

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA <i>ex rel.</i>	:	
ANTI-DISCRIMINATION CENTER OF	:	
METRO NEW YORK, INC.,	:	
	:	
Plaintiff,	:	
	:	No. 06 Civ. 2860 (DLC)
v.	:	
	:	ECF Case
WESTCHESTER COUNTY, NEW YORK,	:	
	:	
Defendant.	:	
-----	X	

**MONITOR'S FIRST BIENNIAL ASSESSMENT OF WESTCHESTER COUNTY'S
EFFORTS AND PROGRESS RELATED TO THE OBLIGATIONS SET FORTH IN
THE STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL**

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As required by paragraph 15 of the Stipulation and Order of Settlement and Dismissal (“Settlement”) in this matter, the Monitor hereby submits this assessment of the efforts and progress by Westchester County (“County”) related to the obligations set forth in the Settlement. This is the first such biennial assessment required by the Settlement. This assessment is primarily based on materials submitted by the County in response to a request by the Monitor, the quarterly reports previously submitted by the County, and communications between and among the County, the U.S. Department of Housing and Urban Development (“HUD”), and the Monitor. It is also informed by the voluntary and helpful responses of 18 of the County’s 31 eligible communities to the Monitor’s requests for information concerning the implementation of the Settlement.

In addition, on January 4, 2012, pursuant to paragraph 40 of the Settlement, the Monitor conferred with County representatives on certain compliance issues in contemplation of the filing of this assessment with the Court. Those discussions also informed the contents of this assessment.

I. Executive Summary

In August 2009, the County settled litigation based on allegations that it violated the False Claims Act in connection with its receipt and administration of funds granted by HUD. In exchange for a limitation on its exposure, the County assumed (with the agreement of the United States) significant undertakings, including but not limited to developing at least 750 units of affordable housing along an agreed timeline, affirmatively marketing those units to areas with large non-white populations within and near the County, and developing and promoting a model zoning ordinance. The County

also agreed to promote passage of legislation to ban discrimination based on source of income and agreed to sponsor public relations campaigns designed to broaden support for, among other things, integration.

By the close of 2011, the County had surpassed the Settlement's numerical benchmarks for the development of housing units. The County's quantitative success is not matched, however, by achievement in all of its obligations under the Settlement. The record is mixed, reflecting both that the County is in breach of one obligation – the duty to promote source-of-income legislation – and that inaccurate and counterproductive statements by the County Executive have undercut substantial efforts in compliance with the Settlement. Other duties have yielded results that, while not fully successful, provide promise for the way forward.

II. The Settlement's Purpose and Terms

A. The Need for Housing That Is Both Affordable and Affirmatively Furthers Fair Housing

Along with considerable wealth, Westchester is home to families of modest means. While the median household income in the County in 2000 was \$83,100,¹ roughly 20 percent of all households reported an income of less than \$25,000 a year, 94,336 households (28.1% of the total County population) earned less than 50 percent of the County median and 59,001 households (17.6% of the total County population) earned between 50 and 80 percent of the County median. Center for Urban Policy Research,

¹ This figure compares favorably to \$50,046 reported for counties nationally and \$51,691 reported for counties in the state of New York. See 2000 U.S. Census, *available at* <http://factfinder.census.gov/>.

Rutgers University, *Westchester County Affordable Housing Needs Assessment* at 8, 26 (2004) [hereinafter “Rutgers Study”].² As a result, many families have found it increasingly difficult to obtain affordable housing in the County. The allocation plan subsequently developed by the Westchester County Housing Opportunity Commission found that the Rutgers Study was conservative in its estimate that the County needed to build over 10,768 affordable housing units between 2005-2015 to keep up with growing demand among Westchester residents alone. Westchester County Housing Opportunity Commission, *Affordable Housing Allocation Plan 2000-2015* at 1 (2005) (“HOC Allocation Plan”); Rutgers Study at v-vi, 63-64. That number is no doubt higher when including demand from residents of the contiguous counties.

Similarly, viewed from a high level, the County is diverse. A closer lens shows, however, that numerical diversity at the County level is not reflected in the 31 eligible communities under the Settlement. Although it is among the most heterogeneous counties in New York State, the County is not integrated. According to data from the 2000 U.S. Census, more than half of the municipalities in the County had a population that is less than three percent African-American, despite a large population of African-American residents in certain areas of the County. *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, 668 F. Supp. 2d 548, 559 (S.D.N.Y. 2009) [hereinafter *ADC II*]. A disproportionate number of those in need of quality affordable housing are also racial and ethnic minorities. While the non-white

² The Rutgers Study was conducted with the Westchester County Housing Opportunities Commission and submitted to the BOL.

population of the County according to 2000 Census data was 24.7 percent, 51 percent of those that were housing-deficient³ were non-white. Rutgers Study at 26. Similarly, the Rutgers Study found that although only 11.3 percent of County households were Hispanic, housing-deficient households were 23.9 percent Hispanic. *Id.* The County's 2004-2008 Consolidated Plan found that while 72 percent of households in the consortium through which the County applies for federal funding owned their own homes, that figure was only 46 percent for black households and 35 percent for Hispanic households. *ADC II*, 668 F. Supp. 2d at 553.

B. The Anti-Discrimination Center Suit

The County applies for and administers federal funding for housing and community development through a consortium made up of the vast majority of municipalities in the County. The County receives federal funds under several HUD programs, including the Community Development Block Grant ("CDBG") program. In doing so, the County has undertaken obligations to affirmatively further fair housing ("AFFH"). In all, nearly \$52 million were provided to the County over six years under conditions in which the County promised, among other things: (a) to accurately report how it was managing the federal funds; (b) to perform an analysis of impediments to fair housing choice ("AI") that specifically addresses impediments based on racial discrimination or segregation; and (c) to take appropriate actions to overcome the effects

³ Deficient housing is defined in the Rutgers Study as housing lacking in quality in at least two of four areas: year structure built, plumbing facilities, kitchen facilities, or heating fuel. *See* Rutgers Study at 10-12.

of any impediments identified through that analysis. *See generally ADC II*, 668 F. Supp. 2d at 551.

In April 2006, the Anti-Discrimination Center of Metro New York, Inc. (“ADC”) filed a federal lawsuit alleging that the County had violated the False Claims Act by making certain certifications in its applications to HUD regarding its compliance with the Civil Rights Act of 1964 and the Fair Housing Act. *See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, 495 F. Supp. 2d 375, 376-78 (S.D.N.Y. 2007) [hereinafter *ADC I*]. As a recipient of HUD grants, the County was required to AFFH, in part by conducting an AI. *Id.* at 376. The ADC alleged that as part of its AFFH obligations, the County was required specifically to address impediments based on racial discrimination and that the County knowingly failed to do so. *Id.* at 376-77. As a matter of policy, the ADC alleged, the County also “refused to monitor the efforts of participating municipalities to further fair housing and did not inform them that Westchester might withhold federal funds if the municipality did not take steps to further fair housing.” *Id.* at 378. The ADC further alleged that the County knowingly misrepresented that it had conducted the appropriate analysis of impediments based on race, and as a result had defrauded the federal government by accepting more than \$52 million in federal funds over a six-year period. *ADC II*, 668 F. Supp. 2d at 550. Because the ADC brought its lawsuit under the False Claims Act, the County faced statutory penalties including civil fines and treble damages (more than \$150 million), as well as the prospect of losing HUD funding going forward.

