County provided a response (“Zoning Submission”) that purported to address the zoning requests made in the Monitor’s Report. *See* Zoning Submission, attached hereto as Ex. 1. The County’s Zoning Submission, however, was inadequate. Among other things, the Zoning Submission failed to identify *any* strategy for overcoming exclusionary zoning practices, much less one that conformed with the Monitor’s, or Judge Gorenstein’s, analysis, and failed to provide a legal basis, facts or analysis that would adequately support its conclusion that exclusionary zoning did not exist in Westchester County.

A. The Monitor's May 14, 2012, Requests

16. In a letter dated May 14, 2012, the Monitor directed the County to prepare a supplemental zoning analysis, and provided the County with the relevant state and federal legal principles to guide its analysis. That letter is attached hereto as Exhibit 2. Specifically, the Monitor asked the County to analyze the exclusionary impact of six zoning practices based on socio-economic status and race. *See id.* at 4-7.

17. The Monitor also requested data and documents that would allow an assessment of the adequacy of the County's analysis and conclusions. *Id.* at 7-9. To that end, the Monitor requested internal County documents, communications, and the names of personnel who participated in producing the Zoning Submission, for the purpose of conducting interviews to further assess the County's compliance. *Id.* The Monitor set a response deadline of July 2, 2012, to conduct the supplemental zoning analysis, *id.* at 8, and July 9, 2012, to produce documents, communications, and a list of participants, *id.* at 9.

B. The County's July 2012 Submissions

18. On June 28, 2012, the Senior Assistant to the County Executive emailed the Monitor's team to request an extension of the time within which the County was to provide the supplemental zoning analysis in order to permit the Deputy County Executive an opportunity to review the submission. Email Exchange of June 28, 2012, attached hereto as Ex. 3. The County was subsequently granted additional time to reply. *Id.*

19. The County produced a supplemental zoning submission on July 6, 2012 (the “Supplemental Zoning Submission”). On its face, that submission, which is attached hereto as Exhibit 4, suggested an alternative basis for legal analysis and failed to comply with the Monitor’s specific requests for data and other information that is necessary to complete the assessment of the County’s compliance. The specific requests, the County’s responses and a brief analysis of those responses follow:

(a) *Monitor’s Request*: “State whether each municipality has met its allotted number of affordable housing units under the County’s Affordable Housing Allocation Plan and identify any shortfall.” Ex. 2 (Monitor Letter of May 14, 2012, at 8).

County’s Response: “In paragraph 5(a) of your letter, on pages 7 and 8, you asked about the County’s Affordable Housing Allocation Plan. It was developed by the Housing Opportunity Commission in 2005, but was never adopted by the County’s Board of Legislators, was advisory in nature, and further, was not a component of the Settlement Agreement.” Ex. 4 (Supplemental Zoning Submission, at 6).

Discussion: The question, of course, did not turn on whether the Board of Legislators had specifically adopted the Allocation Plan. Indeed, nearly a year earlier, the Monitor directed the County to the Allocation Plan as a useful touchstone for analysis. See

Monitor's Report, July 7, 2011, at 13. Whether mandatory or advisory, the plan exists, there were specific allocations made under the plan and the County has the capacity to analyze the data pursuant to the plan. Nevertheless, the County provided no information as to the allocation by community and no further response to this request.

(b) *Monitor's Request*: "State the effect that each Questioned Practice will have on the cost and geographic placement of affordable housing in each municipality, and provide specific quantitative or qualitative evidence to support any conclusions." Ex. 2 (Monitor Letter of May 14, 2012, at 8).

County's Response: "As to the impact of the six Questioned Practices on cost or geographical placement of affordable housing, the County finds that the significant restrictions and limitations are the cost of real estate in the eligible communities as well as environmental factors such as steep slopes, wetlands, watershed regulation, soil compatible with septic, and endangered species. The geographic placement of affordable AFFH housing units will be in compliance with the locational criteria of the Settlement Agreement, that is, in an eligible municipality, based on racial and ethnic demographic information from the 2000 Census, with priority given to sites

and census tracts that are located in close proximity to public transportation.” Ex. 4 (Supplemental Zoning Submission, at 6).

Discussion: This response is, quite simply, an inartful dodge. Rather than analyzing the impact of the Questioned Practices on the costs of development, the County provided a superficial explication of other costs and potential impediments and an all but meaningless restatement of its duty to locate homes consistent with the requirements of the Settlement. The County provided no “specific qualitative or quantitative evidence to support any conclusions” as it was plainly asked to do.

