

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

**MONITOR'S REPORT AND RECOMMENDATION
REGARDING DISPUTE RESOLUTION**

In accordance with paragraph 14(c) of the August 10, 2009 Stipulation and Order of Settlement and Dismissal in this matter (“Settlement”), the Monitor hereby submits this report regarding the disputes referred for resolution by Westchester County (“County”) and the United States (“Government”).

The Settlement sets forth a list of required actions the County must take. Emphasized throughout the Settlement is the County’s obligation to affirmatively further fair housing. The County is also required to submit an Analysis of Impediments to Fair Housing Choice (“AI”) that is deemed acceptable by the U.S. Department of Housing and Urban Development (“HUD”). *See* paragraph 32.¹

In the course of working toward an acceptable AI,² the parties have both requested, pursuant to paragraph 14(b) of the Settlement, that the Monitor resolve their disputes concerning two issues: (1) “Source of Income” legislation; and (2) local zoning practices. *See* July 20, 2011 letter from Kevin J. Plunkett on behalf of the County, attached hereto as Exhibit 1; August 18, 2011 letter from Benjamin H. Torrance on behalf of the Government, attached hereto as Exhibit 2. These are the only issues before the Monitor.

The County has requested findings on other issues largely related to the propriety of the rejection of the AI by HUD. This issue is not properly joined for resolution. Accordingly, neither the question of whether the County’s July 2011 AI submission was

¹ Unless indicated otherwise, all paragraph citations refer to the Settlement.

² To date, HUD has rejected five iterations of the County’s draft AI.

improperly rejected by HUD nor the question of the adequacy of the County's certification that it is affirmatively furthering fair housing is before the Monitor.

The parties have set forth their positions in both initial and reply submissions, which are attached hereto as Exhibit 3 (County's Statement of Position); Exhibit 4 (Government's Statement of Position); Exhibit 5 (County's Response); and Exhibit 6 (Government's Response). Upon review of these submissions and familiarity with the record, the Monitor issues this report and recommendation in connection with both disputed issues. For the reasons stated below, the Monitor finds that the County is in breach of its obligation to promote certain "Source of Income" legislation. The Monitor further finds that, under the terms of the Settlement, the County should analyze zoning ordinances in connection with the AI and it is appropriate that such analyses be completed by February 29, 2012.

I. "Source of Income" Legislation

As noted above, paragraph 33(g) of the Settlement requires that the County "promote, through the County Executive, legislation currently pending before the Board of Legislators to ban 'source-of-income' discrimination in housing." Paragraph 33(i) requires that this undertaking be incorporated in the County's AI.³

The relevant facts are not in dispute. At the time the County entered into the Settlement, the Board of Legislators ("BOL") had begun consideration of Source of

³ In characterizing the content of the AI, the County states that the AI is to comply "with the guidance in HUD's Fair Housing Guide." This statement is incomplete. Both paragraphs 32 and 33 require additional elements in the AI.

Income legislation in a bill styled, “A Local Law amending the Laws of Westchester County, in relation to prohibiting housing discrimination based on source of income” (“Source of Income legislation”). After the Settlement was approved by the BOL in September 2009, then-County Executive Andrew J. Spano took two steps in support of the legislation then before the BOL. First, in October 2009, he wrote to the BOL leadership urging passage of the Source of Income legislation pending at the time. Second, a month later, Mr. Spano wrote letters to five housing advocacy organizations urging them to support and advocate for the pending legislation.⁴ The parties have identified no other action by Mr. Spano to support the legislation.

The BOL did not vote on the measure before the legislative session expired on December 31, 2009, but the legislation was reintroduced shortly thereafter in the new session, on January 19, 2010. Over the next several months, the BOL considered the legislation in at least eight meetings, including four meetings of the full BOL and four committee meetings. The BOL also conducted hearings at which 39 speakers commented on the legislation. The County has offered no evidence that current County Executive Robert P. Astorino (who took office on January 1, 2010) participated in any of the BOL meetings or hearings in connection with the legislation. To the contrary,

⁴ Mr. Spano wrote to Legal Services of the Hudson Valley/Westchester Residents Against Income Discrimination; Westchester Residential Opportunities, Inc.; Mount Vernon United Tenants; Human Development Services of Westchester; and Housing Action Council. *See* County’s Statement of Position at 13.

Mr. Astorino's letter of July 28, 2010 demonstrates that the County Executive was absent from the public process by which the legislation was considered.⁵

The BOL passed Local Law 3-2010, an amended version of the Source of Income legislation, on June 14, 2010. County Executive Astorino vetoed that legislation on June 25, 2010.

The County submits that it is in compliance with paragraph 33(g) because the previous County Executive's actions in October 2009 sufficiently "promoted" the legislation. *See* County's Statement of Position at 12-16. The County proffers four principal arguments to support its position.

⁵ By letter dated June 28, 2010, the Monitor directed County Executive Astorino to provide additional information concerning his veto. Mr. Astorino's July 28, 2010 response is attached to the County's initial submission as Exhibit E. Excerpts from the letter follow, including the Monitor's prompts:

1. Identify all steps taken since January 1, 2010, to promote any Source of Income Legislation, including, but not limited to, Local Law 3-2010.

None by the undersigned for several reasons, including among other things, that I considered that requirement of the Settlement to have been fulfilled by the actions of the former County Executive Andrew Spano and that a prior County Executive and prior County Board of Legislators cannot bind the thought process and discretion of a newly elected County Executive in this circumstance.

2. Identify all meetings, telephone calls or any other communication the County Executive had with any and all members of the BOL concerning Local Law 3-2010 and to provide the date, time, and participants in all such communications.

There were no meetings that I recall. I had a few casual conversations individually with Legislators Thomas Abinanti, John Nonna and Martin Rogowsky at various events that we mutually attended.

3. Identify all alternatives to Local Law 3-2010 developed by, or at the direction of, the County Executive.

None by County Executive Robert P. Astorino.

First, the County asserts that the Settlement does not require the adoption of Source of Income legislation, but “merely that the legislation currently pending in 2009 be promoted.” *See* County’s Statement of Position at 12. Second, the County argues that “the County Executive’s obligation to ‘promote’ the legislation ‘currently before’ the Board of Legislators when the Settlement was signed in August 2009, ended when the County Board of Legislators’ session expired December 31, 2009.” *See* County’s Response at 5. Third, the County argues that County Executive Astorino had legitimate grounds to exercise his right to veto the Source of Income legislation because the legislation would not “advance the cause of providing affordable housing in the County and through potential unintended consequences may even hinder that cause.” *See* County’s Response at 6 (quoting County Executive’s veto message). Finally, the County contends that the introduction of new Source of Income legislation would be futile because the County has not identified Source of Income discrimination as an impediment to fair housing. *See* County’s Statement of Position at 16.

The Government argues that the County has not met its obligations under paragraphs 33(g) and 33(i). *See* Government’s Statement of Position at 2. The Government contends that the County’s obligation to promote Source of Income legislation is a continuing one, because the Settlement directly links the promotion of a source-of-income ban to the County’s obligation to affirmatively further fair housing. *See* Government’s Statement of Position at 3; Settlement paragraph 33. Additionally, the Government argues that the County Executive’s purported grounds for vetoing the

legislation are inconsistent and implausible. *See* Government’s Statement of Position at 3.

The key questions for resolution of this issue are: (a) what does it mean to “promote” the Source of Income legislation through the County Executive; (b) over what period of time did that duty exist; and (c) did the County Executives discharge that duty.

Consent decrees, such as the Settlement, are court ordered agreements subject to general rules of contract interpretation. *Doe v. Pataki*, 481 F.3d 69, 75 (2d Cir. 2007) (“The basic principles governing interpretation of consent decrees and their underlying stipulations are well known. Such decrees reflect a contract between the parties (as well as a judicial pronouncement), and ordinary rules of contract interpretation are generally applicable.”) (citations omitted); *see also Mastrovincenzo v. City of New York*, 435 F.3d 78, 103 (2d Cir. 2006). As contracts, consent decrees must be interpreted according to the plain meaning of the language and the normal usage of the terms selected. *See Travelers Cas. & Sur. Co. v. Dormitory Auth.-State of New York*, 735 F. Supp. 2d 42, 56 (S.D.N.Y. 2010) (Cote, J.) (“In interpreting a contract under New York law, words and phrases should be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all of its provisions.”) (citations omitted); *see also Mastrovincenzo*, 435 F.3d at 103; *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985). A dictionary can supply the meaning for a word used in a contract. *See Anthracite Capital, Inc. v. MP-555 W. Fifth Mezzanine, LLC*, No. 03 Civ.5219, 2004 WL 27722, at *2 (S.D.N.Y. Jan. 6, 2004) (Cote, J.) (using Black’s Law Dictionary to define the word “sale”); *see also Succo v. First Reliance Standard Life Ins. Co.*, 16 F. App’x 53, 55 (2d

Cir. 2001); *R/S Assocs. v. New York Job Dev. Auth.*, 98 N.Y.2d 29, 33 (2002). As with any other contract, the Settlement should be interpreted in light of its purpose. *Thompson v. Gjivoje*, 896 F.2d 716, 721 (2d Cir. 1990).

Under this standard, the County's arguments must be rejected. While it is true that the Settlement does not mandate the ultimate adoption of Source of Income legislation, the County's interpretation of its obligation to "promote" such legislation is far too limited as to both the nature of true "promotion" and the length of time over which promotion is to occur.

The American Heritage Dictionary defines "promote", in relevant part, as follows:

1. To help or encourage to exist or flourish; further . . .
2. To advance in rank, dignity, position, etc. (opposed to demote) . . .
4. To aid in organizing (business undertakings).
5. To encourage the sales, acceptance, etc., of (a product), especially through advertising or other publicity."⁶

In a different context, the Second Circuit recently stated that "[t]he ordinary meaning of 'promote' includes 'to bring or help bring into being,' to 'contribute to the growth, enlargement, or prosperity of,' or to 'encourage' or 'further.'" *United States v. Awan*, 607 F.3d 306, 314 (2d Cir. 2010) (citations omitted). This meaning, equally applicable here, simply cannot be squared with either County Executive's steps in connection with Local Law 3-2010 or its predecessor.

⁶ Am. Heritage Dictionary of the Eng. Lang. (4th ed.). In a similar vein, "promoter" is defined in Black's Law Dictionary (9th ed. 2009) as "a person who encourages or incites, or a founder or organizer of a corporation or business venture; one who takes the entrepreneurial initiative in founding or organizing a business or enterprise."

The County's position rests on the very thin reed of Mr. Spano's acts in support of the legislation. Neither the single letter to the BOL, nor the five letters to advocacy organizations, taken separately or together, can be credibly considered as acts sufficient "to help or encourage to exist or flourish", "to encourage the sales, acceptance, etc., of (a product), especially through advertising or other publicity", "to bring or help bring into being," to "contribute to the growth, enlargement, or prosperity of," or to "encourage" or "further." Mr. Astorino stepped back from even Mr. Spano's limited effort at compliance and did nothing until the time of the veto, which vitiated any prior act of promotion and placed the County in breach of the Settlement.

The County argues that the duty to promote the Source of Income legislation was time limited and that the duty expired at the end of 2009 with close of the legislative session. That contention must also be rejected. First, the parties were meticulous throughout the agreement in setting time limits and deadlines, from the time periods within which the County was to complete the AI to the dates by which the financing and permits for housing units were to be provided.⁷ Accordingly, the absence of any time limitation in paragraph 33(g) speaks volumes.

Moreover, the County's construction of this provision would lead to an unreasonable result in light of the structure of the obligations taken as a whole. The

⁷ See, e.g., paragraph 18 (providing that the County shall complete an implementation plan within 120 days of the entry of the Settlement); paragraph 23 (providing benchmarks for financing and building and permits for housing units); paragraph 27 (providing that the County shall, within 120 days, "amend the Long Range Land Use Policies as contained in Westchester 2025"); paragraph 31 (providing that the County shall adopt a policy statement within 90 days); paragraph 32 (providing that the County will submit an AI within 120 days); paragraph 44(c) (providing that the County shall, within 90 days, "identify any Unallowable Costs included in payments previously sought by the County from the United States").

Settlement calls upon the County to include in its AI the duty to promote the Source of Income legislation. Paragraph 33(i). The Settlement provides that the AI would be due 120 days after the Settlement was entered by the Court. Paragraph 32. Had the County not requested an extension, the earliest deadline for AI submission would have been December 9, 2009. The parties contemplated HUD review of the AI thereafter, leaving less than three weeks in which to promote the legislation before the legislative session ended. This is an unreasonable interpretation of the County's obligation. In the absence of an express limitation and in light of the provisions and purposes of the Settlement as a whole, the only reasonable interpretation of paragraph 33(g) would require promotion activity through the time either that the legislation was voted down or, if passed, signed by the County Executive.

The County's further arguments amount to either policy assertions, unsupported by analysis or, even less relevant, political claims based on the actions of, among others, former Governor David A. Paterson. *See* County's Statement of Position at 15. Citing *Horne v. Flores*, 129 S. Ct. 2579, 2594 (2009), the County argues that the County Executive properly rejected the Source of Income legislation because a requirement "that future County elected officials continue to promote 2009 proposed source of income legislation improperly deprives and interferes with their ability to respond to the priorities and concerns of their constituents and fulfill their duties as democratically elected officials." County's Statement of Position at 13. *Horne*, however, does not apply. It is distinguishable both on its facts and its procedural posture.

Here, the County Executive unilaterally interpreted a contractual provision and acted on that interpretation over the objection of the other party to the Settlement less than a year after the Settlement had been “so ordered” by the Court. *Horne*, by contrast, involved a declaratory judgment order, the objective of which had arguably been achieved in the years following its entry, and a subsequent contempt order. *Id.* at 2595, 2605-06. As a procedural matter, the party challenging the orders in *Horne* asked the district court to grant relief pursuant to Federal Rule of Civil Procedure 60(b)(5), based on changed circumstances. *Id.* at 2589, 2591. *Horne* does not stand for the proposition that a party may unilaterally abrogate its obligations under a court order. Nothing in *Horne* suggests that any party has the right to undertake an extra-judicial change of a consent decree’s terms. Quite to the contrary, the course of “self-help” taken here raises the possibility of a contempt citation and the imposition of fines.

In sum, the Settlement requires the County Executive to continue to promote the Source of Income legislation. This duty went unfulfilled because the County Executive viewed the legislation as unwarranted. The County could have moved the Court for reconsideration of the consent decree. It did not. Nor is such reconsideration warranted. There is no legal support for the notion that self-help is an option. The County is in breach.

Pursuant to paragraph 13(c), the Monitor recommends 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. Should the

Government decide that it would like direction enforceable by contempt citation of the County's ongoing obligations, paragraph 34(b) expressly provides that the Government has the right to seek specific performance of the Settlement by court order.

II. Zoning

Among other things, the Settlement requires the County to develop at least 750 AFFH Units (as that term is defined in the Settlement), to provide incentives to entities to assist the development of such units, to identify municipal resistance to such units and take steps, including litigation, to overcome such resistance. *See* paragraphs 7(i); 7(j); 15. The duty to identify municipal resistance is of sufficient import to be found in two sections of the Settlement. The parties have reached an impasse regarding the nature and scope of the County's duty to address local zoning ordinances that may hinder efforts to affirmatively further fair housing, particularly as that duty is to be memorialized in the AI.

Based on the parties' submissions, the Monitor has identified three specific issues in dispute relating to local zoning that are appropriate for decision here: (1) the timeframe in which the County is required to identify specific local zoning practices that have exclusionary impacts; (2) whether the County is required to specify a strategy to overcome exclusionary zoning practices; and (3) whether the County is required to identify the types of zoning practices that would, if not remedied by the municipality, require the County to pursue legal action.

A. Period in Which the County Must Identify Exclusionary Zoning Practices

Paragraph 32 is broad in scope; in addition to incorporating HUD guidelines, the County agreed to:

- (a) commit to collecting data and undertaking other actions necessary to facilitate the implementation of this Stipulation and Order; and
- (b) identify and analyze, *inter alia*:
 - (i) the impediments to fair housing within its jurisdiction, including impediments based on race or municipal resistance to the development of affordable housing;
 - (ii) the appropriate actions the County will take to address and overcome the effects of those impediments; and
 - (iii) the potential need for mobility counseling, and the steps the County will take to provide such counseling as needed.

Importantly, paragraph 32 sets a floor, not a ceiling, for what action must be taken, data collected and issues analyzed. For example, the parties explicitly noted that analysis would include issues other than those identified in the document. The County has committed to identifying specific zoning practices that may have exclusionary impacts. County's Statement of Position at 8. The parties disagree about the date by which that must be accomplished. The County seeks approval to complete the analysis by December 31, 2012. *See* County's Statement of Position at 8. The Government, in response, requests that the County fulfill its obligations within a reasonable time, and, at

the latest, by February 29, 2012. *See* Government's Response at 3-4. The Government states that the County's proposed date is unreasonable because December 31, 2012 is a nearly a year and a half after the submission of the County's latest AI and more than three years after the entry of the Settlement. Government's Response at 3 n.5.