C. The Settlement

In July 2007, this Court denied the County's motion to dismiss, holding that "[i]n identifying impediments to fair housing choice, it must consider impediments erected by race discrimination, and if such impediments exist, it must take appropriate action to overcome the effects of those impediments." *ADC I*, 496 F. Supp. 2d at 387. In February 2009, this Court ruled that the County had made misrepresentations in its applications, but did not decide the question of whether the misrepresentations were made knowingly. *ADC II*, 668 F. Supp. 2d at 570-71. Following the Court's holding, the U.S. government intervened in the lawsuit and reached the Settlement with the County, which was approved by this Court on August 10, 2009. The Settlement sets out, in broad and specific terms, the duties and responsibilities of the County, and provides for the appointment of a Monitor to oversee and facilitate compliance with the terms of the Settlement.

In the Settlement, the County and HUD acknowledged that "the development of affordable housing in a way that affirmatively furthers fair housing is a matter of significant public interest." Settlement, First Whereas Clause. The parties also accepted as given that "the broad and equitable distribution of affordable housing promotes sustainable and integrated residential patterns, increases fair and equal access to economic, educational and other opportunities, and advances the health and welfare of the residents of [the County] and the municipalities therein." Settlement, Second Whereas Clause. The purpose of the Settlement is to create opportunity and further the goal, accepted by the County at the time, of racially and ethnically integrated communities. The Settlement is not ambiguous on this point. Indeed, the County itself

undertook the obligation to support that goal through public education about the benefits of integrated communities. *See* ¶ 33(c).⁴ This assessment, in part, will reflect how well those principles have been addressed through the particular requirements and means detailed in the terms of the Settlement.

III. Duties and Responsibilities of the County

A. Implementation Plan

The Settlement requires the County to develop an Implementation Plan (“IP”) “setting forth with specificity the manner in which the County plans to implement the provisions of” the Settlement concerning the development of Affordable AFFH Units. ¶ 18. The elements of the IP are discussed in greater detail below. The Settlement provides that after the Monitor concludes that the IP satisfies the requirements of the Settlement, the IP is to be incorporated into the County’s AI, which in turn must be approved by HUD. ¶¶ 20-21, 32. If the Monitor finds that the IP does not accomplish the objectives and terms of the Settlement, the County has the opportunity to revise the plan. If the revised plan is still found to be deficient, the Monitor must specify revisions to the plan. ¶ 20(d).

B. Affirmative Marketing Plan

As part of its IP and its overall obligation to AFFH, the County must take affirmative steps to market affordable housing within the County as well as in contiguous or proximate communities with large non-white populations. ¶ 33(e). A critical

⁴ Unless indicated otherwise, all paragraph citations refer to the Settlement.

component of the County's obligations under the Settlement is the development of a clear plan for marketing Affordable AFFH Units. County agreements with developers must also require adherence to the affirmative marketing plan. *Id.*

C. Financing Strategies

The Settlement requires the County to set aside three sources of funds that will be the minimum amounts used to implement the Settlement:

1. \$21.6 million that will be under the control of HUD for use in the development of new affordable housing units that comply with the requirements of the CDBG program (¶ 2);
2. \$30 million that the County must incorporate into its budget for fiscal years 2009 through 2014 for land acquisition, infrastructure improvement, construction, acquisition, or other necessary direct costs of development of new affordable housing units (¶ 3, 5); and
3. \$400,000 to pay for consultants and public education, outreach, and advertising to AFFH (¶ 33(h)).

In carrying out its Settlement obligations, however, the County is not limited to these funds. The Settlement contemplates that the County will find supplemental sources of funds, and use other financing strategies, such as creating a revolving fund, to augment the resources set forth in the Settlement. ¶¶ 7(i); 22(d)-(e).

D. Inclusionary Zoning

The County's IP must also include a model ordinance that it will promote to municipalities, which, among other things, requires new development projects to set aside

a certain percentage of affordable units, set standards for the units, and provide definitions of who is eligible for affordable housing. ¶ 25(a)(i). The ordinance must also set standards for affirmative marketing to ensure outreach to racially and ethnically diverse households, provide an expedited review process for development proposals, and provide a legal mechanism to ensure continued affordability of new units. ¶ 25(a)(ii)-(iv).

E. Analysis of Impediments

The AI is at the heart of the County’s obligations to AFFH. The AI requires:

- Conducting an analysis of impediments to fair housing choice within the County;
- Taking appropriate actions to overcome the impediments; and
- Maintaining records reflecting the analysis and action taken. ¶ 32; *see also* 24 C.F.R. § 91.425(a)(1)(i).
- The County’s AI must also address the potential need for mobility counseling, and provide for data gathering. ¶ 32.

The County’s alleged failure to properly analyze impediments to fair housing choice, specifically race, was at the center of the underlying ADC lawsuit. Under the Settlement, the County must submit an AI that is consistent with HUD’s Fair Housing Planning Guide and is deemed acceptable by HUD. ¶ 32. The County must then take all actions specified in the AI. *Id.*

F. Source-of-Income Legislation

As part of its AI, the County must also “promote, through the County Executive, legislation currently before the Board of Legislators to ban ‘source-of-income’

discrimination in housing.” ¶ 33(g). Such legislation, if it were to become law, would prevent landlords from refusing to rent to tenants solely on the grounds that a person’s income is derived from government programs such as Section 8, Social Security, or disability benefits. The paragraph 33(g) obligation is among several that must be incorporated into the County’s AI.

G. Affordable AFFH Units

As part of its AFFH obligations, the County must develop at least 750 Affordable AFFH Units⁵ (as that term is defined in the Settlement) in communities that have low African-American and Hispanic populations. ¶ 7. The units must be affordable at various levels of income below the County’s median income (area median income or “AMI”) and must include a mixture of rental and ownership units. *Id.*

H. Promotion and Enforcement of Municipal AFFH Obligations

The County must provide a clear strategy, using a mixture of incentives and enforcement, to encourage municipal compliance with the Settlement, specifically in adopting inclusionary zoning amendments and developing Affordable AFFH Units. The Settlement requires the County to “use all available means as appropriate,” including legal action, to address a municipality’s failure to “take actions needed” to promote development of the Affordable AFFH Units, or actions that hinder that objective. ¶ 7(j).

⁵ This number of units is a floor, not a ceiling, and it represents less than 10% of the total units called for by the HOC Allocation Plan to address the County’s need for affordable housing.

I. Institutional Capacity and Leadership

Implicit in the Settlement is a requirement that the County dedicate resources and expertise in order to meet its obligations under the Settlement. This requires devoting the necessary and qualified staff, and may require consulting with outside experts when appropriate.

Compliance with the obligations under the Settlement also requires leadership from the County, specifically the County Executive. The bricks-and-mortar requirement of developing a minimum of 750 Affordable AFFH Units is only one part of the County's obligations under the Settlement. Overcoming impediments to fair housing, including working with municipalities to reform local zoning, carries long-term policy implications. Of course, some obstacles to implementing the Settlement may be outside of the County's direct control.

IV. Assessment of the County's Performance and Compliance

The County's compliance with the terms of the Settlement has had successes, elements of promise, and one clear and glaring breach. In this section, the Monitor will address the various aspects of the Settlement, taking into account, as appropriate, the views offered by the parties and evaluating the level of compliance and non-compliance.

At the Monitor's request, both parties have shared their views concerning the County's compliance. In addition to earlier correspondence, meetings, and County reports, the Monitor's findings are informed by the County's submission of December 14,

2011 (attached hereto as Exhibit 1⁶), HUD's letter of December 16, 2011 (attached hereto as Exhibit 2), and a conference call with the County and HUD on January 4, 2012.