(c) *Monitor’s Request*: “State the percentage of developable land, including land occupied by existing housing units, that is zoned for building multi-family housing as-of-right in each municipality” Ex. 2 (Monitor Letter of May 14, 2012, at 8).

County’s Response: None.

Discussion: This failure to respond is particularly egregious since the County did not take the minimal step of providing and explaining information available on the website of the Westchester County Planning Department. *See* Westchester County Planning Department, “Parcel Based Land Use” (*available at*: <http://bit.ly/sVe3qu>). The fact that

this data is accessible to individuals willing to invest the time to search it out does not relieve the County of the duty to provide it.

(d) *Monitor's Request*: "State the racial and ethnic composition of each zoning district in a given municipality and indicate which of the Questioned Practices are present in that district." Ex. 2 (Monitor Letter of May 14, 2012, at 8).

County's Response: "We are unable to respond to paragraph 5(a)iv, since racial and ethnic composition is only available through census numbers, which are broken down into census tracts, block groups, and blocks. These designations do not match or conform to zoning districts." Ex. 4 (Supplemental Zoning Submission, at 6).

Discussion: According to the County's own Zoning Submission, there are 853 zoning districts (Ex. 1 (Zoning Submission Attachment 1, at 4)) and 15,170 census blocks in Westchester County (*see* Westchester County Department of Planning, Population Density by Census 2010 Block Map, *available at* <http://planning.westchestergov.com/images/stories/MapPDFS/popdensityblock2010.pdf>). Accepting the County's representation that there is not a perfect overlap between zoning districts and census blocks, there is nevertheless a fairly simple way to obtain a reasonable estimate in response to the Monitor's question. Census blocks are sufficiently

small that a large majority of them will be fully contained within a single, particular zoning district. Others may straddle zoning districts. The County could provide an estimate of the demographic composition of a district by, for example, providing a figure based solely on census blocks that are fully contained within a particular zoning district and also providing a figure that includes both the census blocks fully contained within a particular zoning district and the census blocks that straddle two zoning districts. This approach would provide a lower and upper bound for the requested figure. The County has made no showing that it actually undertook any effort to estimate a response to the Monitor's request by the foregoing methodology or any other methodology. Indeed, given the nature of the County's response to the other requests, it is doubtful that such an effort was undertaken.

20. The County failed to fully comply with any of these specific requests and simply failed to respond to one. Rather, after having over six weeks to complete its supplemental analysis, the County provided a litany of reasons as to why it would not, or purportedly could not, comply with the Monitor's requests. At no point prior to the initial deadline or the extended deadline did the County communicate any questions, disagreement or concerns with any of the requests, including during an in-person meeting with the Monitor on June 21, 2012 convened to discuss other outstanding issues.

21. One example of the County's failure to respond in full is particularly striking. On May 14, 2012, the Monitor requested "[t]he names and positions of all personnel who participated in preparing the Zoning Submission, and reasonable estimates of time spent by each individual preparing the Zoning Submission." Ex. 2 (Monitor

Letter of May 14, 2012, at 8). On July 9, 2012, the County submitted a letter and accompanying documents purporting to comply with the remaining data and document requests (Nos. 5(c) through (h)) in the Monitor's May 14, 2012, letter. *See* County Letter of July 9, 2012, at 1, attached hereto as Ex. 5. The letter did not comply with those requests, including the request for a list of personnel involved in preparing the Zoning Submission. The County offered a list that was incomplete on its face, since it did not include Kevin Plunkett, Deputy County Executive and signatory to the County's Zoning Submission, Mary Mahon, Senior Assistant to the County Executive and signatory to the July 9, 2012, submission or Norma Drummond, Deputy Commissioner of Planning, who has been actively involved in matters related to the Settlement. *See* Ex. 5 (Attachment 1 to County Letter of July 9, 2012, at 1).

22. The County's July 9, 2012, letter also makes clear that members of the Westchester County Attorney's Office were involved in the review of the Zoning Submission. *See* Ex. 5 (County Letter of July 9, 2012, at 2) ("In addition to the documents we are sending in response to paragraphs (e) and (f), we have identified certain emails and other communications where members of the Westchester County Attorney's Office were part of the communications or were copied on the communications.")² Nevertheless, they too were left off of the list of personnel.

² The Monitor has also requested an interview with Professor John Nolon who, at the request of the County, provided the alternative legal analysis that the County included in its Supplemental Zoning Submission. Ex. 2 (County Letter of June 9, 2012, at 1). John Nolon, who was also not included on the July 9, 2012 list of personnel, may have also participated in preparing the original Zoning Submission.