The Monitor notes that both the Government and the County propose deadlines that are more than two years after the AI was originally due. In that time, the County has not delivered an AI acceptable to HUD. Although it is and was foreseeable that identifying specific local zoning practices would be a vital part of the AI as provided by the Settlement and precedent, *see, e.g., LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir. 1995) (zoning restrictions may constitute discriminatory housing practice); *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 936-38 (2d Cir. 1988) (zoning that restricted multi-family housing to certain geographical areas adversely affected minorities and perpetuated segregation), *aff'd*, 488 U.S. 15 (1988) (per curiam), the Monitor is left to conclude either that the County did not begin to undertake the enterprise during the two years since the Settlement was first entered, or is proceeding with the task at a rate that would amount to analyzing fewer than three sets of municipal zoning ordinances every two months. Whether the County has begun the work or not, it has a maximum of 31 sets of zoning ordinances to analyze. Analyzing the ordinances at a rate of ten per month during the three months and three weeks between now and the end of February 2012 should be sufficient time to complete the task.

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 ("Restrictive

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.

All of these items were requested by the Government. None is unreasonable.

B. A Clear Strategy

The County states that it has provided a “strategy in connection with local zoning ordinances.” County’s Response at 9. The County’s strategy would consist of the following: “(1) identify[ing] specific zoning issues that may have exclusionary impacts by December 31, 2012; (2) review[ing] specific zoning ordinances that promote, permit or restrict the development and preservation of affordable housing that limit multi-family housing development; and (3) communicat[ing] to municipalities the County’s recommendations on changes that could be made to local regulations so as to enable the local officials to take the necessary corrective action.” *See* County’s Statement of Position at 8.

The Government counters that the County has not yet developed a clear strategy to overcome exclusionary zoning practices. *See* Government’s Response at 3-4. The

Government further states that the County's current discussion of this issue in its AI is insufficient because it "fails to specify actions (beyond recommendations) the County will take to overcome . . . impediments to fair housing." Government's Response at 3; *see also* Government's Statement of Position 5-6.

The Monitor has previously directed the County to develop a clear strategy that encourages compliance by municipal governments. For example, the Monitor's February 2010 report advised that the County should develop a strategy for using carrots and sticks to encourage compliance by municipal governments, including the County's plan for monitoring local approval processes and municipalities' cooperation with County's efforts to implement the Settlement. To date, the County's efforts appear to have been limited to the development of the model zoning ordinance and the discretionary funding allocation policy, which has yet to be completed. The County has not provided such a strategy to address action—or lack thereof—by municipal governments regarding specific zoning practices. Although the County has said it will make recommendations to municipal governments, the County should 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.

Pursuant to Paragraph 28 of the Settlement, the County is directed to report on these efforts and include the status of the analysis of the zoning ordinances in its quarterly reports to the Monitor. The analysis shall include the Restrictive Practices listed above, and the required data should be reported by municipality.

C. Compliance Enforcement

The County states that “in the event legal action becomes appropriate or necessary, the County’s actions would include, among other things, preparing legal action to combat exclusionary zoning.” *See* County’s Statement of Position at 6. The County, however, states that nothing in the Settlement “requires the County to target or proactively challenge specific zoning practices through litigation.” County’s Response at 12. Furthermore, the County contends 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. *See* County’s Statement of Position at 6; County’s Response at 9.

The Government, in response, states that the County should, in developing its strategy, identify the “types of situations that would lead to litigation” because an “exclusionary zoning practice standing alone may be an impediment to the development of Affordable AFFH Units.” *See* Government’s Response at 3. This strategy, the Government contends, would “fairly and clearly communicate to municipalities what

actions are needed, and the consequences of not taking such actions.” *Id.* Additionally, the Government states that the County’s current strategy—pursuing legal action “where an individual project is blocked or hindered by a local ordinance”—improperly shifts the burden to developers to challenge local zoning practices. Further, the Government argues such an approach is unlikely to yield results, as developers are not likely to incur the risk and expense of pursuing projects in municipalities with such hostile zoning in place. *See id.*

The Settlement 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 AFFH Units), or actions that hinder those objectives. *See* paragraph 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 acknowledges in its submissions 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 Nov. 14, 2011) (“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 [17](http://www.foxnews.com/on-air/hannity/2011/09/08/feds-</p></div><div data-bbox=)

accusing-nyc-suburb-segregation?page=2) (last accessed Nov. 14, 2011) (“They want us to sue our municipalities to rip up local zoning. We are not going to stand for that.”).

It is the Monitor’s view that litigation is a powerful lever the County may exercise to bring municipal governments into compliance, and that the County must identify the types of zoning practices that would, if not remedied by the municipality, lead the County to pursue legal action. Otherwise, merely restating paragraph 7(j)’s reference to “legal action”—especially in light of the County Executive’s repeated public statements to the contrary—renders the tool much less useful and meaningful.

More importantly, it is fair and appropriate for the municipalities to know the circumstances under which the County may employ litigation. Fair notice is vital to any an enforcement regime, particularly one that would use, as contemplated here, sticks as well as carrots. The County’s vague assertion that litigation will be used as a last resort provides no such notice. The County should clarify the circumstances that may warrant using that tool.

Dated: November 14, 2011
New York, New York

Respectfully submitted,

/s/ James E. Johnson

James E. Johnson
(jejohnsn@debevoise.com)
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Monitor

Exhibit 1

July 20, 2011

James E. Johnson, Esq.
Debevoise & Plimpton, LLP
919 Third Avenue
New York, N. Y. 10022

Re: United States ex rel Anti-Discrimination Center of Metro New York, Inc.
v. Westchester County, New York

Dear Mr. Johnson:

Pursuant to the provisions 14 (b) of the Settlement Agreement and Stipulation in the above matter, we are notifying you of a dispute between HUD and the County.*

By letter dated July 13, 2011, HUD notified the County that the County's revised Analysis of Impediments ("AI"), submitted on July 11, 2011, provided insufficient evidence to support the accuracy of the County's AFFH certification. Since the revised AI did not incorporate the Corrective Actions mandated by HUD, HUD rejected the County's certification and disapproved the County's FY2011 Action Plan as substantially incomplete. (See attached July13, 2011 HUD letter.)

Impacts on the Settlement Agreement of HUD's July 13th Letter

Without approval of the FY2011 Action Plan, Westchester County ceases being a grantee for the federal Community Planning and Development programs covered by the AI, effective May 1, 2011. This unprecedented action by HUD has a direct and material impact on the Housing Settlement. Further, it is noteworthy that this disapproval impacts the third year of a three year cycle.

The County's housing staff is carried on the HUD grant line, and pursuant to the County's Budget Act, they must be terminated at the expiration of the funds provided by the grant. Accordingly, the County employees who are most experienced in building fair and affordable housing are facing imminent layoff. This will have a direct impact on the

*County Executive Robert P. Astorino is scheduled to meet with HUD Secretary Shaun Donovan on July 27, 2011 in Washington, D.C. At that time, the County Executive will be discussing with the Secretary the issues presented in this letter, with the goal of reaching an understanding that will obviate the need for your involvement to resolve the dispute set forth herein.

Office of the County Executive



Michaelian Office Building
White Plains, New York 10601

Telephone: (914) 995-2909

Fax: (914) 995-3372

E-mail: kplunkett@westchester.gov.com

averaged \$68,800 per unit. The reality is that the actual required subsidy to date has been \$101,700—and that has included drawing on the \$51.6 million of Settlement funds, plus subsidy from CDBG and HOME funds, and in some cases, additional County funds. The loss of CDBG and HOME funds makes it even more unlikely that 750 Affordable AFFH units can be built within the financial parameters of the Settlement Agreement.

Dispute Resolution under the Settlement

Paragraph 14(a) of the Settlement Agreement states as follows: “At all stages, the County and the Government pledge good faith to resolve their disputes with regard to the implementation of the Stipulation and Order.” Paragraph 14(b) says that if such effort fails to resolve the dispute, the County and Government shall notify the Monitor of the dispute.

Accordingly, we respectfully request that pursuant to paragraph 14(c) of the Settlement Agreement, you arrange for dispute resolution to resolve the impasse that exists between the County and HUD over the AI. Please advise us on how you wish to proceed in this process.

Finally, as we move to resolve the impasse through talks with Secretary Donovan, and failing that, through your involvement as Federal Monitor, we must also prepare for the shutdown of the CDBG, HOME and related programs that Westchester County has administered as a grantee for more than 30 years.

The FY2011 Action Plan was terminated effective May 1, 2011. Accordingly, we are writing Vincent Horn, Director of Community Planning and Development in the New York Regional Office, to set up a meeting with his staff to start the preparation for an orderly transfer of the federal program back to HUD. Of course, if HUD approves the Action Plan for FY2011, there will be funding available for the local communities’ projects as well as for the salaries and overhead of the County staff who oversee the CDBG and Home programs as well as the Settlement compliance.


Kevin J. Plurkett
Deputy County Executive

Enclosure

Cc: Hon. Robert P. Astorino, County Executive
Hon. Adolfo Carrion, Jr., Regional Administrator, HUD
Helen Kanovsky, Esq., General Counsel, HUD
Benjamin Torrance, Esq., Assistant U.S. Attorney, SDNY
Mary J. Mahon, Esq., Special Assistant to the County Executive
Robert Meehan, Esq., County Attorney
Erich Grosz, Esq., Debevoise & Plimpton, LLP
Noelle Duarte Grohmann, Esq., Debevoise & Plimpton, LLP
Mirza Negron Morales, Deputy Regional Administrator, HUD
Vincent Hom, Director, Community Planning & Development, HUD
Glenda L. Fussa, Esq., Deputy Regional Counsel, HUD
Valerie M. Daniele, Esq., Attorney-Advisor, HUD

July 13, 2011

Honorable Robert P. Astorino
County Executive
Westchester County
148 Marine Avenue
White Plains, New York 10601

Subject: *Notice of Rejection of Fiscal Year 2011 Certification*
Disapproval of FY 2011 Action Plan

Dear Mr. Astorino:

The United States Department of Housing and Urban Development has reviewed Westchester County's (the "County's") revised Analysis of Impediments to Fair Housing Choice ("AI") submitted in response to HUD's May 13, 2011 letter (the "May 13 Letter"). In that letter, HUD set forth the reasons for disapproving the County's FY 2011 Annual Action Plan based on HUD's rejection of the County's certification that it will affirmatively further fair housing ("AFFH"). The County's response provides insufficient evidence to support the accuracy of its AFFH certification.

Pursuant to Paragraph 32 of the Stipulation and Order of Settlement and Dismissal entered in *United States ex rel. Anti Discrimination Center of Metro New York v. Westchester County* (the "Settlement"), the County agreed to complete an AI acceptable to HUD. The May 13 Letter provided the County with detailed comments and corrective actions that needed to be addressed in the AI before it could be deemed acceptable pursuant to Paragraph 32 of the Settlement. Additionally, HUD provided the County with technical assistance over three days – June 2, 3 and 29, 2011 – to aid the County in revising its AI to comply with the May 13 Letter.

The revised AI, including subsequent revisions submitted on July 11, 2011, does not meet the Settlement's requirements for an acceptable AI, as set forth in the May 13 Letter. Specifically, the revised AI did not incorporate the Corrective Actions identified to address deficiencies regarding promotion of source-of-income legislation or plans to overcome exclusionary zoning practices. See May 13 Letter at pp. 3, 5-6. Therefore, HUD is rejecting the County's certification and, in accordance with 24 CFR 91.500, is disapproving the County's FY 2011 Action Plan as substantially incomplete.

Sincerely,

A handwritten signature in black ink, appearing to read "Vincent Hom". The signature is written in a cursive style with a long horizontal stroke at the end.

Vincent Hom
Director
Community Planning and Development

Exhibit 2



United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

By mail and electronic mail

August 18, 2011

James E. Johnson, Esq.
Debevoise & Plimpton, LLP
919 Third Avenue
New York, New York 10022

Re: United States ex rel. Anti-Discrimination Center v. Westchester County, 06 Civ. 2860

Dear Mr. Johnson:

This Office represents the United States (the “government”) in the above-named action. We have received the letter of July 20, 2011, from Deputy Westchester County Executive Kevin Plunkett, requesting that you, as the Monitor, resolve a dispute between the County and the government. We have also received your response to Mr. Plunkett dated July 21, 2011, seeking comments from the government.

Pursuant to paragraph 14 of the August 10, 2009, Stipulation and Order of Settlement and Dismissal (the “Settlement Agreement”), the government requests that the Monitor resolve the following disputes:

1. Whether Westchester County has fully complied with paragraph 33(g) and 33(i) of the Settlement Agreement, requiring the County, as part of its additional obligations to affirmatively further fair housing, to “promote, through the County Executive, legislation currently before the Board of Legislators to ban ‘source-of-income’ discrimination in housing,” and to “incorporate” that undertaking in the County’s analysis of impediments to fair housing choice within its jurisdiction. If not, what actions the County must take to satisfy this obligation. *See* Letter from HUD to Westchester County dated May 13, 2011 (“May 13 Letter”), at 2-3.

2. Whether paragraphs 7(i), 7(j), and 15 of the Settlement Agreement (a) require the County to identify specific zoning practices within the County that hinder the development of Affordable AFFH Units (as that term is used in the Settlement) that the County will challenge; and (b) also require the County to establish a process for notifying the municipalities in which such practices exist of the changes that must be made and of the consequences of their failure to do so. If so, what actions the County must take to satisfy these obligations. *See* May 13 Letter, at 5-6.

We respectfully request an expedited process for the resolution of these two issues. We appreciate your attention to this matter, and look forward to receiving further information regarding the process for going forward.

Very truly yours,

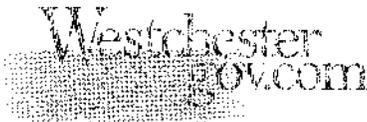
PREET BHARARA
United States Attorney

By: _____

BENJAMIN H. TORRANCE
Assistant United States Attorney
Telephone: 212.637.2703
Fax: 212.637.2702
E-mail: benjamin.torrance@usdoj.gov

cc: Robert Meehan, Esq. (by e-mail)
Glenda Fussá, Esq. (by e-mail)

Exhibit 3



Robert E. Astorino
County Executive

Office of the County Attorney
Robert F. Meehan
County Attorney

October 7, 2011

By electronic mail

James E. Johnson, Esq.
Debevoise & Plimpton, LLP
919 Third Avenue
New York, New York 10022

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

Dear Mr. Johnson:

In accordance with the schedule set forth in your correspondence of September 8, 2011, enclosed herewith is the County's written statement of its position with regard to the issues in dispute.

Thank you for your consideration and attention to this matter.

Very truly yours,

Robert F. Meehan

RFM/cfa
encl.

cc w/encl: Benjamin H. Torrance, Assistant United States Attorney
Hon. Robert P. Astorino, County Executive
Hon. Kenneth Jenkins, Chairman, Board of Legislators

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

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

Plaintiff,

v.

WESTCHESTER COUNTY, NEW YORK,
Defendant.

-----X

Case No. 06 Civ. 2860
(DLC)

**COUNTY'S SUBMISSION-
DISPUTE FOR
RESOLUTION
BY THE MONITOR**

STATEMENT OF POSITION

ROBERT F. MEEHAN
Westchester County Attorney
Attorney for Westchester County
148 Martine Avenue, 6th Floor
White Plains, NY 10601
914-995-2690

OF COUNSEL:

James F. Castro-Blanco, Chief Deputy County Attorney
Carol F. Arcuri, Deputy County Attorney
Linda Trentacoste, Associate County Attorney
Shannon S. Brady, Associate County Attorney
Adam Rodriguez, Senior Assistant County Attorney

PRELIMINARY STATEMENT

The United States Of America (“Government”) through the United States Department of Housing and Urban Development (“HUD”) has unreasonably and unjustifiably withheld the approval of Westchester County’s (“County’s”) revised Analysis of Impediments (“AI”) in violation of the letter and the intent of the Stipulation and Order of Settlement and Dismissal that was “So-Ordered” by the United States District Court on August 10, 2009 (the “Settlement”).

As will be set forth in further detail below, the information provided in the County’s amended AI surpasses the specific requirements detailed in the Settlement as well as HUD’s guidelines for the completion of AIs generally. Moreover, the Government’s insistence that the County identify in hypothetical and theoretical fashion and memorialize in the AI all local zoning ordinances that under some future circumstances may pose an impediment to affirmatively further fair housing (“AFFH”) is: (1) not required by the Settlement, (2) in contradiction to the parties’ understanding of the Settlement as set forth in the Government’s September 21, 2009 letter, (3) contrary to well-established law; (4) premature and completely frivolous.

In full compliance with the terms of the Settlement, the County did promote, through the previous County Executive, the “current” legislation that was pending in 2009 before the County Board of Legislators to ban source of income discrimination. The Government’s position that the Settlement completely usurps the incumbent County Executive’s discretion to veto subsequent proposed source of income legislation is unfathomable, especially where the State and Federal Governments have been unwilling to adopt similar legislation.

Consequently, it is imperative that the instant dispute be resolved against the Government and its unjustified action in rejecting the County's AI, and in favor of the County, so that the County's time, funds and efforts may be fully devoted to accomplishing the objectives of the Settlement to affirmatively further fair housing.¹

THE COUNTY'S AI SUBMISSIONS

The County submitted a draft AI on or about May 8, 2009, for the Government's review and recommendation for improvement. Subsequent to the execution of the Settlement, the Government rejected the draft AI by letter dated October 23, 2009, which included the reasons for the rejection, as well as the corrective actions that should be taken. In response, the County submitted a revised AI on or about July 23, 2010, which was also rejected by the Government by letter dated December 21, 2010. After review of the corrective actions detailed in the Government's rejection, the County submitted another revised AI on or about April 13, 2011. Once again, the Government found the revised AI to be unacceptable pursuant to letter dated April 28, 2011 and then provided its May 13, 2011 letter with the reasons for the disapproval, as well as corrective action plans. The County submitted yet another revised AI on June 13, 2011, and after several face-to-face meetings with the Government on June 29, 2011 and June 30, 2011, the County submitted its latest revised AI on or about July 11, 2011. This revised AI addressed the "corrective actions" set forth in the Government's May 13, 2011 letter to the County.