A. Implementation Plan

The Settlement contemplates an effort which has as its goal sustainable, equitable distribution of housing and housing opportunities. A linchpin of this effort is an IP.

1. Content

The mandatory elements to be included in the IP include:

- A model ordinance that the County will promote to municipalities to advance fair housing (§ 25(a));
- An affirmative marketing plan to “ensure outreach to racially and ethnically diverse households” (§ 25(a)(ii));
- A CDBG allocation “process/plan designed to promote activities that AFFH,” (§ 25(b));
- “A commitment to amend County Law to eliminate a municipality’s right of ‘first refusal’ with respect to Fair Housing or Affordable Housing land purchases by the County” (§ 25(c));
- A discretionary funding allocation policy “to condition . . . the use of public funds and resources . . . by municipalities” on certain commitments (§ 25(d));
- The “[e]xplor[ation] and implement[ation of] mechanisms by which the monies made available pursuant to” the Settlement, “and proceeds from the expenditure of these funds, can be placed in a revolving fund dedicated to the development of Affordable AFFH Units” (§ 22(e));
- An assessment of “the means by which the County can maximize the development of Affordable AFFH Units in the eligible municipalities and census blocks with the lowest concentrations of African American and Hispanic residents” (§ 22(f)); and

⁶ Exhibit 1 includes the most relevant portions of the County’s submission.

- The benchmarks “set forth in paragraph 23 and . . . steps and activities that will be needed to meet those benchmarks” (§ 24).

Implicit in these requirements is the need for a plan for how the units will be financed.

As previously noted in the Monitor’s October 2011 report, the draft IP submitted by the County includes topics that are not explicitly required by the terms of the Settlement to be included in the IP itself.

2. Process

As noted in previous reports to the court, the Monitor did not approve the three draft IPs the County submitted in January, March, and August 2010. Following the County’s submission of its third draft IP in August 2010, the Monitor adopted a segmented approach, in the interest of resolving certain aspects of the IP that are particularly time-sensitive for the County’s compliance with its obligations under the Settlement. This approach has benefited from the County and municipal leaders’ input as to the priority and urgency of various components. The Monitor approved the Model Ordinance in October 2010. A final approved version of the Affirmative Marketing Plan is attached to this report as Exhibit 3, and the Monitor expects to issue a final Discretionary Funding Policy on or before January 11, 2012. It is the Monitor’s view that once the financing strategy has been finalized, the IP will be substantially complete.

B. Affirmative Marketing Plan

As discussed in detail in earlier reports, in late 2010 the Monitor convened a working group of stakeholders to develop a template affirmative marketing plan. The working group included members of the following entities or groups:

- Westchester County Executive's Office;
- Westchester County Board of Legislators ("BOL");
- Westchester County Department of Planning;
- HUD;
- United States Department of Justice (including both Assistant U.S. Attorneys from the Southern District of New York and attorneys from the Civil Rights Division in Washington); and
- Municipal leaders (under the auspices of the Westchester Municipal Officials Association).

In the course of the working group's meetings, which took place between December 2010 and April 2011, the members discussed general principles related to affirmative marketing, issues specific to the County, and comments submitted by several developers with experience in marketing affordable housing in the area. The Monitor also sought additional outside input and asked New York University's Furman Center for Real Estate and Urban Policy at New York University ("Furman Center") to convene a roundtable of experts with a variety of relevant experience. Following the roundtable discussion, the Furman Center prepared a report (the "Furman Report") on affirmative marketing, both generally and with a specific suggestions for the County to consider in developing its affirmative marketing plan. The Furman Report (attached as Exhibit 2 to the Monitor's April 2011 report), supplemented a summary of the roundtable session with a survey of relevant academic literature. Members of the working group had the opportunity to discuss and comment on the agenda for the roundtable before it took place and to ask questions of a member of the Furman Center's team following the issuance of the report.

Following these working sessions, in late April 2011 the Monitor's team circulated what was considered to be a near-final plan ("April 2011 draft"). HUD provided comments on May 27, 2011. No comments were received from any other working group members until June 16, 2011, when the County advised the Monitor's team of certain minor changes to the draft to respond to HUD's comments. During the summer of 2011, however, the County appeared to be focused on issues related to its most recent AI submission, and several months passed without the County's submission of a revised draft.

In late August 2011, the County informed the Monitor's team that it contemplated significant substantive revisions to the plan. On September 23, 2011, the County submitted very significant revisions, including the division of the previous single draft into two separate documents ("September 2011 drafts") – one laying out the County's own responsibilities, and one setting forth the responsibilities of the developer. Among other changes, the September 2011 drafts largely eliminated the role of a third-party marketing consultant. The April 2011 draft required that such a marketing consultant would centralize marketing and outreach activities, thereby improving efficiency, consistency, and oversight. In the September 2011 drafts, many of the marketing consultant's responsibilities had shifted to individual developers. Perhaps most significantly, many of the County's responsibilities had been diluted and were merely optional in the September 2011 drafts.

The Monitor subsequently circulated the County's September 2011 drafts to the other members of the working group and, later, the public, and invited comment. The

Monitor's team consolidated the comments received from HUD, the Monitor's team of advisors from the Pratt Institute, advocates, and developers, and discussed them with the County and HUD in a conference call held on December 12, 2011. The County made substantial revisions in response to HUD's concerns. These comments and revisions have been considered in preparing a final version of the plan, drafted under the Monitor's authority to direct revisions to the IP under paragraph 20(d) of the Settlement. The plan is attached to this assessment as Exhibit 3. The final plan maintains the division of responsibility in two documents (as requested by the County), but directs a centralized approach through a marketing consultant, as previously reflected in the April 2011 draft.

The five-month lapse between the draft circulated by the Monitor's team and the County's substantially revised drafts slowed the completion of this key element of the IP. In the interim, for those developments for which marketing was due to begin, the County submitted to the Monitor project-specific marketing plans.

C. Central Intake System

Pursuant to paragraph 33(f) of the Settlement, the County developed a two-part plan for a Central Intake System: 1) a system that enables interested prospective home buyers to enroll for consideration of purchasing an Affordable AFFH Unit and registration for updates as new units become available; and 2) a computer-based program that provides information and visual mapping of Affordable AFFH Units and the communities where they are based.

The County launched the first part of its Central Intake System in September 2010.⁷ The System includes an intake form that is not an application for a rental or ownership unit, but rather an invitation to sign up for updates as such units become available. The user is required to submit his or her name, address, household size and the number of minors, total annual household income, and whether the user is interested in homeownership, rentals, or both. Voluntary information is also requested, including, among other things, current monthly rent or mortgage, current monthly utility bills, race and ethnicity, location of interest in Westchester, and transportation preferences.

The second part of the Central Intake System was launched on December 21, 2011, adding an interactive map that pinpoints the location of housing developments and their proximity to community resources, including, among other things, public transportation, hospitals, schools, supermarkets, and government services.⁸ The map also links to specific information about affordable housing developments and to web pages pertaining to community resources.

According to information submitted by the County, through December 7, 2011 a total of 1,501 people have signed up since the system went live in September 2010. Of the total registrants, 64 percent currently live in Westchester County, 21 percent in Bronx County, 6 percent in New York County (Manhattan), and 2 percent in Kings County (Brooklyn), with the remainder residing in other parts of New York and other parts of the

⁷ The Central Intake system is available at <http://homes.westchestergov.com/homeseeker-housing>.