Accordingly, there is sufficient reason to believe that the list is incomplete and therefore does not comply with the Monitor's request. The County should be compelled to produce a list of all individuals involved in any way with the preparation, review, and discussion of the Zoning Submission, including the preparation and delivery of all public communications concerning the Zoning Submission up to and including July 12, 2012.

23. Finally, the County failed to provide a strategy for overcoming exclusionary zoning that complies with the Monitor's request, as affirmed by this Court. Judge Gorenstein's Decision & Order at 16-17. Despite Judge Gorenstein's explicit rejection of the County's argument that formulating such a strategy was "premature," *see id.* at 17, the County stated that "it cannot formulate a strategy to 'overcome' [exclusionary zoning] provisions which have not been found to exist" (Ex. 4 (Supplemental Zoning Submission, at 5)). Instead, the County described a process of communication and advocacy that it hopes will encourage municipalities to make changes in their zoning provisions—a far cry from the Monitor's court-sanctioned request that the County "identify the types of zoning practices that would, if not remedied by the municipality, lead the County to pursue legal action." Judge Gorenstein's Decision & Order, at 17.

C. The Need for a Court Order Requiring the County to Submit an Adequate Zoning Response

24. To date, nearly eight months has elapsed since November 17, 2011, when the Monitor issued his initial request for a zoning analysis and strategy on November 17, 2011, and the Monitor still lacks the necessary information both to fully

assess the County's compliance and to develop specific recommendations for remedial steps should they be necessary.

25. For the reasons stated above, the Monitor supports the Government's request that the Court issue an order affirming the Monitor's authority to inspect "all books, records, accounts, correspondence, files and other documents, and electronic records of the County and its officers, agents, and employees concerning the subject matter and implementation of the Stipulation and Order." Settlement ¶ 13(b).

26. The Monitor also requests that the Court issue an order compelling the County to comply by no later than August 9, 2012, with the specific data requests as originally stated in the May 14, 2012, letter:

- (a) State whether each municipality has met its allotted number of affordable housing units under the County's Affordable Housing Allocation Plan and identify any shortfall.
- (b) State the effect that each Questioned Practice will have on the cost and geographic placement of affordable housing in each municipality, and provide specific quantitative or qualitative evidence to support any conclusions.
- (c) State the percentage of developable land, including land occupied by existing housing units, that is zoned for building multi-family housing as-of-right in each municipality.

- (d) State the racial and ethnic composition of each zoning district in a given municipality and indicate which of the Questioned Practices are present in that district.
- (e) Provide the names and positions of all personnel who participated in preparing the Zoning Submission, and reasonable estimates of time spent by each individual preparing the Zoning Submission.

III. The County's Worsening Record of Compliance with Deadlines

27. The County's failure to comply with the specific information requests in the Monitor's request for a zoning analysis and strategy provides an important window into the County's chronic failure to meet deadlines and provide information. It is not the sole lens through which the County's conduct is revealed. The County's incomplete responses to information requests and frequent requests for extensions, often on or near the deadlines, has impeded the Monitor's ability to adequately assess the County's compliance with the substantive requirements of the Settlement.

28. The Settlement contains certain deadlines to ensure that this Court receives timely and complete information, and to ensure that the County makes progress in fulfilling the requirements of the Settlement. For example, the Settlement provides that the Monitor would conduct "an assessment of the County's efforts and progress related to the obligations set forth" in the Settlement on December 31, 2011, and every two years thereafter until the expiration of the Settlement. Settlement ¶ 15. The Monitor

must also prepare a report to the Court “no less than every six months for the first two years after the Monitor’s appointment and annually thereafter” on the implementation and enforcement of the Settlement, including “observed or substantiated lapses in the County’s compliance with the Stipulation and Order.” *Id.* ¶ 39.

29. In order to ensure that the Monitor can meet certain deadlines provided by the Settlement, the Monitor in turn includes deadlines for information requests he makes to the County. This authority is implicit in the Monitor’s authority to “have access to all books, records, accounts, correspondences, files, and other documents, and electronic records of the County,” and to “[t]ake reasonable and lawful steps to be fully informed about all aspects of the County’s compliance with this Stipulation and Order.” *Id.* ¶ 13(b).

30. The County’s failure to comply with deadlines, coupled with the incompleteness of some of its responses on critical issues, and non-responses to others, have impeded the Monitor’s ability to assess compliance, and therefore recommend remedies, to ensure the County’s compliance with its obligations under the Settlement.

31. The County’s lack of full cooperation has clearly manifested itself in the responses to the Monitor’s requests for information related to the County’s obligation to create a public education campaign, as well as its zoning submissions.