¹ Additionally, the Government is improperly holding up the approval and/or disbursement of approximately 7 million dollars of the County's third year of the 2008-2011 Community Development and Block Grant ("CDBG") funds pending the acceptance of its approval of the County's AI. This "leverage" being used by the Government is unconscionable and in bad faith. In prior funding years, the County's AIs have never been rejected.

By identifying only two areas which the Government claims require further corrective action in its July 13, 2011 letter, it has conceded that the County addressed all the other issues previously identified in its May 13th letter. In rejecting the County's submission as "substantially incomplete," the Government stated that:

[t]he revised AI, including subsequent revisions submitted on July 11, 2011, does not meet the Settlement's requirements for an acceptable AI, as set forth in the May 13 Letter. Specifically, the revised AI did not incorporate the Corrective Actions identified to address deficiencies regarding promotion of source-of-income legislation or plans to overcome exclusionary zoning practices ... Therefore, HUD is rejecting the County's certification and, in accordance with 24 CFR 91.500, is disapproving the County's FY 2011 Action Plan as substantially incomplete.

See, July 13, 2011 letter at p. 1; *see also*, May 13, 2011 letter at pp. 3, 5-6. Copies of these letters are attached hereto collectively as Exhibit "A".

Thereafter, in framing the parameters of the instant dispute with respect to the AI, the Government submitted these two issues to the Monitor for resolution in its letter dated August 18, 2011. Although the Government asserts that it has not submitted the issue of the acceptability of the County's AI to the Monitor (*see* August 24, 2011 letter), the two issues that the Government has referred are the only issues that have been identified as delaying the approval of the AI. As such, the resolution of these issues will necessarily determine the acceptability of the County's AI.

ARGUMENT

I. NEITHER THE SETTLEMENT NOR HUD'S FAIR HOUSING PLANNING GUIDE REQUIRES THAT THE AI CONTAIN SPECIFIC PLANS TO CHALLENGE LOCAL ZONING ORDINANCES PRIOR TO EXHAUSTING ALL OTHER STRATEGIES

Pursuant to Section 32 of the Settlement, the County is required to complete "an AI within its jurisdiction that complies with the guidance in HUD's Fair Housing Planning Guide". With respect to the AI, the Settlement only requires that the County:

(a) commit to collecting data and undertaking other actions necessary to facilitate the implementation of the Stipulation and Order; and

(b) identify and analyze, *inter alia*:

(i) the impediments to fair housing within its jurisdiction, including impediments based on race or municipal resistance to the development of affordable housing;

(ii) the appropriate actions the County will take to address and overcome the effects of those impediments; and

(iii) the potential need for mobility counseling, and the steps the County will take to provide such counseling.

The County has met all of the above-referenced requirements with respect to the AI that it has submitted. However, the Government has sought to impose broader requirements for “corrective action” on the County’s AI than required by either the Settlement or its own Fair Housing Planning Guide. In its continued rejection of the County’s AI, the Government ignores the fact that the County’s AI meets the requirements set forth in the Settlement and, by doing so, seriously impedes the County’s ability to advance its other obligations to affirmatively further fair housing under the Settlement. Even HUD’s own Fair Housing Planning Guide focuses on the results and not the wording of the AI insofar as it “considers the achievement of measurable results as the basis of successful FHP [fair housing planning].” *Fair Housing Planning Guide*, p. 1-5.²

Of the four (4) enumerated impediments that may affect the development of affordable housing, the one specifically at issue herein is the land use regulations/local land use approval process. AI, pp. 199-208. In response to the Government’s May 13, 2011 letter and consistent with Paragraph 32 of the Settlement, the County’s AI identifies and analyzes the respective authority of the local municipalities as well as local and County planning boards and provides HUD with a synopsis and excerpts of local land use regulations which could potentially have an

² HUD’s *Fair Housing Planning Guide* is available at <http://www.hud.gov/offices/fheo/images/flhpg.pdf>

impact on AFFH.³ The County further indicates that “in the event legal action becomes appropriate or necessary”, the County’s actions would include, among other things, preparing legal action to combat exclusionary zoning practices. AI, p. 201. The AI further sets forth that the form of:

such legal action will depend upon an evaluation of a number of facts and circumstances including the inaction or the obstructive actions of the municipality involved in the context of the particular zoning and other land use regulations and approvals applicable in that particular jurisdiction.

AI, p. 205.

This language acknowledges the impossibility of establishing specific plans to initiate legal action where there is no project for an AFFH development being blocked or hindered by a local ordinance. Indeed, the Government affirmatively acknowledged that “the nature of real estate development, especially in the context of developing affordable housing, depends on a number of factors that cannot always be predicted or controlled.” Settlement, Paragraph 15.

³ See AI, p. 131 (which generally addresses the history of zoning. The U.S. Supreme Court case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) that upheld the validity of comprehensive zoning as a proper exercise of the police power of a municipality); AI, pp.135-139 (which addresses the government framework for planning and the interrelationship and authority of each entity); AI, pp. 140-141 (tables that explain when an action is required to be referred to the County Planning Board and when only notification is needed.); AI, p. 144 (which contains a section entitled Zoning Ordinance and discusses the adoption, general composition and enforcement of such ordinances); AI, p. 147 (which contains a section entitled Current Zoning Regulations in Westchester County and abstracts of each of the 43 municipal zoning codes were created and attached in Appendix 11 to the AI); AI, pp. 148-154 (which contains a section entitled “Land Use Regulations of Importance to Affordable Housing that specifically identifies, defines and discusses a list of specific land use regulations which “promot[e], permit[]or restrict[] the development and preservation of affordable housing.”); AI, pp. 154-155 (which contains a section entitled “Affordable Housing Ordinances” and notes that a compendium of extracts of fair and affordable housing ordinance provisions by municipality is attached in Appendix 12); AI, pp. 159-161 (which contains a section entitled “Regional Impediment Analysis” which focuses on the cities of Mount Vernon, New Rochelle, White Plains and Yonkers and specifically identifies the impediments in each of those cities).

The Government's *Fair Housing Planning Guide* is referenced in the Settlement and was developed for the specific purpose of assisting municipalities to complete an acceptable AI. The guidance provided therein is substantially less onerous than the demands the Government is unreasonably imposing upon the County for its completion of the AI. *See Fair Housing Planning Guide, Chapter 3*, which specifically states that the examples are not "required" actions as the only response, pp. 3-11. According to HUD's *Fair Housing Planning Guide*, the AI:

- Serves as the substantive, logical basis for FHP;
- Provides essential and detailed information to policy makers, administrative staff, housing providers, lenders, and fair housing advocates;
- Assists in building public support for fair housing efforts both within a State or entitlement jurisdiction's boundaries and beyond.

Fair Housing Planning Guide, p. 2-8. Nowhere in the Government's manual does HUD require an AI to include language which mandates the initiation of lawsuits against local municipalities with respect to their local land use regulations. *Fair Housing Planning Guide*, pp. 5-6 through 5-8. Nor does the Government cite to any HUD regulations which require such action by the County.

As such, it is disingenuous for the Government to continue to insist that the AI include "specifics in terms of a legal strategy" (May 13, 2011 letter at p. 5), when any such "specifics" would be speculative and legally unsound. In short, it would be foolhardy and premature for the County to propose initiating litigation against any municipality based upon the language of current zoning ordinances absent a proposed project that would be adversely impacted by those zoning ordinances.

II. THE GOVERNMENT'S REJECTION OF THE COUNTY'S AI IS CONTRARY TO WELL-ESTABLISHED LAW, IS COMPLETELY FRIVOLOUS, AND IS IN BAD FAITH

The Government's demand that the County include language in its AI to mandate the initiation of litigation against local municipalities with respect to their potentially adverse zoning laws, without any consideration to a particular project or location, is simply unreasonable. While Paragraph 32 of the Settlement requires the AI to be "deemed acceptable by HUD", said provision does not authorize HUD to unreasonably withhold its acceptance so as to make the County's compliance with the Settlement impossible. Indeed, such a stance violates the Government's pledge of "good faith". Paragraph 14(a) of the Settlement requires that "[a]t all stages, the County and the Government pledge good faith to resolve their disputes with regard to the implementation of this Stipulation and Order". However, the Government's actions and its intractable positions have considerably hindered the implementation of the ultimate objective of the Settlement, *i.e.*, to affirmatively further fair housing.

The County has asserted in its AI that it will: (1) identify specific zoning issues that may have exclusionary impacts by December 31, 2012; (2) review specific zoning ordinances that promote, permit or restrict the development and preservation of affordable housing that limit multi-family housing development; and (3) communicate to municipalities the County's recommendations on changes that could be made to local regulations so as to enable the local officials to take the necessary corrective action⁴. AI, p. 204. The AI further states that in the event that any municipality is not cooperating or is actively hindering the objectives of Paragraph 7 of the Settlement, the County shall initiate targeted legal action as may be necessary, appropriate and as authorized by the County Board of Legislators. AI, pp. 204-5.

⁴ The County has also been promoting a "model ordinance", which has been approved by the Monitor, to its local municipalities to affirmatively further fair housing. AI, pp. 201-203.

Moreover, the Government's rejection of the County's AI is completely inconsistent with the written understanding of the parties in 2009 and the requirements of the Settlement. In a letter from the U.S. Department of Justice dated September 21, 2009, the Government confirms that the Settlement does not mandate the County to initiate litigation against local municipalities:

[with respect to] certain language in paragraphs 7(j) and 38... [t]he Agreement clearly expresses that:

The decision to initiate litigation as appropriate, described in paragraph 7(j), is one for the County to make. Such litigation is *an* available means to accomplish the purpose of the Agreement. The County's decision not to initiate litigation is, however, one that may be evaluated by the monitor as part of the monitor's ongoing assessment of the County's pursuit of the goals of the Agreement....

Emphasis added. A copy of said letter dated September 21, 2009, is attached hereto as Exhibit "B". The Government reaffirmed the importance of this interpretation by including in its submission to the Honorable Denise Cote, a Declaration of County Legislator John M. Nonna which specifically referenced this letter and noted that said letter⁵ was "integral" to County Board of Legislators' subsequent approval of the Settlement on September 22, 2009. *See* Declaration of John M. Nonna dated July 29, 2011, p. 2, ¶ 4, a copy of which is attached hereto as Exhibit "D".

The Government has admitted that in an effort to achieve ultimate success of affirmatively furthering fair housing, it is important:

to obtain support from non-parties, and to ensure transparency, community input and accountability; thus, to achieve "ultimate success"... collaboration and consensus building [have been chosen] over confrontation and litigation.

⁵ Another letter from the Government dated September 11, 2009, was also integral to the approval of the Settlement by the County Board of Legislators. Said letter specifically states that the "amount of money required to be spent by Westchester County pursuant to Paragraphs 2, 3, 4, 5, 17, and 33 of the Agreement may not be increased except in the event of non-compliance, which would trigger penalties as set forth in Paragraphs 34 through 38" and that "the term 'supplemental funds' in Paragraph 7(i), and the phrase 'opportunities to leverage funds' in Paragraph 15, refer to funds potentially available from other public and private sources, and not Westchester County funds". A copy of said letter dated September 11, 2009 is attached hereto as Exhibit "C".

See Government Memorandum of Law, p. 10 referencing Monitor's Declaration, ¶¶ 20-21, 42, 47; and Nonna Declaration, ¶ 8. Furthermore, the Government acknowledged that there is no evidence that any "municipality has sought to obstruct the development of the Stipulation's housing". See Government Memorandum of Law, p. 9, referencing Nonna's Declaration, ¶ 6.

Therefore, the importance of the cooperation and input of local officials with respect to their land use and zoning ordinances cannot be over-estimated. As noted in the AI (pp. 131, 135), municipal planning and land use controls are delegated to the local legislative body, and home rule authority under Article IX of the New York State Constitution is significant and relevant in this context. It is local officials who know both the express language of the zoning laws within their jurisdiction and the history and purpose behind the enactment of these laws. Such local officials also have the knowledge as to the best manner to effectuate the appropriate changes to said laws to affirmatively further fair housing while protecting the health, safety and welfare of the community as a whole. To require the County to detail a hostile campaign against the municipalities in its AI is completely counterproductive.

Moreover, Federal and New York State courts prohibit the initiation of "speculative" lawsuits and require a particular case and controversy in order to litigate the applicability and validity of local zoning laws. For example, in *Warth v. Seldin*, 495 F.2d 1187 (2d Cir. 1974), *cert. granted*, 419 U.S. 823, 95 S.Ct. 40, 42 L.Ed.2d 47 (1974), *aff'd*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), a lawsuit involving the zoning ordinances of the town of Penfield, a suburb of Rochester, was commenced by builders that had been denied an opportunity to construct multi-family housing in Penfield. The plaintiffs claimed that Penfield's zoning ordinances were unconstitutional because they barred low and middle income persons, especially members of racial minority groups, from residing in Penfield. The United States Supreme Court

affirmed the Second Circuit's conclusion that granting injunctive relief or making a declaration that zoning was unconstitutional upon the facts presented would be "too abstract, conjectural and hypothetical to establish an Article III case or controversy" and that "appellants lack standing." *Warth*, 495 F.2d at 1189, 1193.

Similarly, litigants in New York State court must establish standing by alleging an injury in fact that falls within their zone of interest. *Silver v. Pataki*, 96 N.Y.2d 532, 730 N.Y.S.2d 482 (2001); *see also, Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761 at 774, 570 N.Y.S.2d 778 (1991); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177 (1990). In fact, "[b]efore any relief may be granted to [petitioner], the threshold question of her standing to sue must be determined." *Aragona v. Cin-Mar Developers, Inc.*, 250 A.D.2d 792, 793, 673 N.Y.S.2d 202, 203 (2d Dep't 1998) (citing *Lubitz v. Mehlman*, 187 A.D.2d 97, 591 N.Y.S.2d 839 [1st Dep't 1993]).

As such, in the absence of an AFFH project adversely affected by a local zoning ordinance, any lawsuit would be based on pure speculation and conjecture alone. A baseless lawsuit where the County does not have standing to challenge a local zoning ordinance could not be commenced in good faith and could ultimately result in sanctions. Accordingly, the Government's current mandate that the County specifically reference and threaten premature and frivolous litigation against currently cooperative local municipalities in the AI is unreasonable. Any such actions will unnecessarily deplete the limited funds available to the County for the development of fair housing. *See Settlement*, ¶ 7 (authorizes the use of the 51.6 million dollars set forth in ¶¶ 2 and 5 for such purposes).

III. THE COUNTY HAS COMPLIED WITH THE SETTLEMENT'S PROVISION TO PROMOTE SOURCE OF INCOME LEGISLATION AND INCORPORATE SUCH UNDERTAKING IN THE COUNTY'S AI.

As specifically identified in the AI, pp. 194-196, the County has fully complied with its responsibilities "to promote" source of income legislation. The Government's insistence that the current and all of the future Westchester County elected officials have a continuing obligation to promote the source of income legislation that was pending in August of 2009 is not required by the Settlement. Significantly, the Settlement does not require that source of income legislation be adopted, but merely that the legislation currently pending in 2009 be promoted. *Contrast* Settlement, ¶ 31 (which states that the County "*shall adopt* ... a policy statement") *with* Settlement, ¶ 33(g) (which requires the County "*to promote*, through the County Executive, legislation currently before the Board of Legislators to ban 'source-of-income' discrimination in housing"). The Government's erroneous and overbroad interpretation of what constitutes "the promotion" of the source of income legislation improperly deprives the powers of future Westchester County elected officials, and interferes with their ability to respond to the priorities and concerns of their constituents. Furthermore, source of income legislation is unwarranted until there exists "a solid foundation of objective, empirical data and factual evidence that demonstrates the need for any such legislation". AI, p. 195. As such, the County has fully complied with Paragraph 33(g) of the Settlement.

Both the AI and County Executive Astorino's letter dated July 28, 2010, establish the manner by which the County has complied with its duty to promote the source of income legislation. At the time of the execution of the Settlement in August of 2009, Andrew J. Spano was the Westchester County Executive and source of income legislation was pending before the County Board of Legislators. A copy of County Executive Astorino's letter dated July 28, 2010, is attached hereto as Exhibit "E". A public hearing was held before the County Board of

Legislators on September 8, 2009. The County Board of Legislators thereafter recommitted the proposed legislation to the Committees on Legislation and Government Operations.

Additionally, in October 2009, former County Executive Andrew J. Spano issued a letter to the leadership of the County Board of Legislators urging that it adopt said legislation. In November 2009, former County Executive Spano issued letters to several housing advocacy organizations urging their continued support and advocacy for the proposed legislation, including: (1) Legal Services of the Hudson Valley/Westchester Residents Against Income Discrimination; (2) Westchester Residential Opportunities, Inc.; (3) Mount Vernon United Tenants; (4) Human Development Services of Westchester; and (5) Housing Action Council. In accordance with their legislative prerogative, no official action was ever taken by the full County Board of Legislators regarding said legislation before the expiration of its term on December 31, 2009. Thus, the County has complied with this term of the Settlement.

To the extent that the Government is mandating that future County elected officials continue to promote 2009 proposed source of income legislation improperly deprives and interferes with their ability to respond to the priorities and concerns of their constituents and fulfill their duties as democratically elected officials. *Horne v. Flores*, 129 S.Ct. 2579, 2594 (2009). The Settlement cannot be interpreted to require elected officials to merely “rubber-stamp” any source of income legislation and completely ignore their own best judgments about how to execute their governmental responsibilities.