⁸ See Westchester County Press Release, Web Enhancements to Fair and Affordable Housing Site (Dec. 21, 2011), *available at*: <http://www3.westchestergov.com/news/3129-web-enhancements-to-fair-and-affordable-housing-site->.

country. *See* Ex. 1, Attachment 3. Of the respondents from Westchester, 30 percent reside in Yonkers, followed by 16 percent in Mount Vernon, 11 percent in White Plains, and 9 percent in New Rochelle. *Id.* Of the total 1,501 registrants, 21 percent identified themselves as white and 40 percent as African American, with 31 percent not indicating a race. *Id.* 32 percent reported Hispanic ethnicity, while 46 percent indicated a non-Hispanic ethnicity, and 22 percent did not specify an ethnicity. *Id.*

The Central Intake System has proven to be a popular tool, and the County has told the Monitor's team that housing counseling agencies have reported positive experiences in using it with potential applicants. The positive experience of the housing counseling agencies and the number of applicants, including African Americans and Hispanics, suggests that, in practical terms, this is an area of significant progress. That said, the Monitor has brought several areas for improvement to the attention of the County team. These include simplifying the navigation to the intake form and translating the intake form itself into Spanish. It is the Monitor's understanding that these issues will be addressed promptly.

D. Financing Strategies

As discussed above, the Settlement provides: "It is anticipated that the County will accomplish the objectives of [paragraph 7] by leveraging the funds that it is expending . . . with supplemental funds," and contemplates that the County may identify and combine other affordable housing funding sources. ¶ 7(i). In addition, the County's IP must assess mechanisms by which Settlement funds can be leveraged by means of "a revolving fund dedicated to the development of Affordable AFFH units." ¶ 22(e).

Since the submission of the County's August 2010 draft IP, which includes a detailed section on financing as well as a memorandum concluding that some or all of the \$21.6 million in Settlement-designated CDBG funds may be used in a revolving fund, the Monitor has had a series of discussions with the County to assess the County's approach to financing and to consider how the County's strategies can be improved, refined and supplemented in order to ensure the most effective use and leveraging of the available funds. Those discussions have included working sessions on July 7 and 14, 2011, with members of the County Executive's Office, the County Department of Planning, HUD, the Monitor's advisors from the Pratt Institute, and attorneys retained by the Monitor and with expertise in public finance from the law firm of Orrick Herrington & Sutcliffe LLP.

The County has taken some steps in 2010 and 2011 to increase the effectiveness of the Settlement funds, including by meeting with banks to explore and encourage alternate sources of funding, by spending non-Settlement funds on activities that relate to and support certain of the housing developments under the Settlement (e.g., the Roundtop development in Cortlandt, the Cottage Town Homes development in the City of Rye) and by supporting developers' requests for funding from New York State and private entities. Notably, on October 25, 2011, the Monitor approved the County's proposal to establish a limited-purpose revolving loan fund which would be used to acquire and rehabilitate existing foreclosed, vacant, abandoned, or *in rem* one- to four-family homes. The homes would be sold to income-eligible purchasers and accessory apartments would be rented to income-eligible tenants. Proceeds would be returned to the revolving loan fund and

would be available for additional cycles of property acquisition and rehabilitation. The Monitor looks forward to the County's updates on the use of that revolving fund.

The County has reported to the Monitor that as of December 7, 2011, \$6,164,500 of the \$21,600,000 in Settlement-designated CDBG funds remained unobligated, \$27,070,000 of the \$30,000,000 in Settlement-designated County funds remained unobligated, and the full \$400,000 "outreach and education budget" remained unobligated. *See* Ex. 1, Attachment 2b. The County is likely to exhaust the designated Settlement funds before completion of the 750 units contemplated by the Settlement unless it more effectively leverages those funds and develops other sources of financing. Much more vigorous and creative strategizing is needed, and such efforts must continue throughout the full term of the Settlement. Merely spending the remaining unobligated funds without an ongoing campaign to leverage those funds, including through active use of the recently established revolving loan fund, and to entice other funding sources will not be considered good-faith compliance with the terms of the Settlement.

E. Zoning

1. Model Zoning Ordinance

In August 2010, as part of its Implementation Plan, the County submitted a model ordinance, which contained fourteen proposed provisions, as well as advisory comments. *See* Implementation Plan Appendix D-1, attached to the Monitor's October 2010 report as Exhibit 2. The model ordinance is meant to supplement existing municipal zoning codes to ensure the provision and promotion of affordable housing that affirmatively furthers fair housing. Among other things, the model ordinance provides for mandatory

set asides for new residential developments, a ban on preferences for income-eligible tenants or purchasers, marketing requirements in accordance with the County's Affirmative Marketing Plan, and an expedited project review process to bring Affordable AFFH Units to market more quickly. The Monitor approved the County's model ordinance in October 2010 and the County has since shared the model with each of the 31 eligible municipalities.

2. Progress in Municipalities

The County summarized the activities at the municipal level to adopt the model ordinance in its December 14, 2011 submission (Attachment 4 to Exhibit 1):

- Six municipalities have adopted versions of the model ordinance: Town of New Castle, Town of Ossining, Village of Rye Brook, Village/Town of Scarsdale, Village of Tarrytown, and Town of Yorktown.⁹
- Two municipalities have shared draft zoning amendments with the County, but have not yet adopted them: Town of North Castle and the Town of North Salem.¹⁰
- Twelve additional municipalities have engaged in a review process to consider the model ordinance provisions: Town of Bedford, Village of Bronxville, Village of

⁹ See Town of New Castle, General Code Chapter 60, *available at* <http://www.ecode360.com/11803418>; Town of New Castle, General Code § 113-23(F), *available at* <http://www.ecode360.com/11765855>; Village of Tarrytown, Local Law No. 13-2011, *available at* <http://www.ecode360.com/documents/TA1273/source/427657.pdf>; Town of Yorktown, General Code Chapter 102, *available at* <http://www.ecode360.com/15601451> (has since been incorporated into the general code); Town of Scarsdale, General Code Chapter 310, Art. XVII, *available at* <http://ecode360.com/15555895> (has since been incorporated into the general code); Village of Rye Brook, Planning Board, Agenda for Meeting, Sept. 8, 2011, *available at* <http://www.ryebrook.org/Cit-e-Access/meetings/viewfiles.cfm?tid=31&mid=19875&viewfile=DRAFT%20AFFH%20LL%20V2.pdf>; Town of Ossining, Town Board Minutes, Aug. 9, 2011, *available at* http://www.townofossining.com/docs/townboard/minutes/2011/minutes_2011_0809.pdf

¹⁰ Although two municipalities have purportedly shared draft zoning amendments with the County, these drafts were not made available to the Monitor for review.

Dobbs Ferry, Town of Harrison, Village of Hastings-on-Hudson, Village of Irvington, Town of Lewisboro, Town of Mount Pleasant, Village of Pelham, Village of Pelham Manor, Village of Pleasantville, and Town of Pound Ridge.¹¹

- Six municipalities have not taken any formal action on adopting or considering the model zoning ordinance, although some have indicated a willingness to consider them in the future: Village of Ardsley, City of Rye, Town of Somers, Town of Cortlandt, Village of Tuckahoe, and Village of Larchmont.
- Five municipalities did not provide information to the County on their status or actions taken: Village of Briarcliff Manor, Village of Buchanan, Village of Croton-on-Hudson, Town of Eastchester, and Town of Mamaroneck.