32. Under paragraph 33(c) of the Settlement, the County is required to “create and fund campaigns to broaden support for fair housing and to promote the fair and equitable distribution of affordable housing in all communities, including public

outreach specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities.”

33. The County was notified in the Monitor’s First Biennial Assessment, filed January 2, 2012 (ECF No. 391), at 36-37, and again in an April 4, 2012, letter responding to the County’s 2011 Q4 Report, at 3, attached hereto as Exhibit 6, that it was not in compliance with paragraph 33(c).

34. In an April 17, 2012, letter, the Monitor requested documents and communications relating to the County’s efforts to comply with paragraph 33(c) of the Settlement and set a deadline for May 11, 2012. *See* Monitor Letter of April 17, 2012, at 2, attached hereto as Ex. 7. With only an informal indication by telephone a day earlier that the County might request an extension, the County sent the Monitor an email at 5:21 pm on May 11, 2012—after the close of business on the deadline itself—requesting an additional two weeks. *See* Email Exchange of May 11, 2012, attached hereto as Ex. 8. The Monitor replied, “I note that it is after 5 on the date set for a response. A two week extension requested at the eleventh hour is hardly timely.” *Id.* A one week extension was granted. *See id.*

35. The County responded on May 18, 2012, with a two-page letter that did not attach a single document or communication as requested, but rather invited the Monitor and his team to schedule time to examine the County’s files in White Plains, New York.³ *See* County Letter of May 18, 2012, attached hereto as Ex. 9, at 2. At no

³ On May 23, 2012, members of the Monitor’s team reviewed the County’s files and flagged documents to be produced.

time prior to the original or extended deadline did the County indicate that it would not be producing the documents as requested.

36. On June 21, 2012, the County and Monitor met to discuss the lack of progress on the public education campaign and the parties agreed to reconvene shortly thereafter to discuss the County's revised proposals. Efforts were made by the Monitor's team to schedule the meeting in early July 2012, to no avail. On July 6, 2012, the Monitor called the Deputy County Executive. The Monitor also sent an email in which he called on the parties to speak with him jointly to find a date for this meeting. Email Exchange of July 6, 2012, attached hereto as Ex. 10. The Monitor did not receive a return call, but in an email later that day, the Deputy County Executive said that he was going on vacation and asked to schedule the meeting during the week of July 23, 2012 "around your schedule." *Id.* The Monitor responded that "[t]he County is overdue on the public education campaign and arguably out of compliance" and requested that the County "field a team that could help us move this forward in the very near term" and that the meeting not be delayed due to the Deputy County Executive's vacation. *Id.*

37. Just three days later, the County abandoned the Deputy County Executive's proposal to meet during the week of July 23 and sought an even greater delay: "We request that the meeting be scheduled for the first week of August to permit the development of a more fully developed campaign proposal that has been thoroughly reviewed by County personnel." Ex. 5 (County Letter of July 9, 2012, at 2).

38. The County's most recent delay on the outreach and public education issue is in stark contrast to the County's representations at the June 21, 2012, meeting

where the County indicated that it may be prepared to undertake a compliant public education campaign and hoped to reconvene with the Monitor's team in a smaller working session two weeks later.

39. The failure to timely provide a responsive Zoning Submission, as described above, is another troubling example of the County's failure to cooperate fully with the Monitor. The Monitor sent the County two letters concerning the Zoning Submission. In the first letter, dated May 14, 2012, the Monitor requested data, documents and a Supplemental Zoning Analysis. Ex. 2 (Monitor Letter of May 14, 2012, at 7-9). The Monitor encouraged the County to work with HUD which had offered technical assistance and indicated that that he would interview witnesses, as appropriate, depending on progress made between HUD and the County. *Id.* at 9 ("The Monitor notes that HUD has extended an offer of technical assistance to the County that could be helpful as the County endeavors to fulfill its obligation to comply with the information request. The Monitor will evaluate the need for undertaking a more searching review based on the results of any sessions in which HUD and the County work to achieve compliance with the outstanding request."). After hearing nothing suggesting that the County had approached HUD seeking technical assistance, the Monitor sent a letter on June 29, 2012, requesting interviews of two personnel who have been central to the County's compliance efforts, Mary Mahon and Norma Drummond. Ex. 11 (Monitor Letter of June 29, 2012, at 1). The letter also indicated that the specific topics of the interviews would be provided following the receipt of the County's responses to the May 14, 2012, requests for information and analysis. *Id.* at 2.