Notwithstanding, a new County Executive, the Honorable Robert P. Astorino, and a newly constituted County Board of Legislators took office in January of 2010. The same proposed version of the source of income legislation which was pending before the prior County

Board of Legislators in August of 2009, was introduced to the current County Board of Legislators on January 19, 2010, and was referred to the Committee on Legislation.

Numerous meetings were held by the Legislation Committee and the full County Board of Legislators in 2010 to discuss proposed changes to, and the final adoption of, the proposed source of income legislation. *See e.g.*, Legislation Committee Agendas for February 22, 2010, March 15, 2010, May 3, 2010, and May 10, 2010; County Board of Legislators' Agendas for March 22, 2010, April 5, 2010, May 10, 2010 and June 14, 2010. Additional public hearings were held on April 26, 2010 and May 24, 2010 and approximately 39 speakers commented on said legislation. In accordance with their statutory duties and responsibilities as County legislators, extensive revisions were made by the Committee members to the proposed source of income legislation. Said amended version was ultimately adopted by County Board of Legislators on June 14, 2010, subject to the approval of the County Executive.

In accordance with his own statutory duties and responsibilities as County Executive, which includes the obligation to affirmatively further fair housing, County Executive Astorino did not approve the legislation as adopted by the County Board of Legislators. In his veto message dated June 25, 2010, the County Executive indicated that the local law adopted by the County Board of Legislators substantially changed the 2009 version of the source of income legislation and that with those changes, the law would "not, in this form, advance the cause of providing affordable housing in the County and through potential unintended consequences may even hinder that cause". The County Executive noted that the legislation adopted by the County Board of Legislators included exceptions to its applicability based on property classifications (*e.g.*, cooperative apartments, condominiums) and that the inclusion of such exemptions was inconsistent with the creation of a "protected class". A copy of the County Executive's Veto

Message is attached hereto as Exhibit “F”. This action by the County Executive is wholly consistent with his duties and responsibilities as an elected official as well as the County’s obligations to affirmatively further fair housing. The County Board of Legislators received and filed the County Executive’s veto message on July 12, 2010, and in accordance with the County Board of Legislators’ legislative authority, no action was taken by it to override the County Executive’s veto.

It should be noted that during the same timeframe in 2010, the New York State Legislature considered and adopted source of income legislation subject to the Governor’s approval. Said proposal would have amended New York State Executive Law Section 296 to make it unlawful for New York property owners to discriminate against a person seeking housing on the basis of the source of income.⁶ However, then Governor Paterson vetoed said legislation because of the heavy burden it would place on small New York property owners at a time when they are struggling to pay their mortgages and maintain their homes, and because of its impact on the State’s finances. *See* Governor’s Veto Message - No. 6766, attached hereto as Exhibit “G”. Like County Executive Astorino, former Governor Paterson indicated that such legislation would “have the perverse result of creating a disincentive for people to invest in affordable housing in New York”. It is also worth mentioning that as recently as December 2010, the U.S. Congress considered yet failed to pass source of income legislation. *See* 111th Congress, 2d Session, H. R. 6500, a copy of which is attached hereto as Exhibit “H”. The Government has rejected the County’s AI for failing to pass the same type of legislation that it itself has been unable to adopt.

⁶ If both source of income laws had passed, the County’s source of income law would have been preempted to the extent that it was inconsistent with New York State’s law. The issue of preemption was addressed in Governor Paterson’s Veto Message insofar as it would “eliminate the carve out for New York City property holders” which exempts owners of buildings with five or fewer apartments.

It is uncontested and indisputable that the Settlement does not require the County to *adopt* source of income legislation. It would be counter-intuitive and contrary to the intent of the Settlement to adopt legislation that would hinder the County's ability to affirmatively further fair housing. Furthermore, the Settlement did not deprive or in any way limit the authority of the current or future County Executives to exercise their veto power especially where, as here, the legislation could have an adverse affect upon the County's ability to affirmatively further fair housing.

Moreover, source of income discrimination has not been identified by the County as an impediment to fair housing choice as no empirical data relating to Westchester County housing has been identified that would support the proposition. *See* AI, p. 194. By contrast, there is data which would suggest that the adoption of source of income legislation, in and of itself, poses an impediment to affirmatively furthering fair housing. *See* Jenna Bernstein, *Section 8, Source of Income Discrimination, And Federal Preemption: Setting The Record Straight*, 31 *CARDOZO L. REV.* 1407 (2010); *see also* former Governor Paterson's Veto Message No. 6766.

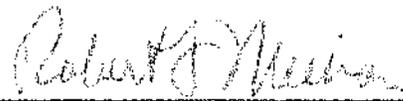
Notably, the AI states that HUD recently awarded Westchester Residential Opportunities ("WRO") a grant of \$251,156.17 to conduct two systemic fair housing testing initiatives throughout Westchester County. The results of WRO's testing initiatives will provide the empirical data necessary to evaluate whether a future need for source-of-income legislation exists. If such a need is found to exist, legislation could be tailored and proposed to meet such need. *See* AI, p.195.

Accordingly, the County has complied with Paragraph 33(g) of the Settlement Agreement.

CONCLUSION

The County's AI fully complies with the requirements of the Settlement with respect to the promotion of the source of income legislation and has adequately identified and analyzed issues and actions with regard to local land use regulations. As such, the Government is unreasonably withholding its approval of the AI. Consequently, the Monitor should resolve the instant disputes in favor of the County and the AI should be deemed approved so that the County's time, funds and efforts may be fully devoted to accomplishing the objectives of the Settlement to affirmatively further fair housing.

Dated: October 7, 2011
White Plains, New York



Robert F. Meehan
Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601
(914) 995-2690

EXHIBIT A



U.S. Department of Housing and Urban Development
New York State Office
Jacob K. Javits Federal Building
26 Federal Plaza
New York, New York 10278-0068
<http://www.hud.gov/local/nyn/>

July 13, 2011

Honorable Robert P. Astorino
County Executive
Westchester County
148 Martine Avenue
White Plains, New York 10601

Subject: *Notice of Rejection of Fiscal Year 2011 Certification
Disapproval of FY 2011 Action Plan*

Dear Mr. Astorino:

The United States Department of Housing and Urban Development has reviewed Westchester County's (the "County's") revised Analysis of Impediments to Fair Housing Choice ("AI") submitted in response to HUD's May 13, 2011 letter (the "May 13 Letter"). In that letter, HUD set forth the reasons for disapproving the County's FY 2011 Annual Action Plan based on HUD's rejection of the County's certification that it will affirmatively further fair housing ("AFFH"). The County's response provides insufficient evidence to support the accuracy of its AFFH certification.

Pursuant to Paragraph 32 of the Stipulation and Order of Settlement and Dismissal entered in *United States ex rel. Anti Discrimination Center of Metro New York v. Westchester County* (the "Settlement"), the County agreed to complete an AI acceptable to HUD. The May 13 Letter provided the County with detailed comments and corrective actions that needed to be addressed in the AI before it could be deemed acceptable pursuant to Paragraph 32 of the Settlement. Additionally, HUD provided the County with technical assistance over three days – June 2, 3 and 29, 2011 – to aid the County in revising its AI to comply with the May 13 Letter.

The revised AI, including subsequent revisions submitted on July 11, 2011, does not meet the Settlement's requirements for an acceptable AI, as set forth in the May 13 Letter. Specifically, the revised AI did not incorporate the Corrective Actions identified to address deficiencies regarding promotion of source-of-income legislation or plans to overcome exclusionary zoning practices. See May 13 Letter at pp. 3, 5-6. Therefore, HUD is rejecting the County's certification and, in accordance with 24 CFR 91.500, is disapproving the County's FY 2011 Action Plan as substantially incomplete.

This notice applies to all Community Planning and Development ("CPD") formula programs covered by the County's FY 2011 Action Plan submission.

If you have any questions on this matter please have the appropriate person contact me at (212) 542-7428.

Sincerely,

A handwritten signature in black ink that reads "Vincent Hom". The signature is written in a cursive style with a long horizontal stroke at the end.

Vincent Hom
Director
Community Planning and Development



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410

May 13, 2011

Mr. Kevin Plunkett
Deputy County Executive
Westchester County
148 Martine Avenue
White Plains, NY 10601

Dear Mr. Plunkett:

By letter dated April 28, 2011, HUD disapproved Westchester County's ("County") FY2011 annual action plan based on HUD's rejection of the County's FY 2011 certification that it will affirmatively further fair housing ("AFFH"). Pursuant to Section 105(c) of the Cranston-Gonzalez National Affordable Housing Act and 24 CFR 91.500, this letter provides the specific reasons for HUD's disapproval of the action plan as well as actions the County can take to meet the criteria for approval. The rejection of the County's AFFH certification is based on HUD's review of the Analysis of Impediments to Fair Housing Choice ("AI"), submitted on April 13, 2011 ("Submission").

In a letter dated December 21, 2010 ("December letter"), HUD identified deficiencies in the County's AI submitted on July 23, 2010, provided specific ways that the County could remedy the noted deficiencies, and offered further technical assistance for a revised AI. The County was given until April 1, 2011 to submit an acceptable AI. The Submission came to HUD on April 13, 2011, twelve days after the April 1, 2011 deadline. The Submission demonstrates limited progress in addressing the concerns outlined in the December letter, but it falls short of certain clear expectations. In this regard, the Submission remains substantially incomplete and unacceptable to HUD. To meet the criteria for HUD approval, the County must submit a revised AI that provides a clear response and specific goals and timetables for the corrective actions set forth in this letter by June 13, 2011. HUD will reconsider the County's AFFH certification(s) based on the submission of a revised AI. HUD will contact the County in the next five days to provide technical assistance to the County.

Reasons for Disapproval and Corrective Actions

The County's Submission does provide some specificity and discussion in response to the December letter, primarily in Chapter 12 of the document in terms of promotion of a model ordinance and its outreach and education efforts. It does not, however, adequately address certain other concerns raised in the December letter that were based on applicable HUD regulations, the Fair Housing Planning Guide ("FHPG") and requirements in the August 10, 2009 Stipulation and Order of Settlement ("Settlement"). The corrective actions set forth in this letter require a substantive response from the County for HUD to deem the AI acceptable and approve its action plan.

A. Promoting Fair Housing Choice for Voucher Holders and Other Lower-Income and Minority Households

1. Mobility Counseling

"To satisfy the requirements under the Fair Housing Planning Guide and paragraph 32(b)(iii) of the Settlement, the County must identify the steps it will take to provide mobility counseling". (December letter at 5.)

As part of the Settlement, the County agreed to "identify and analyze...the potential need for mobility counseling and the steps the County will take to provide such counseling as needed." (Settlement at ¶ 32(b)(iii).) In the Submission, the County acknowledges that "[g]iven the strong barriers that prevent lower-income households from seeking housing in neighborhoods with high median incomes and with low concentrations of minorities, a strong, coordinated, and intentional mobility counseling program is needed." (Submission at 92.) The actions the County commits to in this regard, however, are limited to the development of web applications "that support mobility counseling." It is unclear whether and how the County will carry out the counseling itself.

Corrective Actions

To correct this deficiency, the County must commit to steps that it will take to provide mobility counseling. In describing its mobility counseling program, the County must estimate the number of persons who will need counseling for each year over the next five years and identify specific outreach and marketing strategies to reach those persons. It must identify which agency or agencies will operate the program, how, when and where counseling will be offered, and what components of mobility counseling will be made available. Considering the fact that the County identifies five public housing authorities that do not currently provide mobility counseling and that the County itself has relinquished its management of Housing Choice Vouchers (HCV), a resubmitted AI must describe the coordination efforts the County will make with HCV administrators at the State and local level and list the steps that will be taken with timelines for each step to coordinate counseling materials, resources, and personnel across the different agencies. The AI must identify additional approaches (e.g. one-on-one counseling, in-home counseling and telephone access points for persons with disabilities) that will be made available to low income or disabled individuals and families who may not have access to online mobility counseling or web resources because of technological barriers, language barriers or disability. The County must include a plan for translating vital documents and for providing oral translation services for meeting the needs of persons with limited English proficiency.

2. Promoting Source-of-Income Legislation

"[T]he County must set forth what actions it will take to promote source-of-income legislation." (December Letter at 5).

Under the terms of the Settlement, the County agreed to "promote, through the County Executive, legislation currently before the Board of Legislators to ban 'source-of-income'

discrimination in housing.” In light of the County Executive’s veto of legislation prohibiting discrimination based on source of income, the Submission does not detail any steps the County will take to promote source-of-income legislation. Instead, the Submission states only that the County will review data obtained from the Westchester Residential Opportunities, Inc. (WRO) systemic tests to evaluate the future need for source-of-income legislation. (Submission at 150.) This suggests the County will defer its plans until it evaluates such a study. The Submission is substantially incomplete without a discussion of the planned actions by the County to promote passage of an effective source-of-income legislation that is substantively similar to the bill that was before the Board of Legislators as described in the Settlement. (See Settlement at ¶33(g)).

Corrective Actions

The County’s AI must describe the County’s plans to promote source-of-income legislation. The AI must include, at a minimum, the following information: a description or text of proposed legislation to ban source of income discrimination that is substantially similar to the bill introduced before the Board of Legislators and a description of the steps the County will take to promote passage of the legislation with the Board of Legislators and the public, including but not limited to support for passage of strong source of income protections in public forums including the media and the efforts the County will make to ensure the introduction and passage of the legislation including securing support from individual Legislators.

The proposed and enacted legislation must be substantially similar to the bill described in the Settlement and provide protection against housing discrimination on the basis of lawful sources of income such as Section 8 vouchers, Social Security, Supplemental Security Income (SSI), veteran’s benefits and pensions. The AI must identify the steps planned or taken by the County to garner support for passage of the ordinance with the legislative body and with the public within the next legislative session. The AI must discuss efforts to inform the public, including elected and appointed decision makers, about the importance of such an ordinance and describe workshops and other community outreach planned to promote passage of the ordinance.

The AI must provide assurances that upon the passage of Source of Income legislation reasonable and necessary to implementation of the Settlement it will be supported by the County Executive.

B. Increase the Availability of Affordable Housing for Families with Children

“The County must examine the scarcity of affordable rental housing for families with children and take action to address the impediments it identifies, which includes plans to locate such housing consistent with other provisions of the Settlement.” (December letter at 5.)

The data in the County’s Consolidated Plan demonstrated scarcity in the availability of affordable rental housing for families needing more than two bedrooms (FY 2009-2013 Westchester Urban County Consortium Consolidated Plan, Chapter 2: Housing Market Analysis at 9, 28), which was not adequately addressed in the July AI or the most recent Submission. While the County’s Submission includes some measures it is taking to promote family housing—including “urging” developers to include dens in apartments and implementing occupancy standards on

subsidized housing—it is not clear that the County has provided any further examination of the availability of family rental housing to determine what barriers exist. The County indicates that 33% of the households in the County have one or more children (Submission at 30.) and that there are 8600 households in the County that are overcrowded. (2009-2013 Consolidated Plan, Ch.2 page 10.) Currently most rental units in the County are one and two bedroom units. (*Id* at 9.) The County also acknowledges that black and Hispanic female-headed households are disproportionately more likely to have children compared with white female-headed households. (Submission at 57.)

Corrective Actions:

Based on HUD's analysis, the scarcity of affordable rental housing for families with children represents a barrier to fair housing choice. Consistent with its obligations under the Settlement, the County's description of appropriate actions to overcome this barrier by promoting affordable family housing throughout Westchester County must contain specific details on how the proposed actions will be implemented. In the absence of an explicit analysis of need, the County must commit that at least 50% of the affordable housing units developed by the County or with County support within the next five years, including the units covered by the Settlement Decree, will have three or more bedrooms. The County must also describe where it will locate, or incentivize development of, affordable rental housing for families with children in areas that do not further increase racial and ethnic segregation. (See Section E. Addressing the Location of Affordable Housing.) The County must identify in its AI the locations of above average schools and identify the steps it will take to prioritize the development of units with three or more bedrooms in areas that are within such public school districts. The County must also identify potential sites or incentives for development of larger housing units near public transportation and shopping. The County must locate sites for these units in areas that will not perpetuate racial segregation including those geographic areas prioritized in the Settlement.

C. Identifying Barriers Related to Patterns of Racial and Ethnic Segregation

“Conditions the County mentions that may relate to racial segregation and discrimination include mortgage denial rates based on race and income...; disparities in access to opportunities including differential public school performance and differential access to jobs...; and the availability of regional public transportation and its effect on employment and affordable housing opportunities.... To comply with the Fair Housing Planning Guide and the Settlement, the County must meaningfully assess whether these conditions serve as impediments to fair housing choice and, if so, design a set of actions that will overcome these impediments.” (December letter at 3.)

Although the December letter stated that it must do so, the County still has not sufficiently analyzed data and information regarding demographics and local conditions to identify impediments to fair housing based on race, color, religion, sex, disability, familial status, or national origin. (December letter at 3.) According to Census 2010 data, 21 of the County's municipalities have non-Latino African-American population of less than 3% and 12 of these also have Latino populations of less than 7%. The County describes itself as having a diverse population (Submission at 11), but fails to explain and analyze its long history of segregation and the impact that segregation has had and may have in the future on fair housing choice for racial and ethnic minorities.