While six municipalities have adopted versions of the model ordinance, no municipality has adopted it in its entirety. For example, the municipalities varied in the number of set-aside units required in new and existing residential subdivisions, with only the Town of Ossining adopting the precise standards recommended by the model ordinance. *See* Summary of Zoning Amendments (prepared by Monitor's team), attached hereto as Exhibit 4. Similarly, only three of the six municipalities adopted the occupancy standards recommended in the model ordinance, and only three adopted the model's expedited procedure for approving affordable housing developments. *See id.* While the County has encouraged municipalities to revise their proposed zoning law where the provisions of the law depart from the model ordinance, municipalities have not always heeded the County's advice. *See* Ex. 1, Attachment 5e.

¹¹ Only three municipalities, the Village of Hastings-On-Hudson, the Village of Irvington, and the Village of Pleasantville, have publicly available minutes of board and committee meetings that indicate that the model ordinance was under consideration.

3. Municipalities: Working with Monitor and County

In a letter dated November 23, 2011, the Monitor requested information from municipalities on the County's efforts to promote its model ordinance. Notably, the municipalities had no duty to respond, but more than half did so. Their responses are attached as Exhibit 5. According to representatives of several eligible municipalities, the County has contacted individual municipalities regarding the model ordinance (*see, e.g.*, Letter from the Town of Bedford, dated Dec. 15, 2011); the County has offered technical assistance to municipalities in adapting the model ordinance to their current zoning regulations, and has reviewed and commented on draft amendments (*see, e.g.*, Letter from the Village/Town of Scarsdale, dated Dec. 9, 2011; Letter from the Village of Tarrytown, dated Dec. 12, 2011; Letter from the Town of Yorktown, dated Dec. 7, 2011); the County has sponsored workshops and panels at which County representatives have answered questions related to the model ordinance (*see, e.g.*, Letter from the Town of Harrison, dated Dec. 12, 2011; Letter from the Village of Hastings-on-Hudson, dated Dec. 12, 2011); and County staff have also taken municipal personnel to the sites of successful affordable housing developments (*see, e.g.*, Letter from the Village of Bronxville, dated Dec. 20, 2011). One municipality reported that the County had also made it known that a failure to adopt the model ordinance could result in a loss of discretionary funding. *See* Letter from Village of Ardsley, dated Dec. 13, 2011.

Municipal governments are vital in clearing the path to the development of affordable homes, and they can be important to the affirmative marketing effort. That is why the Monitor took the step of including the Westchester Municipal Officials Association in the affirmative marketing working group and has welcomed opportunities

to travel to different municipalities to review sites. In many of these meetings, municipal leaders have articulated a desire to get the work done. They have often indicated a desire to receive more technical support as they work through practical problems.

More than a year since the Monitor approved the County's model zoning ordinance, fewer than 20 percent of the municipalities have passed zoning amendments; 35 percent of municipalities have not indicated that they have taken even preliminary steps towards considering revisions to their zoning codes. *See* Ex. 1, Attachment 4. The County must do more than simply provide technical support and written encouragement to ensure municipalities carry forward the goals of the Settlement. Paragraphs 7(i)-(j) of the Settlement requires the County to use "all available means," which includes inducements, such as conditioning County funds on adoption of the model ordinance, as well as coercive measures, such as the threat of legal action, as discussed in greater detail below. The County must clearly inform them of the centrality of zoning reform as part of their efforts to AFFH. Fairness and sound local planning require that municipalities receive clear notice as to the consequences of failing to adopt reforms in a specified period of time. *See* Monitor's Report and Recommendation Regarding Dispute Resolution (Amended) (Nov. 17, 2011) at 11-18. As discussed below, the County's messages on this issue have been muddled and counterproductive.

4. Discretionary Funding Policy

The Settlement also requires the County to implement, and to include in its IP, a Discretionary Funding Policy, i.e., a "policy to condition, as appropriate, the use of public funds and resources, including, but not limited to, CDBG funds and the County

Open Space funds, by municipalities on commitments included in the funding agreement between the County and the municipalities that the municipalities shall, inter alia: (i) ban local residency requirements and preferences and other selection preferences that do not AFFH; (ii) offer the County a ‘right of first refusal’ to retain and/or purchase land acquired *in rem* to be used for affordable housing that AFFH; and (iii) actively further implementation of this Stipulation and Order through their land use regulations and other affirmative measures to assist development of affordable housing.” ¶ 25(d).

The County, HUD and the Monitor have exchanged drafts of a proposed discretionary funding policy and comments regarding those drafts. The County’s most recent draft was provided to the Monitor on November 1, 2011. The BOL requested an opportunity to review and consider that draft. On December 5, 2011, BOL Chairman Ken Jenkins informed the Monitor that the Board had no comment on the draft policy at that time and that the sense of the Board is that the County administration will present the policy for adoption by the Board after the Monitor’s review. The Monitor, having reviewed the County’s draft, expects no major substantive changes or issues, but is preparing a final round of revisions and will convene a conference call with the County and HUD to discuss the policy. The Monitor anticipates that the discretionary funding policy will be finalized on or before January 11, 2012.

F. Analysis of Impediments

As described above, paragraph 32 of the Settlement requires the County to prepare an AI. Since the approval of the Settlement in 2009, the County has submitted five iterations of its AI, all of which have been rejected by HUD as unacceptable. During

the first half of 2011, HUD provided technical assistance to the County in revising the AI, but ultimately the County's AI still fell short, in HUD's view. HUD rejected the last proposed AI on July 13, 2011. According to HUD's letter of December 16, 2011, the AI failed to adequately address two areas: "the AI has not been acceptable because the County has not addressed deficiencies in its AI submission regarding the promotion of legislation banning source-of-income discrimination, and plans to overcome exclusionary zoning practices." *See* Ex. 2. The County, needless to say, disagrees with HUD's position.

The parties referred their dispute regarding those aspects of the AI to the Monitor for resolution and, at the Monitor's request, briefed their positions in initial and reply submissions during October 2011. The Monitor subsequently issued a Report and Recommendation (amended November 17, 2011) analyzing the disputed issues and proposing a resolution as follows.

1. Source-of-Income Legislation

At the time the County entered into the Settlement, the BOL had begun consideration of legislation prohibiting housing discrimination based on one's source of income. After the Settlement was approved by the BOL in September 2009, then-County Executive Andrew J. Spano took limited steps in support of the legislation then before the BOL, but the BOL did not vote on the measure before the legislative session expired on December 31, 2009. The legislation was reintroduced in the new session in January 2010. Over the next several months, the BOL considered the legislation repeatedly and conducted hearings, but current County Executive Robert P. Astorino was absent from

the public process by which the legislation was considered. The BOL passed an amended version of the legislation on June 14, 2010, but County Executive Astorino vetoed it on June 25, 2010.

The Monitor found that neither former County Executive Spano's limited acts in support of the legislation nor current County Executive Astorino's actions, culminating in his veto of the legislation, could be considered acts sufficient to "promote" the legislation as required by the Settlement. The County Executive's duty to promote source-of-income legislation went unfulfilled largely because the current County Executive viewed the legislation as unwarranted, notwithstanding the County's binding contractual commitment to promote it. The Monitor therefore concluded that the County was in breach of the Settlement.

The Monitor recommended that a reasonable interpretation of "promotion" of legislation could encompass, at a minimum, requesting that the legislature reintroduce the prior legislation, providing information to assist in analyzing the impact of the legislation, and signing the legislation passed.