40. On July 6, 2012, the Deputy County Executive sent a letter that (a) took the unreasonable position that the June 29 letter requesting interviews somehow relieved the County of the duty to provide the information and documents to be delivered on July 9; and (b) further attempted to avoid providing data by offering to make a presentation on zoning issues at a later date as “an alternative, or at least preliminary venue for resolving questions you have relating to the Zoning Submission.” Ex. 4 (County Letter of July 6, 2012, at 7). The County stated in the July 6 letter: “With respect to your requests in paragraphs 5(c) through 5(h) for the names of individuals who participated [*sic*] the preparation of the Zoning Submission, along with records and documents relating thereto, and other data, we respectfully look to your June 29th letter as suggesting that the process and topics for interviews and related discovery can be discussed following your receipt of this letter.” *Id.* In an email sent later that evening, the Monitor stated that the County’s misinterpretation was unreasonable and indicated that the July 9, 2012, deadline would not be extended. Monitor Email of July 6, 2012, attached hereto as Ex. 12.

41. The County was given twelve weeks to complete its Zoning Submission—which it first committed to undertake many months earlier in its June 2011 AI—and six weeks to complete its Supplemental Zoning Submission. At no point during that process did the County request clarification or indicate that it could not, or that it was not obligated to, comply with any of the enumerated requests. In fact the County waited until three days before the later deadline to ask for an extension—again, never indicating its intention not to comply with any specific request.

42. The County's delays on public education and zoning are merely illustrative. Although the Monitor has been amenable to reasonable requests for extensions, the County's pattern of making requests on or near deadlines has led to an unpredictable process that impedes the Monitor's ability to assess the County's compliance in a timely manner. Other examples include:

- (a) On November 17, 2011, the Monitor requested information to inform the first biennial assessment of the Settlement required by paragraph 15 thereof. *See* Monitor Letter of November 17, 2011, at 2, attached hereto as Ex. 13. On December 9, 2011, the day of the deadline, the County called to request an extension and formalized that request in writing on December 12, 2011. *See* County Letter of December 12, 2011, at 1, attached hereto as Ex. 14.
- (b) On November 23, 2011, the Monitor requested additional information for the biennial assessment and on December 12, 2011, the deadline for that request, the County requested an extension. *See* Monitor Letter of November 23, 2011, at 2, attached hereto as Ex. 15; Ex. 14 (County Letter of December 12, 2011, at 1).
- (c) On April 4, 2012, the Monitor requested information concerning the County's 2011 Fourth Quarter Report and set a deadline of May 4, 2012. *See* Ex. 6 (Monitor Letter of April 4, 2012, at 5). On the day of the deadline, the County requested by phone a three-day extension, which it subsequently missed, and

submitted its response on May 9, 2012. *See* County Letter of May 9, 2012, attached hereto as Ex. 16.

A. The Need for a Court Order Compelling the County's Compliance with Future Requests

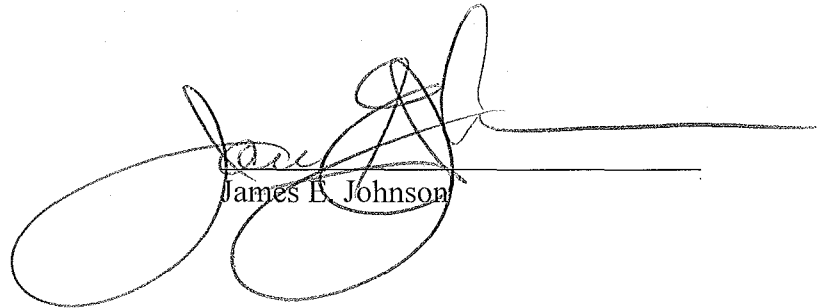
43. The County's pattern of delay and insufficient responses has become more pronounced in the last six months, and there is no evidence that compliance will occur absent this Court's intervention.

44. Therefore, the Monitor supports the Government's request for an order compelling the County to fully comply with all future requests and with the following recommended procedures to encourage greater compliance with requests for information pursuant to the Settlement:

- (a) The County must object, in writing, to any information request from the Monitor (including the deadlines specified by the Monitor) within five business days of the County's receipt of the Monitor's information request.
- (b) If the Monitor rejects the County's objection, the County must meet and confer with the Monitor within five business days of receiving notice of the Monitor's rejection.
- (c) If the Monitor and the County are not able to resolve the dispute within five business days of that meeting, either the County or the Monitor shall have the right to an expedited review of the dispute by a magistrate judge assigned by this Court.

(d) The magistrate judge will have the authority to overrule the matter or order compliance and recommend a finding of contempt.

Executed on July 10, 2012



James E. Johnson