Corrective Actions

The County must provide steps it will take to identify mortgage lending, discrimination including working with private groups to conduct testing, undertaking enforcement efforts and working with lenders to educate borrowers about lending discrimination, investigating potential complaints of lending discrimination, and encouraging lenders to provide refinancing and loan modification opportunities in those neighborhoods. This revised submission must include specific details and timelines for proposed actions.

D. Addressing Plans to Overcome Exclusionary Zoning Practices

"The County accordingly must set forth specific steps it will take to overcome exclusionary zoning practices. In addition to the tools set forth in paragraph 7 of the Settlement, these actions must include the County's detailed plans to promote its model ordinance as required under paragraph 25(a) of the settlement." (December letter at 5.)

The Submission mentions municipal ordinances as an impediment to fair housing, and states that the County will overcome exclusionary zoning practices by promoting a Model Ordinance, implementing a discretionary funding policy, establishing a bonus provision for awards of CDBG funds, and preparing for legal action to combat exclusionary zoning practices. These are all important first steps that HUD supports, but the plan lacks specifics in terms of a legal strategy.

Corrective Actions

The legal strategy must include: identification of specific zoning issues that the County will challenge, identification of the specific municipalities where the zoning issues exist, and a process for notifying the jurisdictions of the changes that must be made and of the consequences of their failure to do so. The plan must also include a list of the steps that the County will take if the municipalities do not enact the changes within three months of the County's notification. The AI must include a strategy to involve municipal decision makers in leading changes on zoning and land use restrictions and ways in which substantive dialogue and other, more concrete steps will be used in an orderly fashion to achieve changes.

The specific zoning practices which must be addressed by the County include restrictions that limit multifamily housing development, including outright prohibition of such housing, limitation by the size of a development, limitations directed at Section 8 or other affordable housing, and limitations on the number of 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, limitations on townhouse development, and infrastructure barriers related to zoning such as the absence of sewer systems that are impediments to the development of rental housing or to affordable housing.

The following specific steps that the County must include, at a minimum:

- Provision of notice to a municipality that fails to remove, or which enacts during the next five years, a prohibited zoning ordinance and the timeframe, not to exceed 90 days, for the municipality to act.
- A requirement that the municipality provide evidence of the change within the designated time frame to the County
- Designation of an office to which the evidence will be provided
- A list of actions that the County will take when a municipality does not make the zoning change or where action is inadequate including funding suspension or termination and litigation. Such action must be initiated within 30 days of the date that the County becomes aware of the failure of the municipality to take the action.
- A description of how these requirements, in the future, will be included in contracts or other written agreements between the County and a municipality.

E. Addressing the Location of Affordable Housing

To sufficiently address this deficiency in its AI, the County must set forth the strategies it will employ to ensure that as it develops affordable housing, it is reducing patterns of racial and ethnic segregation. (December letter at 4.)

The County agreed to adopt a policy acknowledging that “the location of affordable housing is central to fulfilling the commitment to AFFH because it determines whether such housing will reduce or perpetuate residential segregation. (Settlement at ¶31(c)). The County must consider the effects that the location of affordable housing will have on segregation patterns in the area and describe detailed strategies that it will use to ensure that it reduces patterns of racial and ethnic segregation as it supports the development of affordable housing.

In its Submission, the County sets forth strategies to increase the placement of “fair and affordable” housing opportunities in census blocks with the lowest concentration of African-American and Hispanic residents under the terms of the Settlement. However, the discussion does not adequately address how it will reduce segregation patterns apart from its obligation under the Settlement, including in its existing housing stock. (Submission Table 12.1 lists all County funded affordable housing developments as of December 1, 2010.) (December letter at 4.) The data indicates that almost 54% of the existing affordable housing units are located in the racially concentrated areas of New Rochelle, Port Chester, Sleepy Hollow, White Plains and Yonkers. These municipalities are ineligible for the placement of the required 750 AFFH units. The Submission briefly mentions that the County “will utilize the same analytical tools to address patterns of segregation” (Submission at 138) in non-eligible municipalities but it is unclear how such strategies address patterns of segregation in those communities. The County must apply a similar analysis to all non-eligible municipalities and provide a list of the geographic areas which the County intends to target to locate affordable housing and provide for each area the County’s justification for selecting them as areas that will reduce the concentration of African American and Hispanic residents.

Corrective Actions

The AI must address the County's obligation to affirmatively further fair housing beyond the four corners of the Settlement. A considerable part of the County's plans to locate affordable housing includes strategies to provide at least 750 units consistent with the terms of the Settlement. However, the County must include a description of its strategies to develop, support the development of, or preserve affordable housing in areas of the County that are not included in the Settlement and for housing units beyond those provided for in the Settlement.

F. Considering Regional Approaches or Collaboration

"[T]he County must consider whether regional approaches or collaboration with regional actors is needed to sufficiently address each impediment." (December letter at 6.)

The FHPG indicates that an AI should be made in a manner that "will provide . . . a comprehensive picture of the status of fair housing at local, *regional*, and State levels." (FHPG at 2-10 (emphasis added).) A regional approach is necessary to understand and overcome impediments, given the regional nature of housing markets and the barriers that operate within them. (FHPG at 2-11.) HUD's October 2009 letter to the County also highlighted this issue and cautioned "[i]t is likely that Westchester will not be able to adequately address issues of discrimination and segregation without a regional approach." (October 2009 Letter at 4.)

While the County's Submission includes a section titled "Regional Impediments Analysis," it merely recounts the impediments identified in the AIs of four jurisdictions—Mount Vernon, New Rochelle, White Plains and Yonkers—and concludes that "outside forces dictate and control" the impediments identified in those other jurisdictions' AIs. (Submission at 127.)

Corrective Actions

The County must develop a strategy for outreach and communication with neighboring jurisdictions to develop regional approaches or collaboration on shared or related impediments it identifies. The strategy should include specific steps for outreach, meetings, and coordination on fair housing.

G. Combating Community Opposition

"...[T]he County must set forth what specific actions it will take to address the local opposition to affordable housing that the AI reveals exists in the County." (December letter at page 6.)

Although the Submission notes the County will address local opposition to affordable housing "with an outreach and education campaign to reach as broad an audience as possible on the benefits of mixed-income housing and racially and ethnically integrated communities" (Submission at 145). It does not adequately "set forth what specific actions it will undertake to address the local opposition to affordable housing that the AI reveals exists in the County." (December letter at 6.)

The County has committed to a program to "reach community leaders with the message that they need to actively support the development of affordable housing and housing choice." (AI at 148.) This is a critical part of any plan to addressing community opposition but the AI lacks details on the specifics of the plan.

Corrective Action

The County must commit to meeting with elected and appointed officials in jurisdictions where affordable housing is likely to be sited to remind them of their obligations to comply with the Fair Housing Act and not act on opposition to affordable housing development based on race, national origin, presence of children in the household and other prohibited bases. The County must advise the officials that the County will take action to counter community opposition including actions by elected or appoint officials that interferes with the actions that will be taken by the County under the AI. In addition, the County must have a policy that describes the County's response and designated responders to cases of hate crimes or other criminal acts that target housing providers or actual or potential residents of affordable housing. HUD will provide resources to assist the County in this area.

H. Adequately Addressing the Engagement of LEP and Disabled Populations

In developing actions for each impediment, the County must address access to its programs for persons with limited English proficiency and with disabilities. The County must list the populations that need special outreach for engagement, including the specific populations in its Market Area where more than 5% of the population speaks or reads English not well or at all. The American Census FactFinder data from 2005-2009 indicates that more than 5% of the County's Spanish speaking population does not speak English very well and the County indicates that the Latino population in the County is increasing. The County must provide a plan, with timelines, to offer translation into Spanish of vital documents including surveys and marketing materials for its public engagement activities, and documents used to publicize or disseminate information described in the AI. It must also commit to providing Spanish language interpretations at all public meetings related to the activities in the AI and publicize those meetings in Spanish.

The County must also commit to provide sign language interpretation at public engagement meetings and for meetings related to the actions in the AI, and offer materials in alternative formats for blind persons on demand. Material on the County's website for the public must comply with Section 508 of the Rehabilitation Act of 1973. In developing actions for each impediment, the County must identify the actions that it will take, and include those actions and a timeframe for those actions to provide written translations for documents and oral translation at public meetings that assure that the activities are accessible to persons with limited English proficiency or disabilities.

Conclusion

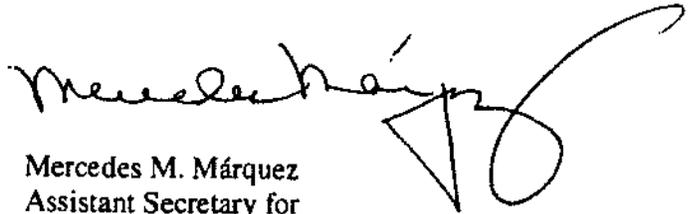
The County must resubmit a revised AI by June 13, 2011 that complies with the directions in this letter. Failure to provide a revised AI by that date may result in further action against the County. In accordance with 24 CFR 91.500, HUD will reconsider the County's AFFH

certification(s) based on the submission of a revised AI that fully addresses the corrective actions required by this letter. As noted, these corrective actions are based on agreements the County has made and clear guidance set forth in the Fair Housing Planning Guide. HUD will contact the County within five days from the date of this letter to schedule technical assistance.

Sincerely,



John D. Trasviña
Assistant Secretary for
Fair Housing and Equal Opportunity



Mercedes M. Márquez
Assistant Secretary for
Community Planning and Development

cc: Jim Johnson, Debevoise & Plimpton LLP
Benjamin Torrance, Assistant U.S. Attorney for the Southern District of New York

EXHIBIT B

U.S. Department of Justice



United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

September 21, 2009

Stuart Gerson, Esq.
Epstein, Becker & Green
1227 25th Street, N.W.
Washington, D.C. 20037

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

Dear Mr. Gerson:

During our meeting today with three members of the Board of Legislators, two remaining questions were posed concerning terms of the settlement agreement of the above-referenced case, and in particular certain language in paragraphs 7(j) and 38. As we indicated in our letter of September 11, 2009, the Stipulation and Order of Settlement and Dismissal (the "Agreement") is a fully-integrated document that speaks for itself. The Agreement clearly expresses that:

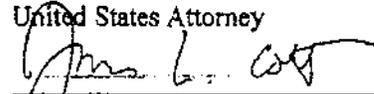
1. The decision to initiate litigation as appropriate, described in paragraph 7(j), is one for the County to make. Such litigation is an available means to accomplish the purpose of the Agreement. The County's decision not to initiate litigation is, however, one that may be evaluated by the monitor as part of the monitor's ongoing assessment of the County's pursuit of the goals of the Agreement.
2. The penalties described in paragraph 38 may be waived by the monitor in his discretion, and it is the intent of the parties that the monitor's exercise of discretion will be informed by the Agreement as a whole, which includes, among other things, the County's efforts to comply with the Agreement, market conditions, and circumstances outside of the County's influence or control.

We hope this letter addresses the remaining concerns that have been raised. As we made clear to the legislators with whom we met this morning, the federal government will not renegotiate the terms of the Agreement. We provide this letter merely as a clarification and as consistent with the discussion during our meeting today.

Very truly yours,

PREET BHARARA
United States Attorney

By:



JAMES L. COTT
SEAN C. CENAWOOD
BENJAMIN H. TORRANCE
Assistant United States Attorneys
Telephone: 212.637.2695/2705/2703

EXHIBIT C

U.S. Department of Justice



United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

September 11, 2009

Stuart Gerson, Esq.
Epstein, Becker & Green
1227 25th Street, N.W.
Washington, D.C. 20037

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

Dear Mr. Gerson:

We understand that some questions have been posed by County Legislators concerning the terms of the settlement agreement of the above-referenced case, and in particular the terms that relate to the cost of the settlement to the County. The Stipulation and Order of Settlement and Dismissal (the "Agreement") is a fully-integrated document that speaks for itself. The settlement document clearly expresses the intent of the parties that:

1. The amount of money required to be spent by Westchester County pursuant to Paragraphs 2, 3, 4, 5, 17, and 33 of the Agreement may not be increased except in the event of non-compliance, which would trigger penalties as set forth in Paragraphs 34 through 38; and

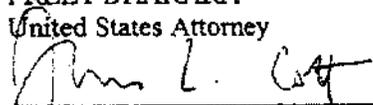
2. Given what is stated in 1. above, the term "supplemental funds" in Paragraph 7(i), and the phrase "opportunities to leverage funds" in Paragraph 15, refer to funds potentially available from other public and private sources, and not Westchester County funds.

We hope this letter addresses the concerns that have been raised.

Very truly yours,

PREET BHARARA
United States Attorney

By:



JAMES L. COTT
SEAN C. CENAWOOD
BENJAMIN H. TORRANCE

Assistant United States Attorneys
Telephone: 212.637.2695/2705/2703

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

v.

WESTCHESTER COUNTY, NEW YORK,

Defendant.
----- X

No. 06 Civ. 2860 (DLC)

**DECLARATION OF JOHN M. NONNA
IN OPPOSITION TO MOTION TO INTERVENE**

JOHN M. NONNA, 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 Westchester County legislator and have been a member of the Westchester Board of Legislators since January 2008. The Board of Legislators is the legislative branch of county government and is separate and independent from the executive branch. I respectfully submit this declaration in opposition to the Anti-Discrimination Center's motion to intervene.
2. I was a county legislator at the time the Stipulation and Order of Settlement and Dismissal ("Settlement Agreement") resolving the underlying litigation in this matter was signed by the then-County Executive and approved by the Board of Legislators. Under the Westchester County Charter, the Board of Legislators was

required to approve the Settlement Agreement. The Settlement Agreement stated that it was subject to such approval.

3. The Board of Legislators was provided with the Settlement Agreement in August 2009. The Board held five meetings between September 1 and September 18, 2009 to discuss the agreement with counsel, the Monitor and representatives of the then County Executive's administration. I attended these meetings.

4. The Board of Legislators approved the Settlement Agreement on September 22, 2009. The Board included, as part of, and integral to, its approval of the Settlement Agreement two letters from the United States Attorney's Office for the Southern District of New York dated September 11, 2011 and September 21, 2009 confirming the intent and language of certain provisions of the Settlement Agreement.

5. Over the period of time following approval of the Settlement Agreement, I have attended a series of meetings with the Monitor, James Johnson, representatives of the County Planning Department and the current County Executive's administration, representatives of the regional office of the U.S. Department of Housing and Urban Development ("HUD"), representatives of the Westchester Municipal Officials Association and consultants to the Monitor. At these meetings the parties have been working together to resolve issues relating to the Settlement Agreement, including the Analysis of Impediments and the Implementation Plan. I have also attended meetings of the Housing and Planning Committee of the Board of Legislators at which representatives of the County Executive and the Planning Department have reviewed the progress of compliance with the Settlement Agreement.

6. Westchester County is complying with the Settlement Agreement's requirements that it ensure the development of 750 units of housing that affirmatively furthers the fair housing goals ("Affordable AFFH Units") of the Settlement Agreement. Westchester has exceeded the 2011 benchmark for obtaining financing for units. Westchester is actively pursuing such housing projects in a number of municipalities. Westchester municipalities have expressed an interest in such projects and have moved forward to review, and in several cases, approve these projects. To my knowledge, no municipality has sought to obstruct the development of Affordable AFFH Units.

7. I understand that there are disagreements between Westchester County and HUD concerning certain requests HUD has made. There is a mechanism in the Settlement Agreement for resolving these disagreements without the need for court intervention at this time or for intervenors to insert themselves into the case.

8. In sum, I respectfully submit that the record reflects that HUD, the County and municipal officials have been working together to implement the Settlement Agreement and resolve issues that have arisen in the interpretation, application and implementation of the Settlement Agreement in these times of economic uncertainty and distress.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 29, 2011

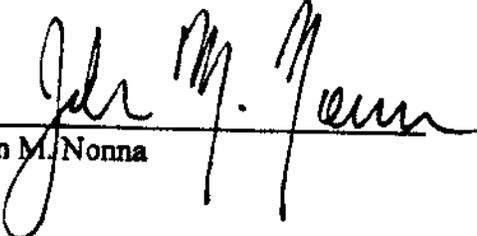

John M. Nonna

EXHIBIT E



Robert P. Astorino
County Executive

July 28, 2010

James E. Johnson, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
(212) 909-6646
jejohnson@debevoise.com

Re: *United States ex rel Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, New York*, No 06-Civ.-2860 and Source of Income Legislation

Dear Mr. Johnson,

Thank you for your letter of June 28, 2010. Your letter requests additional information about my decision to veto the Source of Income legislation passed by the Westchester County Board of Legislators on June 14, 2010 ("Local Law 3-2010").

At the outset, let me state clearly that, as long as the August 2009 Stipulation and Order of Settlement and Dismissal ("Stipulation") remains in place, I am committed to making sure that Westchester County (the "County") meets its obligations under that decree, including the development of 750 new affordable housing units that is at the heart of the agreement reached last year by the prior administration and prior Board of Legislators. As you noted in your July 7, 2010 Report to the court (at pages 22-24), my administration has taken the following steps, among others, to implement this agreement:

- Reported four Affordable AFH projects, representing 30 units, in the public review process;
- Worked with municipal officials and conducted studies to identify potential sites for the development of Affordable AFH Units;
- Conducted extensive outreach activities, including meetings with municipal officials, developers, property owners, community leaders and not-for-profit organizations that are involved in housing issues;
- Promoted a model housing ordinance by making sure that every affected municipality received a copy of the March 2010 updated model ordinance;
- Taken steps to encourage municipalities to eliminate barriers to affordable housing projects, including encouraging the City of Rye to remove age restrictions on one of its housing developments.