2. Exclusionary Zoning

The other deficiency in the County's AI that led HUD to reject it was the County's approach to local zoning ordinances that may hinder efforts to affirmatively further fair housing. The Monitor rejected the County's request for a December 2012 deadline, more than three years after the approval of the Settlement, to complete its analysis of zoning practices. Instead, the Monitor concluded that the County should be able to complete its analysis by the end of February 2012. Furthermore, the Monitor

found that the County should, at a minimum, assess the impact of each of the following zoning practices or explain why the analysis of the listed practices would not be helpful to understanding the impact of the zoning ordinances taken as a whole:

- Restrictions that limit or prohibit multifamily housing development;
- Limitations on the size of a development;
- Limitations directed at Section 8 or other affordable housing, including limitations on such developments in a municipality;
- Restrictions that directly or indirectly limit the number of bedrooms in a unit;
- Restrictions on lot size or other density requirements that encourage single-family housing or restrict multifamily housing; and
- Limitations on townhouse development.

The Monitor further found that the County had not provided a clear strategy to address action – or lack thereof – by municipal governments regarding specific zoning practices. Although the County had said it will make recommendations to municipal governments, the Monitor recommended that the County explain how it intends to persuade municipalities to follow those recommendations and what additional steps, if any, it will take if those recommendations are not followed. In developing its strategy, the County should first identify specific exclusionary zoning practices, as noted above.

The County should also, at a minimum:

- Develop a process for notifying municipalities of zoning issues that hinder the County's obligations under the Settlement and changes that must be made, and if not made, the consequences of municipalities' failure to make them;
- Develop a process to involve municipal decision-makers in consultation regarding changes in zoning and land use restrictions; and
- Provide a description of how these requirements will be included in future contracts or other written agreements between the County and municipalities.

Lastly, the County has contended that legal action, although a possibility, is considered a last resort and will be pursued on a case-by-case basis only when a particular project is blocked or hindered by a local zoning ordinance. The Settlement, though, explicitly states that the County “shall use all available means as appropriate,” including “pursuing legal action,” to address a municipality’s failure to act to promote the objectives of paragraph 7 of the Settlement (which lays out the general requirements for the 750 Affordable AFFH Units), or actions that hinder those objectives. *See* ¶ 7(j). In the Monitor’s July 2010 report, the Monitor asked the County to meaningfully explore what shape such legal action might take. Although the County has acknowledged that pursuing legal action is an option to combat exclusionary zoning, the County Executive has publicly stated on several occasions that the County will not sue municipal governments over zoning practices. *See, e.g.,* Friends of Rob Astorino, <http://www.robastorino.com/> (last accessed Jan. 5, 2012) (“HUD is trying to force me and Westchester County to dismantle local zoning, sue our municipalities and bankrupt our taxpayers. I will not allow that to happen.”); *Hannity: Feds Accusing NYC Suburb of Segregation?* (Fox News television broadcast Sept. 7, 2011) (transcript available at <http://www.foxnews.com/on-air/hannity/2011/09/08/feds-accusing-nyc-suburb-segregation?page=2>) (last accessed Jan. 5, 2012) (“They want us to sue our municipalities to rip up local zoning. We are not going to stand for that.”).

The Monitor’s view was and is that litigation is a powerful lever the County may exercise to bring municipal governments into compliance, and that the County should identify the types of zoning practices that would, if not remedied by the municipality,

lead the County to pursue legal action. More importantly, the Monitor found that it is fair and appropriate for the municipalities to know the circumstances under which the County may employ litigation, and that the County should provide clarification.

Nevertheless, from the Monitor's perspective, the County has failed to satisfy its obligation to submit an AI acceptable to HUD, even after two years of effort, five drafts and extensive assistance from HUD. The parties currently are briefing the County's appeal of the Monitor's Report and Recommendations, which then will await decision by Magistrate Judge Gorenstein.¹²

G. Housing Units

1. Overall Progress

Paragraph 23 of the Settlement provides annual housing development benchmarks. By the end of 2011, the County was to have financing in place for 100 Affordable AFFH units, and building permits for 50 Affordable AFFH units. The County has surpassed these benchmarks: Financing is in place for 182 units, of which 108 have been issued building permits. In addition, construction is underway for 104 units (with rehabilitation complete or not necessary for an additional 4 units). In addition, marketing and tenant lotteries have been completed for 87 units. The table below provides a high-level summary regarding 206 units that have received approval or conditional approval

¹² This prolonged dispute has funding implications, as described in a November 4, 2011 letter from Deputy County Executive Kevin J. Plunkett, attached hereto as Exhibit 6; *see also* Cover letter to Exhibit 1 at 3.

from the Monitor as of December 7, 2011.¹³ More detailed information regarding these units is provided in Attachment 2a to Exhibit 1.

Status of AFFH Units with Approval or Conditional Approval from the Monitor

Description	Municipality	Number of AFFH Units	Financing in Place	Building Permits Issued
445 North State Road	Village of Briarcliff Manor	14	No	No
Roundtop at Montrose	Town of Cortlandt	83	Yes	Yes
Pinebrook Commons	Village of Larchmont	46	Yes	No
Armonk Crossing	Town of North Castle	10	No	No
42 First Avenue	Village of Pelham	3	Yes	Yes
55 Pleasant Avenue	Village of Pleasantville	2	Yes	No
Pleasantville HDFC	Village of Pleasantville	1	Yes	Yes
Rye Cottage Town Homes (Landings)	City of Rye	18	Yes	Yes
Freedom Gardens for the Handicapped, Inc.	Town of Yorktown	3	Yes	Yes
Crompond Crossing	Town of Yorktown	26	Yes	No
	TOTAL	206	182	108

As for the tenure of the 206 units that have received approval or conditional approval from the Monitor, 89 units (or 43.2 percent) are rentals and 117 (or 56.8 percent) are homeownership units. Paragraph 7(d) requires that at least 50 percent of the total Affordable AFFH Units be rental units.

With respect to location, 120 of the 206 units are in paragraph 7(a) areas, the full 60-unit allowance for paragraph 7(b) has been exhausted, and 26 of the units count

¹³ This discussion and accompanying chart do not include an estimated 17 units that will result from the use of a revolving loan fund to acquire and rehabilitate existing foreclosed, vacant, abandoned, or *in rem* 1-4 family homes; the homes would be sold to income-eligible purchasers, and accessory apartments would be rented to income-eligible tenants. Although the Monitor has approved the use of such a fund in principle, the County has not yet provided information regarding specific sites.

toward paragraph 7(c).¹⁴ As for unit characteristics, 69 or 33.5 percent are one-bedroom units, just over half of the 206 units have two bedrooms (110, or 53.4 percent), and 27 or 13.1 percent are three-bedroom units. There are no four-bedroom units.

By the end of 2011, the County's records show that in addition to the 206 units discussed above, there has been some progress towards development of an additional 266 units.¹⁵ These proposed developments range from several small developments with just two units to a large development with over 100 units. *See* Ex. 1, Attachment 2a.

2. Summary of Developments Submitted to the Monitor

The following developments have received approval or conditional approval from the Monitor as counting toward the County's Settlement obligations:

- Eighteen one-bedroom ownership units at Cottage Landing (15 Edgar Place) in the City of Rye;
- 83 rental units in the Roundtop development (on Route 9A) at Montrose, in the Town of Cortlandt;
- Three rental units for persons with disabilities at Freedom Gardens (1680 Strawberry Road), an existing development in Yorktown;
- The acquisition and conversion of an existing structure in Pelham (42 First Avenue) to one ownership unit and two accessory apartments;

¹⁴ Paragraph 7(c)(ii) provides that no Settlement funds shall be used to develop units in 7(c) locations until 175 units in 7(a) locations have received building permits. The County has represented that the 26 units it seeks to have counted under paragraph 7(c) – which are actually located in a 7(b) area in Cortlandt – will be financed using funds not governed by the Settlement. The Monitor has indicated that this approach appears to be permissible under the Settlement.

¹⁵ This total includes the estimated 17 units that will result from the use of the limited-purpose revolving loan fund, but does not include the 9 proposed units at 191 Revolutionary Road in Briarcliff Manor, because the County has advised that this project is no longer moving forward. The total also does not include the two existing, occupied developments discussed below.

- 46 ownership units at Pinebrook Commons (2101-2105 Palmer Avenue) in Larchmont;
- A two-bedroom ownership unit (293 Manville Road) in Pleasantville;
- The acquisition and conversion of an existing structure in Pleasantville (55 Pleasant Avenue) to a three-bedroom ownership unit and a two-bedroom accessory apartment;
- A 10-unit development of two-bedroom townhouse ownership units (22 Old Route 22) in the Hamlet of Armonk (within the Town of North Castle);
- A 26-unit development of three-bedroom townhouse ownership units (3372 Crompond Road) in Yorktown; and
- A 14-unit development of two-bedroom townhouse ownership units (445 North State Road) in Briarcliff Manor.

Other inquiries regarding specific developments submitted to the Monitor include:

- A proposal including eight units of “shared housing” (also referred to as single-room occupancy units or “SROs”) and one two-bedroom apartment in a former parish house and garage (191 Revolutionary Road) in Briarcliff Manor raised serious questions regarding the meaning of the term “unit” for purposes of the Settlement.¹⁶ The County has advised the Monitor that this development is no longer moving forward for reasons unrelated to the “unit” issue.
- Two existing, occupied affordable developments for which the County sought to preserve and deepen the affordability under paragraph 7(h)(iii) became problematic because of questions regarding resident turnover and a lack of certainty as to whether these units would be affirmatively marketed during the pendency of the Settlement.

¹⁶ HUD has asked the Monitor to consider recommending a modification of the Settlement to make clear that there is a limitation on SRO units that may count toward the County's duty to develop 750 Affordable AFFH Units. *See* Ex. 2. The parties have agreed to discuss this issue further before initiating a formal process that could lead to a modification of the Settlement.

3. Concerns About Siting and Configuration

The County has done well in reaching and surpassing its numerical benchmarks for this assessment period, and is on its way toward reaching the numerical benchmarks for the end of 2012. Overall, however, the County's approach has been largely opportunistic rather than systematically planned. Throughout the implementation period, the Monitor has repeatedly emphasized to the County the importance of being proactive in its approach to identifying and developing sites. Indeed, paragraph 25 of the Settlement clearly contemplates such a strategic approach. In pursuit of this end, the Monitor requested that his consultants from the Pratt Institute prepare a set of best-practices criteria to be used in evaluating potential developments and sites in order to best achieve the Settlement's integrative goals. Those criteria were included in the Monitor's April 2011 report and have been discussed with the County and HUD. The County has provided no evidence that this approach has been adopted.

The Monitor's concerns regarding site selection first arose in relation to several specific development proposals. For example, although the educational and employment opportunities available near the Pinebrook Commons development in Larchmont are laudable, the physical layout of the site tends to isolate it from nearby commercial and residential areas. As discussed above, the "shared housing" or single-room occupancy units in Briarcliff Manor narrowly cleared the bar amid serious concerns on the part of both the Monitor and HUD about the generous construction of the term "unit."

In addition, the County's progress is due in part to the conversion of market-rate housing to affordable housing (*e.g.*, Pinebrook Commons), which has been facilitated by market conditions and the availability of public finance incentives for the latter. Such an

approach likely does not represent the most efficient use of the funds the County has available to it under the Settlement, and demonstrates why a comprehensive financing strategy is vital to the County's ability to meet future benchmarks.

Other areas of compliance are difficult to measure. For example, paragraph 22(f) requires the County to seek to "maximize the development of Affordable AFFH Units in the eligible municipalities and census blocks with the lowest concentrations of African American and Hispanic residents." Simple analysis of the County's data for the 206 approved units suggests that 183 of these units, or nearly 89 percent, are in such areas. This does not provide the full picture, however. Some developments are very close to the border of a community with very different demographics – a clear example of this is the Rye Cottage Town Homes. This development is physically cut off from the City of Rye by a major highway (I-95), and it is the Monitor's understanding that entering and exiting the property requires crossing into Port Chester, which has a very large Hispanic population and is not an eligible community under the Settlement.

Sites with no residential population have raised a different concern. For example, the Armonk Crossing site is in a census block with a residential population of zero, according to 2000 Census data. Although this means that the number of African-American and Hispanic residents is also zero (as the County has emphasized), development in such an area does not further the Settlement's goal of promoting inclusive communities. *See* ¶ 22(a). This goal is not helped by the physical characteristics of the site, which tend to isolate it from other residential areas. For the largest development, Roundtop, the existing population of the coterminous census block

and tract resides in group quarters: two homeless shelters, a U.S. Department of Veterans Affairs hospital, and a state-run nursing home. Because the group-quarters population is not to be counted toward the totals under paragraphs 7(a)-(c), the existing population at this site is technically zero and also raises concerns regarding integration and inclusiveness.

V. Public Communications: Mixed Messages and Inaccuracies

As noted above, the County's duties under the Settlement go beyond the bricks-and-mortar requirements of paragraph 7. The duties extend to communications and the Settlement contemplates at least four audiences: the citizens of Westchester; municipal leaders; business persons involved in the sale and rental of housing units; and families, particularly African American and Hispanic families, seeking to move to areas of Westchester where they had not traditionally settled. In paragraph 33, the parties agreed that the County would undertake a program of public education and information-gathering about the Settlement. These requirements include, among other things, an obligation 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(c).

Among other things, campaigns to broaden support for fair housing would create and enhance a sense of welcome for those considering moving into areas where they would not otherwise consider. This approach was discussed in detail in the Monitor's April 2011 report and the Furman Report that accompanied it. Such campaigns go

beyond advertising of opportunities for Affordable AFFH Units, but must be aimed at educating the general public – not just potential new residents – about the benefits of diverse, integrated communities.

For its part, the County points to hundreds of meetings held with municipal officials, developers, property owners, and non-profit agencies to educate both about the County's program to discharge its obligations under the Settlement and to provide technical assistance under the Settlement. *See, e.g.*, Ex. 1 (County submission of Dec. 14, 2011 (Cover letter at 1)); 3Q 2011 Report (attached to Monitor's October 25, 2011 Report as Exhibit 2 at 7, Appendix IV-1); 2Q 2011 Report (attached to Monitor's October 25, 2011 Report as Exhibit 1 at 8, Appendix IV-1). Separately, municipal officials have reported that the County staff has been singularly helpful and the County Executive and the Deputy County Executive have also been informative in these meetings, acknowledging the duties under the Settlement, setting out the requirements of the model ordinance, informing municipal officials of the consequences of non-compliance with the ordinance. *See* Ex. 5 (voluntary submissions from municipal officials). Many of the municipal officials have gone to great lengths to praise the helpfulness of the County staff. They have praised the staff for having an open door in their approach to municipal questions, and for taking municipal officials to visit successful affordable housing developments. *Id.*

The County has also advised the Monitor and HUD of its efforts to develop an advertising campaign tied to the County's affirmative marketing responsibilities. The draft campaign materials highlight the benefits of living in Westchester, including

educational opportunities and reduced commute times, and direct potential applicants for the Affordable AFFH Units to contact the County (including by accessing the Central Intake Tool) for additional information. The County's previous quarterly reports also report past attendance of cultural festivals to provide information about upcoming affordable developments and how to use the Central Intake System. *See, e.g.*, 3Q 2011 Report (attached to Monitor's October 25, 2011 Report as Exhibit 2) at 7; 2Q 2011 Report (attached to Monitor's October 25, 2011 Report as Exhibit 1) at 8-9.