Office of the County Executive

Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601

Telephone: (914)995-2900 E-mail: ce@westchestergov.com



In addition, and as a result of the County's extensive outreach activities, the County Planning Board has received and commented on 13 referrals and site plan applications.

My decision to exercise the veto power with regard to Local Law 3-2010 reflects the fact that Westchester County, like other state and local governments, "depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004). "As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities," *id.*, and my exercise of the veto power here reflects my best judgment about how to discharge my responsibilities as County Executive. *See* Westchester County Charter §§ 107.71, 209.151.

To the extent that you take the view that the agreement requires me to promote *any* Source of Income law that is now or may later be brought before the Board of Legislators, I respectfully submit that such an overbroad interpretation improperly deprives me of my powers as the elected head of Westchester County government. Such an interpretation would dramatically curtail my "ability to respond to the priorities and concerns of [my] constituents" and my "ability to fulfill [my] duties as [a] democratically-elected official[]." *Horne v. Flores*, 129 S.Ct. 2579, 2594 (2009). While it is certainly true that a local official is bound by the agreements entered into by his predecessors, with regard to "federal consent decrees" like this one, the Supreme Court has warned that "[i]f [the decree is] not limited to reasonable and necessary implementations of federal law," it runs the risk of "improperly depriv[ing] future officials of their designated legislative and executive powers." *Id.* at 2594. If the agreement here were interpreted to require me to ignore my own best judgment about how to carry out my "designated . . . executive powers" and prevent me from ever vetoing a Source of Income law, it would go well beyond a "reasonable and necessary implementation of federal law" and would in fact "improperly deprive" me of my designated executive powers. *See id.*; *cf. Ohio Life Insurance and Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 431 (1853) ("[N]o one Legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body.").

Also, under the consent decree, the County Executive agreed to "promote . . . legislation *currently* before the Board of Legislators to ban 'Source of Income' discrimination in housing." Consent Dec. at ¶ 33(g) (emphasis added). To that end, my predecessor in office Andrew Spano was involved in the effort to pass a Source of Income law, sending letters to the Westchester County Board of Legislators and fair housing advocates (Report at page 24). The activities undertaken by Mr. Spano to ensure the passage of a fair and effective Source of Income law have already complied with the stipulation requirement to "promote" the Source of Income legislation that was before the Board of Legislators in August 2009.

In a continuing effort to work cooperatively, and without conceding that responses to your eight questions are required or necessarily contemplated under the terms of the Stipulation, and expressly reserving the right to assert any Executive or other privileges which are appropriate, my responses are as follows:

1. Identify all steps taken since January 1, 2010, to promote any Source of Income Legislation, including, but not limited to, Local Law 3-2010.

None by the undersigned for several reasons, including among other things, that I considered that requirement of the Stipulation to have been fulfilled by the actions of the former County Executive Andrew Spano and that a prior County Executive

and prior County Board of Legislators cannot bind the thought process and discretion of a newly elected County Executive in this circumstance.

2. Identify all meetings, telephone calls or any other communication you have had with any and all members of the Board of Legislators concerning Local Law 3-2010. Please provide date, time and participants in all such communications.

There were no meetings that I recall. I had a few casual conversations individually with Legislators Thomas Abinanti, John Nonna and Martin Rogowsky at various events that we mutually attended.

3. Identify all alternatives to Local Law 3-2010 developed by, or at the direction of, the County Executive.

None by County Executive Robert P. Astorino.

4. Provide, in detail, the evidentiary basis for the assertion that the "Local Law will not, in this form, advance the cause of providing affordable housing in the County and through potential unintended consequences may even hinder that cause."

The quoted language is my view and opinion based upon information that I received such as commentaries in "Impact-Building and Realty News" (copies of which are enclosed herewith) and upon the views expressed at public hearings and public meetings, by among others, landlords and Westchester County legislators. These views, among other things, expressed concern about additional costs and burdens upon property owners and the resulting disincentive for new construction of housing units.

5. Provide the legal and/or factual basis for the assertion that "the Local Law also attempts to circumvent current federal regulations that specify that the Section 8 Housing Assistance Program...is a voluntary plan."

The Section 8 Housing Assistance Program is a voluntary program, but in my view, implementation of this current Source of Income Law, in effect, makes the Section 8 program mandatory for landlords who fall within the parameters of this law.

6. Provide the legal and/or factual basis for the assertion that the "Local Law raises a question of equal protection." This assertion is, as written, untethered to either the United States or New York Constitution. Accordingly, you are requested to identify which of the two constitutions serves as the basis for your equal protection assertion and provide any cases that support this assertion.

While the use of the phrase "equal protection" may have been very general in the veto message, my concern was that tenants and landlords targeted by the legislation would be treated differently within the identified class and be subject to more exceptions, perhaps unevenly, as compared to other protected classes under the County Fair Housing Law.

7. Provide the legal and/or factual basis for the assertion that the requirement of Local Law 3-2010 "could lead to confusion and potential unnecessary litigation" in light of the requirements of the Emergency Tenants Protection Act of New York State.

It is my understanding that the Source of Income Law would raise questions about a landlord's obligation to continue the terms and conditions of a lease for a Section 8 participant at the conclusion of the sunset period.

8. Provide the legal and/or factual basis for the assertion the "Local Law places unfair burden on limited income property, including in some instances, one and two family homes." Please provide any and all studies or surveys undertaken by the County that relate to that assertion.

I do not have any studies or surveys. However, one and two family homes are not *per se* exempted from the law. It depends upon the circumstances of the owner. For example, if an owner had a single family home to rent and used a broker to rent it, that owner would be subject to the Source of Income Law regardless of how many homes he owned.

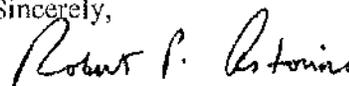
Additionally, in my view, based upon this Local Law, a limited income property would be compelled to accept a Section 8 participant and maintain and/or repair the property at the expense of the landlord and in compliance with the Section 8 program, whereas, in the absence of this law, a landlord had the discretion to rent a property and allow a tenant to make repairs him/herself or place the burden of repair on the tenant to make the repairs.

In addition to my narrative responses above, I have also attached documents responsive to your request for copies of documents concerning the veto of the Source of Income Legislation. Documents are being produced through the date of your letter, June 28, 2010.

I have been advised by my counsel, Robert Meehan, Esq. Westchester County Attorney, that some of the documents gathered, while responsive, should not be produced as they are covered by the attorney-client privilege. As to those documents, a privileged log has been prepared by counsel and is attached as Exhibit A.

I trust that the above responds to your June 28th letter.

Sincerely,



Robert P. Astorino

cc: without enclosures

Honorable Denise L. Cote, U.S. District Court for the Southern District of New York
Nestor M. Davidson, Esq., U.S. Department of Housing and Urban Development
Andrew W. Schilling, Esq., U.S. Attorney's Office, Southern District of New York
Hon. Kenneth W. Jenkins, Chair, Westchester County Board of Legislators

*****3-DIGIT 10601
ANDREW SPANO
WESTCHESTER COUNTY EXECUTIVE
149 MARTINE AVE
WHITE PLAINS NY 10601-3311

BUILDING & REALTY NEWS

A "Shocking and Bizarre" Outcome:

County Legislature Fixes Phantom Problem, Passes "Source of Income" Legislation 10-4

WHITE PLAINS - Westchester building owners lost a two-year battle fighting the county on its proposal to include a person's "source of income" as a protected category under the jurisdiction of the county's Human Rights law.

County Legislators passed the measure at a special morning meeting of the board at 9 a.m. on Jun. 14. There were no owners present and no opportunity to speak at a regularly scheduled open comment session, as there was none provided for.

"The County Board has passed a law that will create the very problems it sought to ameliorate," said Albert Annunziata, executive director of the Building & Realty Institute of Westchester and the Mid-Hudson Region (BRI).

"It will be open season on landlords as tenants will have the right to bring any owner up on charges of alleged discrimination based on income before the County's Human Rights Commission. This will guarantee litigious grist for a county bureaucracy

whose purpose is now duplicated by the state's own Human Rights Commission and various federal agencies," he added.

Legislators were ultimately heedless to the many substantive arguments made by the building and realty industry showing that the measure was unnecessary and without any real merit. In particular, the measure's effect on what had been the voluntary nature of the federal Section 8 rental assistance program was thoroughly presented to the legislature, to no avail. The new law, effective 180 days after passage (barring a county executive veto), heavily tips the scales on behalf of applicants for rental housing who have a verifiable, supplemental source of income, like the federally-funded HUD Section 8 program.

A Troublesome Scenario

Housing industry experts spoke

Continued on page 4

Phantom Problem

Continued from page 1

about the lack of uniformity in the administration of the Section 8 program throughout the county. Once a landlord accepts a Section 8 applicant, both the building and the apartment must undergo a HUD-mandated inspection which is often at odds with the building's regular municipal inspections.

In addition, the HUD inspections are not uniform but vary widely in their findings of even the smallest infractions, depending on the municipality administering the Section 8 program.

"It all takes time, costly time to the building owner," noted Ken Nilsen, chairman of the BRI and past chairman of the Apartment Owners Advisory Council of Westchester and the Mid-Hudson Region (AOAC).

"The owner could be slapped with arbitrary violations that a HUD inspector deems important but are not infractions under the local building code. By the time the owner 'fixes' these problems in order to participate in the Section 8 program, weeks and months can go by where there's no rent coming in on that apartment," he added.

Nilsen added: "What is the incentive to an owner to take on a Section 8 tenant, with all the cost and all the delay? There was a time when owners could chose to rent out a vacant apartment right away or chose to grind it out with a Section 8 applicant. It all depended on mutual need and circumstance. Now there is no more choice. The County Legislature has, with this law, put a gun to the landlord's head and made mandatory what even the federal government says is a voluntary program!"

HUD also makes mistakes, noted another housing industry expert. Last year, it was discovered that a sex offender had

made it past HUD screeners as a tenant in a HUD housing development in Rockland County. The expert added that, if a federal agency like HUD, with all its resources, has problems with keeping track of who applies for its housing and housing programs, how is a landlord supposed to exercise a rational, informed and dispassionate business decision when it comes to these applicants?

More Negatives

The measure is also anti-working family, Nilsen said. He stressed that the measure will not increase the supply of affordable rental housing. It will not increase the supply of Section 8 vouchers. What it will do, he noted, is give legal preference to individuals and families with these vouchers over those working individuals and families who make ever-so-slightly more money and therefore do not qualify for supplemental income programs like Section 8.

"That is the ultimate tragedy and cruelest flaw of this new law," Nilsen said.

Some individual owners have already brought up the possibility of suing the county, said Annunziata. While still too early to say, Annunziata noted that lawsuits now seem to be the way to do business in government, rather than trying to "work things out" and find a better, less costly and less acrimonious way.

"Why shouldn't owners sue?" Annunziata said. "The feds sued the county big-time on a major housing discrimination issue. The county legislators are threatening to sue the county executive over the budget and other operational matters. Why shouldn't the owners sue the county legislators?"

Continued on page 11

Phantom Problem

Continued from page 4

Annunziata added: "The majority of legislators seem to be quite content to take these costly, litigious chances and risk taxpayers' money rather than listen to the wiser, more compassionate and prudent members in their ranks and concentrate on the real problems facing Westchester, like transportation and day care needs that have to do with the economy, like the construction of affordable housing and getting a firm handle on reducing the county's deficit."

Nine Democrats led by Board Chairman Ken Jenkins (Yonkers) and one key Republican, James Malsano of New Rochelle, voted for the measure.

Legislators Michael Kaplowitz (D-Somers), Martin Rogowsky (D-Harrison) and Republicans Gordon Bur-

rows (Yonkers) and John Testa (Peekskill) voted against it. Tom Abinanti (D-Greenburgh), a steadfast opponent to the measure on a number of legal, economic, equitable and practical grounds, was away, as was Republican Bernice Sprackman (Yonkers).

The law goes into effect, barring any executive veto or court-ordered stay, 180-days after the date of passage, which would put it in mid-December of this year. The only other change was in the setting of a maximum fine per "incident" if an owner was found guilty by the county Human Rights Commission. It had been \$100,000 but was reduced to \$50,000 in the final, passed version. — An IMPACT Staff Report

Co-ops, Condos Now Exempt: **Revised "Source of Income" Addition to Human Rights Law Passes Out of County Legislative Committee**

WHITE PLAINS—After two years of debate and deliberation, the Westchester County Board of Legislators' Committee on Legislation passed a revised Source of Income addendum to its Human Rights law, setting the stage for a public hearing and a floor vote of the entire board, most likely on Apr. 26 at 7 p.m.

Over the same period of time, officials of The Building & Realty Institute (BRI) have been arguing steadfastly against the measure.

"Unlike all the usual and properly-protected classes from discrimination, all having to do with who and what a person is, this proposal aims to include a financial factor, Income, which introduces a whole new realm of economics into the equation," said Albert Annunziata, executive director of the BRI.

"What the county proposes to do with this proposal is to make legitimate 'economic decisions' on the part of apartment building owners and managers

Continued on page 3

Co-ops, Condos Now Exempt: Revised "Source of Income" Addition to Human Rights Law Passes Out of County Legislative Committee

Continued from page 1

throughout Westchester subject to the Human Rights Commission's scrutiny and investigation, with potential fines of up to \$100,000."

A Tipping of the Scales

Essentially, the proposal would heavily tip the scales on behalf of applicants for rental housing who have an acceptable supplemental source of income, like federally-funded HUD Section 8 vouchers. Many Section 8 vouchers expire or go unused, according to tenant advocate groups, because some landlords refuse to participate in the Section 8 program, which the federal government has always maintained is a voluntary program.

What these groups would like to see is a broader distribution of Section 8 tenants throughout the county, outside the major cities and major urban areas.

As one landlord said: "It is blatant unfairness—HUD says the Section 8 voucher program is optional, but the County of Westchester is handcuffing us and saying to building owners that we have no choice. The freedom to opt-in or opt-out is exclusively that of the tenant."

ed under the state's Emergency Tenant Protection Act, otherwise known as ETPA. The overwhelming majority of these units are in the cities and urban areas which are not the areas identified by the federal government as the targets for much-needed affordable housing."

Annunziata added: "If the legislators wanted to show real political courage in the face of this federal, court-ordered mandate for 750 units of affordable housing, they would not have excluded multi-family buildings with 2-5 units from Source of Income. Can you imagine the political firestorm if legislators representing some of the more affluent north- and mid-county municipalities voted to force this issue in their communities?"

County Legislative Committee Chairman John Nonna (D-Mount Pleasant) stressed that his committee modified the legislation to "...narrow its scope so that it is more carefully tailored to the problem of individuals with Section 8 vouchers and those receiving rental assistance from the federal, state or local government sources being denied apartments."

Where Is The Trouble?

Westchester housing staff have reiterated before legislative committee meetings that there is no problem filling the thousands of Section 8 vouchers they get. In fact, they admit they could use more from HUD, but due to federal budget constraints, are not likely to get more.

In addition, the director of the County's Human Rights Commission noted last year at county legislative committee meetings that her office was aware of only a handful of potential complaints of potential cases of discrimination based on source of income.

So, Westchester's realty industry is asking, "Where is the problem?"

Realty industry leaders have noted at numerous county legislative committee meetings and public hearings that this measure is a contrived solution to a problem that doesn't exist.

As another argument in favor, county legislative leaders have maintained that 'Source of Income' protection is necessary to further the goals of last year's housing discrimination lawsuit settlement with the federal government.

"If that is the case, then this proposal will not address that problem," said Annunziata. "It will cover buildings of 6 units or more, already well-protect-

An Exemption for Co-ops and Condos

The bill, as amended, exempts cooperatives and condominiums and no longer covers annuities, pensions, child/spousal support or court-ordered payments under what it now considers to be acceptable income sources. If approved, the Source of Income law would constitute an amendment to the County Human Rights Law and would prohibit

landlords of ETPA buildings in Westchester from not renting to prospective tenants with HUD Section 8 vouchers based on that supplemental income source.

"The BRI will continue to oppose this," said Annunziata. "We staunchly and unwaveringly support equal opportunity for all. There is a critical difference, however, between equal opportunity for everybody and an engineered result for some. With this Source of Income legislation, the Board of Legislators is forcing participation in a voluntary federal program. Through punitive public policy and the real threat of excessive fines, legislators are attempting to engineer a pre-determined social and economic result that by-passes business decisions, the merits of the individual tenant case and property owners' rights."

— An IMPACT Staff Report

EXHIBIT A**PRIVILEGE LOG**

Document 1	Email from Susan Geiry to Kevin J. Plunkett and George Oros with a cc to Robert Meehan dated January 15, 2010 at 3:33 p.m. Re: Housing: Source of Income Legislation. This email is being withheld on the basis of an attorney client communication.
Document 2	Email from George Oros to Kevin J. Plunkett with a cc to Robert Meehan dated January 17, 2010 at 1:45 p.m. Re: Housing: Source of Income Legislation. This email is being withheld on the basis of an attorney client communication.
Document 3	Email from Kevin J. Plunkett to George Oros with a cc to Robert Meehan dated January 17, 2010 at 1:49 p.m. Re: Housing: Source of Income Legislation. This email is being withheld on the basis of an attorney client communication.
Document 4	Email from Betsy DeSoye to Katherine Delgado dated March 12, 2010 at 11:46 am with a cc to George Oros; Kevin J. Plunkett; Mary Mahon with a cc: John Nonna; Melanie Montalto; Robert Meehan; Mary L. Nicolas Brewster; Ken Jenkins; Stacey Dolgin Kmetz Re: Source of Income Discussion. This email is being withheld on the basis of an attorney client communication.
Document 5	Email from Betsy DeSoye to Katherine Delgado dated March 15, 2010 at 10:31 am with a cc to John Nonna; Melanie Montalto; Robert Meehan; Mary L. Nicolas Brewster; Ken Jenkins; Stacey Dolgin Kmetz; Mary Mahon; Kevin Plunkett; George Oros Re: Source of Income Discussion This email is being withheld on the basis of an attorney client communication.
Document 6	Email from Kevin Plunkett to Robert Meehan dated June 24, 2010 at 8:35 am. Re: FW Source of Income Legislation. This email is being withheld on the basis of an attorney client communication.