The County's existing and planned education efforts to municipal leaders, developers, non-profit agencies, and potential applicants are promising, but do not satisfy the key portion of paragraph 33(c) requiring "public outreach specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities."

Furthermore, the County's submissions (including its quarterly reports and press statements), together with the correspondence from the municipalities, do not convey the complete course of conduct. In its letter of December 16, 2011 (attached hereto as Exhibit 2), HUD argued that the County has failed to discharge several of its paragraph 33 duties, including educating residents about "the benefits of living in inclusive communities." More pointedly, HUD asserted that the County Executive has undertaken "an extensive media campaign where he has complained about the Department's recommendations for actions that the County could take to affirmatively further fair housing." *See Ex. 2.* These assertions bear examining. From the record provided to the Monitor as well as independent research, there is no active general education campaign.

The discussions of integration thus far have, at best, generated more heat than light and cannot reasonably be considered supportive as that term is used in paragraph 33(c).

At the Monitor's request, the County has provided all of the written public statements of the County Executive and those working on his immediate staff concerning the Settlement. *See* Ex. 1, Attachment 5a. Considered individually or as a whole, they are not evidence of a program of support for the Settlement, or fair housing, or integration. Moreover, there is little that would give rise to a tone of welcome for potential new residents. A discussion of these statements follows.

At a press conference held on July 15, 2011, the County Executive opened by saying that he would address progress generally under the Settlement and in doing so discuss the issue of integration. His words, however, are not words of support:

This letter, this May 13th letter, when we got it I was utterly shocked when I read what is in this letter. And you will get this letter, and you will see, by their own admission, HUD is trying to make the County do things that are outside the settlement. And to use Westchester as the test case for the rest of the country. HUD is no longer calling this, by the way, a housing settlement. In their words this is an integration order. The federal government is demanding that we dismantle local zoning, sue our municipalities and bankrupt our taxpayers. I will not allow that to happen.

See Press Conference, Westchester County Housing Settlement, July 15, 2011, *available at* <http://vimeo.com/26485916> (emphasis added).¹⁷ Based on records provided by the County, this press conference (and the accompanying news release; *see* Exhibit 1, Attachment 5a) was the County Executive's first discussion of integration in the context of the Settlement.

¹⁷ A transcript of the press conference as recorded by the County is attached as Exhibit 7.

Later in July, the County Executive wrote an opinion piece in the *Journal News* in which he addressed his bases for the dispute with HUD. He again turned to the issue of integration and derided HUD's position as follows:

HUD is clearly using the AI to try to expand the terms of the settlement from a straightforward stipulation to build housing into an open-ended, Utopian integration order, which HUD then plans to use as a model across the country.

Robert P. Astorino, Op-Ed, "HUD's Overreaching Goes Far Beyond the Terms of the Housing Settlement," *The Journal News*, July 27, 2011 (*see* Exhibit 1, Attachment 5a).

Of course, in the Settlement, the parties clearly indicated much more than building housing would be required. Both parties acknowledged the benefits of integrated residential patterns and both agreed that the County would undertake steps to educate the public about the benefits of integrated communities. *See* Second Whereas Clause; ¶ 33(c).

In November 2011, the County Executive discussed integration again in an op-ed piece published in the *Daily News* entitled "HUD's Warped War on Westchester: Our County Is Already Diverse." In this piece, the County Executive argues that Westchester is already diverse and cites Census data to support the point. As is plain from its terms, the Settlement is not focused on diversity at the County-wide level. Rather, it is focused on housing patterns at the municipal level and focuses on the communities that are not diverse. *See generally* ¶¶ 7(a)-(c); 22(f).

After stating at least some of the bases for the dispute with HUD, the County Executive wrote:

Where does it end? Is HUD going to call for the break up of Vermont and Maine because they are 95% white? What about Chinatown or other predominantly ethnic city neighborhoods?

In Westchester, anyone can live anywhere they like. Where people live depends on the home they can afford. That's not discrimination. That's economics.

Robert P. Astorino, Op-Ed, "HUD's Warped War on Westchester: Our County is Already Diverse," *The Daily News*, Nov. 30, 2011. Notably, just ten months earlier, the County Executive took a different position in responding to a Westchester Residential Opportunities report regarding housing discrimination. In a press release, Mr. Astorino praised the County's success in "decreas[ing] the instances" of discrimination, and pledged additional efforts and further progress. *See* Press Release, Westchester County, Housing Bias Report: County Has Made Significant Improvement (Jan. 26, 2011) (contained in Ex. 1, Attachment 5a).

Rather than speaking in terms that indicate support for integration, the County Executive frequently notes his opposition to the Settlement. For example, as recently as November 30, 2011, Mr. Astorino wrote in a *Daily News* op-ed piece that he "opposed the settlement from the outset." Robert P. Astorino, Op-Ed, "HUD's Warped War on Westchester: Our County Is Already Diverse," *The Daily News*, Nov. 30, 2011. Mr. Astorino's prepared remarks from an October 2011 symposium convened by Westchester Residential Opportunities and Pace University School of Law provide: "As you know, I was against the settlement" *See also, e.g.*, Robert P. Astorino, Op-Ed, "Astorino Defends Stance on U.S. Housing Deal," *The Journal News*, Oct. 2, 2011; Robert P. Astorino, Op-Ed, "HUD's Overreaching Goes Far Beyond the Terms of the

Housing Settlement,” *The Journal News*, July 27, 2011. Even though these statements of opposition are generally accompanied by an acknowledgment that Mr. Astorino is legally bound to comply, they are not indicative of a campaign to broaden support for integrated communities.

In a recent discussion with the Monitor’s team regarding these public statements, members of the County Executive’s staff argued that a distinction should be drawn between the County’s efforts to comply with the Settlement and Mr. Astorino’s statements about the AI-related dispute with HUD. In the Monitor’s view, it is unrealistic to expect anyone, whether or not familiar with the details of the dispute, to draw such a distinction: Mr. Astorino’s statements specifically reference the Settlement, mischaracterize it as simply an agreement to build housing, and are clearly not limited to the issues in dispute.

All County statements about integration have an impact on the County’s duties under paragraph 33(c). The dispute with HUD did not create a safe harbor for loose rhetoric concerning integration. This is of particular concern in the absence of a general education effort regarding the benefits of integrated communities, as specifically required by the Settlement. The lack of a general outreach and education campaign is a shortcoming that must be remedied, and the Monitor looks forward to receiving updates from the County on the development of such a campaign.

During the first meetings under the Settlement, the Monitor indicated that his approach was based on problem-solving, not ideology. This approach seems particularly appropriate when dealing with a matter as charged as race. The tone used by the County

Executive and members of his staff to discuss matters related to the Settlement is important. The Monitor made this point clear in a report filed with this Court on July 7, 2010, and stated that it would be the subject of review. This assessment is in line with that earlier report.

Going forward, the Monitor will ask the County to include, in its quarterly reports, a copy of all statements made by County officials in connection with the Settlement. In addition, in 2Q 2012, the Monitor will, pursuant to paragraph 13(c), ask the County to respond to questions concerning any public statements made in the past year, the answers to which will be reviewed by the Monitor and HUD, made available to the public on the Monitor's website (<http://www.westchesterhousingmonitor.org>), and filed with the Court.

Dated: January 6, 2012
New York, New York

Respectfully submitted,

/s/ James E. Johnson

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