Document 7	Email from Edwin McCormack to Robert Meehan dated June 24, 2010 at 11:13 am. Re: FW: Ned-Sensitive But Pls Take a Look Phil, Attachments: Re: (No Subject). This email is being withheld on the basis of an attorney client communication.
Document 8*	Email with 2 page attachment dated June 24, 2010 5:21 p.m. from Edwin McCormack to Robert P. Astorino; Kevin J. Plunkett; George Oros; Robert Meehan with a cc to Lynne Bedell Smith Re: Source of Income. This email is being withheld on the basis of an attorney client communication.
Document 9*	Email with 2 page attachment from Katherine Delgado dated June 25, 2010 at 12:11 pm. to Robert Meehan with a cc to Robert Astorino; Kevin J. Plunkett; George Oros Re: Source of Income Local Law-Veto This email is being withheld on the basis of an attorney client communication.
Document 10*	Email with 2 page attachment dated June 25, 2010 12:52 p.m. from Edwin McCormack to Robert P. Astorino; Kevin J. Plunkett; George Oros; Robert Meehan and Mary Mahon with a cc to Lynne Bedell Smith Re: FW Source of Income. This email is being withheld on the basis of an attorney client communication.
Document 11	Email with 2 page attachment dated June 25, 2010 at 1:08 p.m. from Robert Meehan to Stacey Dolgin Kmetz; Mary L. Nicolas-Brewster Re: FW: Re: Source of Income Local Law-Veto, Importance: High This email is being withheld on the basis of an attorney client communication.
Document 12*	Email with 2 page attachment dated June 25, 2010 2:06 p.m. from Robert Meehan to Edwin McCormack; Robert P. Astorino; Kevin J. Plunkett; George Oros; Mary Mahon with a cc to Lynne Bedell Smith Re: Source of Income. This email is being withheld on the basis of an attorney client communication.
Document 13	Email with 2 page attachment dated June 25, 2010 at 2:28 p.m. from George Oros to Robert Astorino; Kevin J. Plunkett; Edwin McCormack; Robert Meehan Re: Latest Version of SOI Veto, Attachments: Veto Message Draft Source of Income.doc This email is being withheld on the basis of an attorney client communication.

Document 14	Email with 2 page attachment from Katherine Delgado dated June 25, 2010 at 2:49 p.m. to Robert Meehan with a cc to Robert P. Astorino; Kevin J. Plunkett; George Oros Re: Please See the 2 nd Revised Draft of the Veto Letter for Source of Income This email is being withheld on the basis of an attorney client communication.
Document 15*	Email from Katherine Delgado dated June 25, 2010 at 3:35 p.m. to Robert Meehan with a cc to Robert Astorino; Kevin J. Plunkett; George Oros Re: Veto Letter-Final Versions This email is being withheld on the basis of an attorney client communication
Document 16	Email with 2 page attachment from Lynne Bedell Smith dated June 25, 2010 at 3:49 pm to Robert Meehan Re: Final Source of Income PR?, Attachments: PR Veto Source of Income June 2010.doc This email is being withheld on the basis of an attorney client communication.
Document 17	Email from Robert Meehan dated June 25, 2010 3:58 p.m. to Robert P. Astorino; Kevin J. Plunkett; George Oros Re: Re: Veto Letter-Final Versions This email is being withheld on the basis of an attorney client communication.
Document 18	Email with 2 page attachment dated June 25, 2010 at 4:18 p.m. from Robert Meehan to Lynne Bedell Smith Re: PR Veto Source of Income June 2010.doc, Attachments: PR Veto Source of Income June 2010.doc This email is being withheld on the basis of an attorney client communication
Document 19	Undated Memo from Lori Alesio to Robert Meehan Re: ADC Stipulation. This memo is being withheld as it is attorney work product.

*Documents with an asterisk identify an email that is part of a string of emails that was sent to numerous disributees and rather than duplicate the email several times, only the original email is identified.

Note:

(1). There are numerous documents/correspondence involving the numerous amendments and revisions to the Source of Income Legislation dating from January 2010 through June, 2010 between the Board of Legislators and the County Attorney's office. Those documents predate the passage of the Source of Income Legislation by the Board of Legislators. These documents are protected by the attorney client privilege, but are not reflected on the privilege log at this time as the County believes that it is outside the scope of the current inquiry. The privilege log identifying those documents can be provided under separate cover should that be deemed necessary by the Monitor.

(2). The following persons are attorneys in the County Attorney's Office: Lori Alesio, Stacey Dolgin-Kmetz, Mary Lynn Nicolas-Brewster.

Dated: White Plains, New York
July 28, 2010

ROBERT F. MEEHAN
Westchester County Attorney
Attorney for County



600 Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601
(914) 995-2690

EXHIBIT F



Robert P. Astorino
County Executive

June 25, 2010

Members of the Westchester County
Board of Legislators
148 Martine Avenue
White Plains, New York 10601

Dear Honorable Board:

Pursuant to Sections 107.71 and 209.151 of the Westchester County Charter, Local Law 3-2010 adopted by your Honorable Board on June 14, 2010 and presented to me on June 15, 2010, is hereby returned to the County Board with my disapproval for the reasons set forth herein.

The Local Law in question has been the subject of a lengthy and substantial debate. During the months of deliberations your Honorable Board attempted to address the concerns of all affected parties, however, in doing so has presented a Local Law that creates more ambiguity, uncertainty and unnecessary regulation. The Local Law will not, in this form, advance the cause of providing affordable housing in the County and through potential unintended consequences may even hinder that cause. Indeed several of your honorable members stated for the record that the Local Law served to be a "disincentive to landlords."

The Local Law also attempts to circumvent current federal regulations that specify that the Section 8 Housing Assistance Program (known also as the Housing Choice Voucher Program-the "Program") is a voluntary plan. The Committee report affixed to the Local Law cites the Program established by the United State Department of Housing and Urban Development. The Committee report fails to acknowledge the regulations and obligations that landlords have who elect to accept Section 8 tenants.

Likewise the Local Law raises a question of equal protection. If Federally assisted tenants are a discriminatory class akin to race, creed, age etc., why is that "discriminated" class entitled to exceptions? If Federally assisted tenants are to be elevated to a "protected" class within the County's Human Rights Law, why are they allowed to have so many exceptions to its applicability? The Local Law presented exemptions certain property classifications (see Section 3-V (3)). Could this open the door to

Office of the County Executive

Michaelian Office Building
White Plains, New York 10601

Telephone: (914) 995-2900

E-mail: cc@westchestergov.com

similar exemptions for other protected classes? If some particularly situated landlords are exempted and can discriminate based upon source of income why not apply those exemptions to other protected classes?

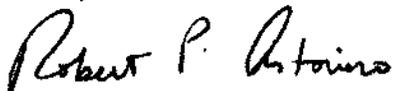
The Board failed to fully examine and consider the implications of the Law and its interaction with the requirements of the Emergency Tenants Protection Act of New York State. While the provisions of the Local Law "sunset" in five years, the requirements of ETPA law does not, which could lead to confusion and potential unnecessary litigation.

The Local Law places an unfair burden upon limited income properties, including in some instances one and two family homes. Section 8 imposes upon landlords its own lease terms, specific maintenance and service requirements. Involvement of a bureaucratic maze into the landlord and tenant relationship is particularly a hardship on landlords of a single family home or someone who may own as few as two, two-family homes. The largest additional burden placed upon the landlord is the lost opportunity costs for viable tenants who are turned away in favor of a Section 8 tenant that cannot be rejected, but who may decide to forego the apartment and leave the landlord with no tenant. Once a landlord accepts the voucher the unit must be taken off the market for weeks or months while necessary inspections and paperwork are completed. Once that process is complete, the Section 8 tenant may, solely at the tenant's option, decide to move somewhere else and not accept the lease. It could be a double hit to a small landlord who lost a viable tenant, waited a month for approval of a Section 8 tenant and now is left with an empty apartment only to start the process all over again.

Finally, the Board has not considered the appropriateness of subjecting landlords to the scrutiny of the Human Rights Commission and the potential severe fine of \$50,000.

For these reasons, Local Law 3-2010 is returned herewith as vetoed with my objections so noted for the record.

Sincerely,

A handwritten signature in black ink that reads "Robert P. Astorino". The signature is written in a cursive, flowing style.

Robert P. Astorino
County Executive

EXHIBIT G



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

V E T O #6766

TO THE ASSEMBLY:

I am returning herewith, without my approval, the following bill:

AUG 13 2010

Assembly Bill Number 10689-A, entitled:

"AN ACT to amend the executive law, in relation to discrimination based upon the income of persons"

NOT APPROVED

This bill would amend Executive Law § 296 to make it unlawful for New York property owners to discriminate against a person seeking housing on the basis of the source of income. "Source of income" is defined to include "wages from lawful employment; child support; alimony; foster care subsidies; income from social security or any other form of federal, state or local public assistance; housing and rental subsidies; and assistance, including section 8 vouchers; savings; investment and trust accounts; and other forms of lawful income." One of the most important effects of the bill would be to require property owners to participate in the federal Section 8 program. The Section 8 program, administered by the United States Department of Housing and Urban Development, provides vouchers to low-income tenants that can be used for payment of rent to property owners participating in the program.

This bill was prompted by very significant policy concerns. Holders of Section 8 vouchers often find it difficult to locate housing because many property owners do not rent to Section 8 tenants. It was not so long ago that advertisements for apartments explicitly included "No Section 8." For the Section 8 program to be meaningful, enough units must be made available for Section 8 tenants. A healthy Section 8 program is particularly critical in times of economic crisis.

Nonetheless, with regret I am compelled to veto the bill, both because of the heavy burden it would place on small New York property owners at a time when they are struggling to pay their mortgages and maintain their homes, and because of its impact on the State's finances.

When a landlord accepts a Section 8 voucher, the unit is taken off of the market while inspections and paperwork are completed. Rent is not collected on the unit during this time, which can total three months or more. In addition, housing units are subject to annual inspections and Section 8 payments are suspended until violations are rectified. A small landlord may have no funds to pay for repairs while payments are being withheld. Even when violations are the result of a tenant's actions and no fault of the landlord, landlords are not allowed to bring non-payment cases to Housing Court for the Section 8 portion of the rent.

The limitations placed on a landlord in regard to Section 8 vouchers are a necessary part of a valuable housing program, but for small landlords, they can be very onerous. For that reason, local laws that bar discrimination on the basis of source of income often carve out such property holders. New York City's anti-discrimination law, for example, exempts owners of buildings with five or fewer apartments. This bill, in contrast, applies to every property owner in New York State but those who occupy one unit of a two-family home. Moreover, this bill, if signed into law, would preempt the New York City law and eliminate the carve-out for New York City property owners. I do not believe this broad compulsion to participate in the Section 8 program is necessary in regard to buildings with three, four and five apartments, and it has the potential to drive such housing from the market, and have the perverse result of creating a disincentive for people to invest in affordable housing in New York.

000005

Further, this bill has the potential to substantially increase the caseload of the Division of Human Rights, requiring a substantial commitment of new resources and the hiring of additional staff. Following the passage of the New York City ban on source of income discrimination, the New York City Commission on Human Rights, which is responsible for enforcing the law, saw complaints based on alleged discriminatory failure to accept Section 8 vouchers swell to 20% of its caseload. A similar upsurge in the caseload of DHR would mean hundreds of new complaints. The additional staff necessary to process these complaints could cost as much as \$2.7 million. The Legislature has identified no existing funds and provided no new revenue to pay for this bill, and this is an expenditure the State simply cannot afford at this time.

The bill is disapproved.

000006

EXHIBIT H

govtrack.us

H.R. 6500: Housing Opportunities Made Equal (HOME) Act

111th Congress: 2009-2010

To amend the Fair Housing Act, and for other purposes.

SUMMARIES

CONGRESSIONAL RESEARCH SERVICE SUMMARY

The following summary was written by the Congressional Research Service, a well-respected nonpartisan arm of the Library of Congress. GovTrack did not write and has no control over these summaries.

12/8/2010--Introduced.

Housing Opportunities Made Equal (HOME) Act - Amends the Fair Housing Act to prohibit discrimination on the basis of sexual orientation, gender identity, source of income, or marital status in housing sales and rentals, residential real estate-related transactions, and brokerage services. Amends the Civil Rights Act of 1968 to prohibit the intimidation, interference, or injury of individuals because of their sexual orientation, gender identity, source of income, or marital status. Redefines "discriminatory housing practice" to specify that the definition: (1) applies regardless of whether the discriminatory practices occur pre- or post-acquisition; and (2) includes a failure to comply with administrative requirements of the Secretary of Housing and Urban Development (HUD), including related regulations, in a manner affirmatively to further nondiscrimination policies. Redefines "familial status" to include individuals (under age 18) residing with: (1) a foster parent or another person having physical custody of such individuals; or (2) anyone standing in loco parentis of such individuals (currently, the designee of such parent or other person having such custody, with the parent's or other person's written permission).

Amends the Equal Credit Opportunity Act and the Fair Housing Act to grant the Attorney General pre-litigation subpoena power if there is reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to an

investigation under the respective Act. States that discrimination against a person because of a handicap includes the failure, in connection with a real estate-related transaction, to make reasonable accommodations for such persons. Revises the limitations on filing complaints and commencing civil actions by certain individuals alleging discriminatory housing practices to deem that the failure to design and construct a dwelling that meets requirements for reasonable modifications for handicapped persons shall continue (and with it the alleged discriminatory housing practice) until such time as the dwelling conforms to them.

Because the U.S. Congress posts most legislative information online one legislative day after events occur, GovTrack is usually one legislative day behind. For more information about where this data comes from, see [About GovTrack.us](#).

To cite this information, click a citation format for a suggestion: [APA](#) | [MLA](#) | [Wikipedia Template](#).

GovTrack.us is a project of **Civic Impulse, LLC**. Read [about GovTrack](#).

Feedback (but not political opining) is welcome to operations@govtrack.us, but I can't do your research for you, nor can I pass on messages to Members of Congress.

You can also find us on our **Facebook Page** and [@govtrack](#) on Twitter.

You are encouraged to reuse any material on this site. GovTrack is open source and supports open knowledge; see the **developers** page.

111TH CONGRESS
2D SESSION

H. R. 6500

To amend the Fair Housing Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 8, 2010

Mr. NADLER of New York (for himself, Mr. CONYERS, Mr. SCOTT of Virginia, Mr. POLIS of Colorado, Mr. TOWNS, Mr. HASTINGS of Florida, and Mr. AL GREEN of Texas) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Financial Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Fair Housing Act, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Housing Opportunities
5 Made Equal (HOME) Act”.

6 **SEC. 2. AMENDING THE FAIR HOUSING ACT TO PROHIBIT**
7 **CERTAIN DISCRIMINATION.**

8 (a) IN GENERAL.—

1 (1) Section 804 of the Fair Housing Act (42
2 U.S.C. 3604) is amended by inserting “sexual ori-
3 entation, gender identity, source of income, marital
4 status,” after “sex,” each place it appears.

5 (2) Section 805 of the Fair Housing Act (42
6 U.S.C. 3605) is amended by inserting “sexual ori-
7 entation, gender identity, source of income, marital
8 status,” after “sex,” each place it appears.

9 (3) Section 806 of the Fair Housing Act (42
10 U.S.C. 3606) is amended by inserting “sexual ori-
11 entation, gender identity, source of income, marital
12 status,” after “sex,”.

13 (b) PREVENTION OF INTIMIDATION.—Section 901 of
14 the Civil Rights Act of 1968 (42 U.S.C. 3631) is amended
15 by inserting “sexual orientation, gender identity, source
16 of income, marital status,” after “sex,” each place it ap-
17 pears.

18 (c) DEFINITIONS.—Section 802 of the Fair Housing
19 Act (42 U.S.C. 3602) is amended by adding at the end
20 the following:

21 “(p) ‘Gender identity’ means the gender-related
22 identity, appearance, or mannerisms or other gen-
23 der-related characteristics of an individual, with or
24 without regard to the individual’s designated sex at
25 birth.

1 “(q) ‘Sexual orientation’ means homosexuality,
2 heterosexuality, or bisexuality.

3 “(r) ‘Source of income’ means the receipt of
4 Federal, State, or local public assistance including
5 medical assistance, or the receipt by a tenant or ap-
6 plicant of Federal, State, or local housing subsidies,
7 including rental assistance under section 8 of the
8 United States Housing Act of 1937 (42 U.S.C.
9 1437f) or other rental assistance or rental supple-
10 ments.

11 “(s) ‘Marital status’ has the same meaning
12 given that term for purposes of the Equal Credit
13 Opportunity Act.”.

14 **SEC. 3. AMENDING THE FAIR HOUSING ACT TO EXTEND**
15 **THE DEFINITION OF DISCRIMINATORY HOUS-**
16 **ING PRACTICE.**

17 Section 802(f) of the Fair Housing Act (42 U.S.C.
18 3602(f)) is amended to read as follows:

19 “(f) ‘Discriminatory housing practice’ means an act
20 that is unlawful under section 804, 805, 806, or 818 of
21 this title, whether occurring pre- or post-acquisition, and
22 also includes a failure to comply with the section 808(e)(5)
23 of this title or a regulation made to carry out section
24 808(e)(5).”.

1 **SEC. 4. AMENDING THE FAIR HOUSING ACT DEFINITION OF**
2 **“FAMILIAL STATUS”.**

3 Section 802(k) of the Fair Housing Act (42 U.S.C.
4 3602(k)) is amended to read as follows:

5 “(k) ‘Familial status’ means one or more individuals
6 (who have not attained the age of 18 years) residing
7 with—

8 “(1) a parent, foster parent, or another person
9 having legal or physical custody of such individual or
10 individuals; or

11 “(2) anyone standing in loco parentis of such
12 individual or individuals.

13 The protections afforded against discrimination on the
14 basis of familial status apply to any person who is preg-
15 nant or in the process of securing legal custody of an indi-
16 vidual who has not attained the age of 18 years.”.

17 **SEC. 5. AMENDING THE FAIR HOUSING ACT AND THE**
18 **EQUAL CREDIT OPPORTUNITY ACT TO PRO-**
19 **VIDE THE DEPARTMENT OF JUSTICE WITH**
20 **PRE-LITIGATION SUBPOENA POWER.**

21 (a) **EQUAL CREDIT OPPORTUNITY ACT.**—Section
22 706(h) of the Equal Credit Opportunity Act (15 U.S.C.
23 1691e(h)) is amended—

24 (1) by inserting “(1)” after “(h)”; and

25 (2) by adding at the end the following:

1 “(2) If the Attorney General has reason to be-
2 lieve that any person may be in possession, custody,
3 or control of any documentary material or informa-
4 tion relevant to an investigation under this title, the
5 Attorney General may, before commencing a civil ac-
6 tion under paragraph (1), issue in writing and cause
7 to be served upon the person, a civil investigative de-
8 mand. The authority to issue and enforce civil inves-
9 tigative demands under this paragraph shall be iden-
10 tical to the authority of the Attorney General under
11 section 3733 of title 31, United States Code, except
12 that the provisions of that section relating to qui
13 tam relators shall not apply.”.

14 (b) FAIR HOUSING ACT.—Section 814(e) of the Fair
15 Housing Act (42 U.S.C. 3614(e)) is amended—

16 (1) by striking “The Attorney General” and in-
17 serting the following:

18 “(1) IN GENERAL.—The Attorney General”;
19 and

20 (2) by adding at the end the following:

21 “(2) CIVIL INVESTIGATIVE DEMANDS.—If the
22 Attorney General has reason to believe that any per-
23 son may be in possession, custody, or control of any
24 documentary material or information relevant to an
25 investigation under this title, the Attorney General

1 may, before commencing a civil proceeding under
2 this subsection, issue in writing and cause to be
3 served upon the person, a civil investigative demand.
4 The authority to issue and enforce civil investigative
5 demands under this paragraph shall be identical to
6 the authority of the Attorney General under section
7 3733 of title 31, United States Code, except that the
8 provisions of that section relating to qui tam relators
9 shall not apply.”.

10 **SEC. 6. AMENDING THE FAIR HOUSING ACT SO THAT DIS-**
11 **CRIMINATION IN REAL ESTATE-RELATED**
12 **TRANSACTIONS INCLUDES THE FAILURE TO**
13 **MAKE REASONABLE ACCOMMODATIONS FOR**
14 **PEOPLE WITH DISABILITIES.**

15 Section 805(a) of the Fair Housing Act (42 U.S.C.
16 3605(a)) is amended by adding at the end the following;
17 “For the purposes of this section, discrimination against
18 a person because of handicap includes the failure, in con-
19 nection with a real estate-related transaction, to make rea-
20 sonable accommodations for such persons.”.

21 **SEC. 7. AMENDING THE FAIR HOUSING ACT TO CHANGE**
22 **CERTAIN LIMITATIONS ON FILING COM-**
23 **PLAINTS AND COMMENCING CIVIL ACTIONS.**

24 (a) SECTION 810.—Section 810(a)(1)(A) of the Fair
25 Housing Act (42 U.S.C. 3610(a)(1)(A)) is amended by in-

1 sertyng after the first sentence the following: “The failure
2 to design and construct a dwelling as required by section
3 804(f)(3)(C) shall be deemed to continue until such time
4 as the dwelling conforms to the requirements of that sec-
5 tion.”.

6 (b) SECTION 813.—Section 813(a)(1)(A) of the Fair
7 Housing Act (42 U.S.C. 3613(a)(1)(A)) is amended by
8 adding at the end the following: “The failure to design
9 and construct a dwelling as required by section
10 804(f)(3)(C) shall be deemed to continue until such time
11 as the dwelling conforms to the requirements of that sec-
12 tion.”.

○

Exhibit 4



*United States Attorney
Southern District of New York*

*86 Chambers Street
New York, New York 10007*

By mail and electronic mail

October 7, 2011

James E. Johnson, Esq.
Debevoise & Plimpton, LLP
919 Third Avenue
New York, New York 10022

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

Dear Mr. Johnson:

The United States (the “government”), plaintiff in the above-named action, respectfully submits this letter as the statement of its position in the disputes referred to the Monitor by the parties. As set forth in further detail below, Westchester County has not satisfied its continuing obligations under the August 10, 2009, Stipulation and Order of Settlement and Dismissal (the “Settlement”). The Monitor should therefore resolve the referred disputes in the government’s favor, and address the County’s noncompliance by directing the County to take the actions specified below.

Scope of the Disputes

Pursuant to paragraph 14 of the Settlement, the Monitor has “the authority to resolve disputes between the County and the Government” upon notification by the parties. The government, by letter dated August 18, 2011, referred the following two issues for resolution:

1. Whether Westchester County has fully complied with paragraph 33(g) and 33(i) of the Settlement Agreement, requiring the County, as part of its additional obligations to affirmatively further fair housing, to “promote, through the County Executive, legislation currently before the Board of Legislators to ban ‘source-of-income’ discrimination in housing,” and to “incorporate” that undertaking in the County’s analysis of impediments to fair housing choice within its jurisdiction. If not, what actions the County must take to satisfy this obligation. *See* Letter from HUD to Westchester County dated May 13, 2011 (“May 13 Letter”), at 2-3.
2. Whether paragraphs 7(i), 7(j), and 15 of the Settlement Agreement (a) require the County to identify specific zoning practices within the County that hinder the development of Affordable AFFH Units (as that term is used in the Settlement) that

the County will challenge; and (b) also require the County to establish a process for notifying the municipalities in which such practices exist of the changes that must be made and of the consequences of their failure to do so. If so, what actions the County must take to satisfy these obligations. *See* May 13 Letter, at 5-6.

As further specified in the government's letter of August 24, 2011, the government has only referred those two specific issues to the Monitor. The matters of the acceptability of the County's July 2011 Analysis of Impediments to Fair Housing Choice (the "AI") submission, or the County's certification that it is affirmatively furthering fair housing as required to obtain funding under the Community Development Block Grant and other programs, are not before you, although HUD will consider your resolution of the referred issues, and any changes the County may make to the AI in response to that resolution, in determining the acceptability of the AI.¹

First Dispute: Source-of-Income Legislation

The first dispute before you concerns whether the County has met its obligations under the Settlement to "promote" legislation that would prohibit housing discrimination based on source of income. Paragraph 33 of the Settlement provides as follows:

As part of its additional obligations to [affirmatively further fair housing], the County also shall: . . .

(g) promote, through the County Executive, legislation currently before the Board of Legislators to ban "source-of-income" discrimination in housing; . . . and

(i) incorporate each undertaking set forth in this paragraph in the County's AI.

Yet despite the County Executive's obligation to "promote" this legislation, the County Executive in fact took the diametrically opposite step and vetoed the source-of-income legislation passed by the Board of Legislators. The County's actions cannot be reconciled with the terms or purposes of the Settlement.

A consent decree must be interpreted according to "the plain meaning of the language and the normal usage of the terms selected." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 103 (2d Cir. 2006) (quotation marks and alteration omitted); *accord Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985). The relevant dictionary definition of "promote" is "[t]o urge the adoption of; advocate." Am. Heritage Dict. of the Eng. Lang. (4th ed.). Under no reasonable reading can the County Executive be said to have "urged the adoption" of legislation whose adoption he prevented, or to "advocate" legislation he vetoed.

¹ In your letter to the parties of September 8, 2011, you referred to the matter before you as "the dispute concerning the County's Analysis of Impediments to Fair Housing Choice." Similar references have appeared in other correspondence. For the reasons set forth in this paragraph, the government believes that a more precise description would refer to disputes concerning the County's obligations under the Settlement, and not to the AI.

In the AI submission by the County to HUD of July 11, 2011 (and in other submissions as well), the County asserted that it had complied with its admitted obligation to “promote” source-of-income legislation by the following: an October 2009 letter from the former County Executive to the Board of Legislators “urging the board’s adoption of such legislation”; approximately five November 2009 letters from the former County Executive to housing advocacy organizations urging them to support the legislation; and attendance by staff of the County Human Rights Commission at discussions in 2009 with the Board to provide information. July 11, 2011, AI at 194–95 (pp. 35–36 of Chapter 12).² The County states that when the Board passed the legislation in 2010, it contained “exclusions, thereby eliminating its potential applicability to a large number of the housing units in Westchester County,” and the County Executive vetoed it as overly burdensome. *Id.*

None of this suffices to fulfill the County’s obligation to “promote” the legislation. Putting aside the question of whether the County’s actions in 2009 were sufficient at the time, the County can point to no action since then, nearly two years ago. Nothing in the Settlement supports the County’s theory that it could “promote” the legislation for a few months and then unilaterally stop doing so—nor is there any plausible reason the parties would have negotiated such a provision. To the contrary, the County’s obligation to “promote” the legislation was a continuing one. *O’Shea v. Littleton*, 414 U.S. 488, 501 (1974) (“an injunction . . . would necessarily impose continuing obligations of compliance”); *Miller v. Silbermann*, 951 F. Supp. 485 (S.D.N.Y. 1997) (“because the injunction plaintiffs seek is directed at possible future acts by defendants, it imposes a continuing obligation of compliance”). The only reasonable reading of the duty to “promote” legislation was to promote it until it was enacted.

And even if the County had taken some action after 2009, the Executive’s veto is fatal to any claim that the County has complied with the Settlement. Conceivably, some hypothetical aspect of the legislation as passed could be legitimate grounds for a veto, but the County has identified none. Instead, it has stated that the Executive vetoed the law because it had too many exclusions and was too burdensome. To begin with, the inconsistency of this criticism—that it was too burdensome and yet did not apply widely enough—makes it implausible. In any event, the “burden” imposed by the legislation in the Executive’s view was, apparently, the non-discrimination obligation itself: the very purpose of the legislation, and the reason for its inclusion as a commitment by the County in the Settlement. For the County to undertake to “promote” a ban on source-of-income discrimination, then veto the passed legislation because of the burden of banning source-of-income discrimination, is inconsistent with both the plain terms of the Settlement as well as the “implied covenant of good faith and fair dealing” inherent in any settlement agreement. *Handschu v. Special Services Division*, No. 71 Civ. 2203, 2007 WL 1711775, at *10 n.10 (S.D.N.Y. June 13, 2007).³

² The Monitor’s Report of February 2010 noted that the pending implementation plan “lacks a concrete plan” to promote source-of-income legislation because it “has apparently been promoted only through letters from the former County Executive to fair housing advocates.” Amended Monitor’s Report for the Period of Aug. 10, 2009 Through Feb. 10, 2010, at 9.

³ The County’s further contention in the July 11 AI submission—that the Settlement did
(continued...)

Finally, while the terms of the Settlement are clear and unambiguous, even if they were not the purpose underlying the Settlement removes any doubt as to the meaning of the obligation to “promote” a ban on source-of-income discrimination. “[W]here a term of a consent decree is ambiguous, a court may consider extrinsic evidence to ascertain the parties’ intent, including the circumstances surrounding the formation of the decree” and “the purpose of the provision in the overall context of the judgment at the time the judgment was entered.” *United States v. Broadcast Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001) (quotation marks omitted); *accord ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 576 (2d Cir. 1990) (“if the terms of a decree are not self-explanatory, the court may look to contextual indicia of meaning”). Here, as you are aware, the Settlement followed a False Claims Act complaint that resulted in two rulings by the United States District Court regarding (among other things) the scope of the County’s duty to “affirmatively further fair housing,” as it agreed to do in accepting certain grants from HUD. To affirmatively further fair housing, the County was required to “conduct an analysis of impediments to fair housing choice within the area [and] take appropriate actions to overcome the effects of any impediments identified through that analysis.” *United States ex rel. Anti-Discrimination Ctr. v. Westchester County*, 668 F. Supp. 2d 548, 551 (S.D.N.Y. 2009) (quoting 24 C.F.R. § 91.425(a)(1)(i)). The Settlement itself clearly links the promotion of a ban on source-of-income discrimination to those obligations, describing it as an “additional obligation to [affirmatively further fair housing].” Settlement ¶ 33. Those obligations, indisputably, were not limited to calendar year 2009. And the Settlement’s purposes in this respect could not be satisfied by the County’s actions for a few months in 2009 or by the Executive’s 2010 veto; they could only be satisfied by actual enactment of the ban, which the Executive prevented from occurring.

³ (...continued)

not require the legislation to actually be “passed and signed into law”—must also fail. July 11, 2011, AI at 194–95 (pp. 35–36 of Chapter 12). The Settlement indeed requires promotion of the legislation by the County Executive rather than passage by the Board of Legislators. But that is only because the Settlement did not constrain the Board. Once the Board actually passed the legislation, the Executive was obliged to “promote” it by signing it.

Additionally, in a letter dated July 28, 2010, to the Monitor, the County Executive purported to justify his refusal to fulfill the Settlement’s obligation by saying that to do so would “curtail [his] ‘ability to respond to the priorities and concerns of [my] constituents’ and [his] ‘ability to fulfill [his] duties as [a] democratically-elected official[.]’” *Horne v. Flores*, 129 S. Ct. 2579, 2594 (2009).” But *Horne* concerned the appropriateness of modifying a consent decree due to unanticipated changes in circumstances. The County Executive’s letter omits the language immediately preceding the quoted passage, which makes clear that it addressed situations where local governments are confronted with “overbroad or outdated consent decrees.” 129 S. Ct. at 2594 (quotation marks omitted). The County has never argued that the Settlement must be modified due to circumstances that have somehow changed since 2009, or that it is overbroad or outdated. And while the importance of the democratic process and the duties of elected officials is unquestioned, the fact is that the County has committed—through its elected officials—to a course of action, ordered by a federal court, that it now declines to follow.

For all those reasons, the County has not lived up to its obligations under paragraphs 33(g) and 33(i) of the Settlement. To remedy the violation, the Monitor should, at a minimum, require the County to take the following actions with respect to the first dispute:

1. Provide a description of legislation to be re-introduced before the Board and supported by the County Executive; the new proposed legislation should be substantially similar to the bill that was before the Board at the time of the Settlement, and should provide protection against housing discrimination on the basis of lawful sources of income such as Section 8 vouchers, Social Security, Supplemental Security Income (SSI), veteran's benefits, and pensions.
2. Devise concrete plans to promote the legislation with the Board and the public including, but not limited to, support for passage in public forums including the media and securing support from individual legislators.
3. Undertake efforts to inform the public, including elected and appointed decision makers, about the importance of such an ordinance and describe community outreach planned to promote passage of the ordinance.
4. Provide assurances that upon the passage of the legislation it will be signed by the County Executive.

Second Dispute: Exclusionary Zoning

The second dispute concerns the County's lack of a strategy for addressing actions or lack of action by municipalities. In particular, the dispute concerns whether the County is required to identify specific zoning practices within the County that hinder the development of Affordable AFFH Units that the County will challenge, and establish a process for notifying the municipalities in which such practices exist of the changes that must be made and of the consequences of their failure to do so.

In the Settlement, the County acknowledged that "it is appropriate for [it] to take legal action to compel compliance if municipalities hinder or impede the County in its performance of [its] duties [for the benefit of the health and welfare of the residents of the County], including the furtherance of the terms of this [Settlement]." Settlement at 2 (first "whereas" clause). The County agreed that "[i]n the event that a municipality does not take actions needed" to promote the development of housing units pursuant to the Settlement, "or undertakes actions that hinder" that development, "the County shall use all available means as appropriate to address such action or inaction, including, but not limited to, pursuing legal action." ¶ 7(j). The County committed itself to "initiate such legal action as appropriate to accomplish the purpose of this Stipulation and Order to [affirmatively further fair housing]." *Id.* ¶ 7(j). And the County agreed that the Monitor's assessments of its actions would consider whether the County "has taken all possible actions to meet its obligations . . . including . . . promoting inclusionary and other appropriate zoning by municipalities by offering incentives, and, if necessary, taking legal action." *Id.* ¶ 15.

There can be no doubt that the zoning practices of municipalities within the County may hinder the development of Affordable AFFH Units, or more generally hinder efforts to

affirmatively further fair housing. Courts have repeatedly identified zoning as an obstacle to fair housing. *E.g.*, *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir. 1995) (zoning restrictions may constitute discriminatory housing practice); *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 936–38 (2d Cir.) (zoning that restricted multi-family housing to certain geographical areas adversely affected minorities and perpetuated segregation), *aff'd*, 488 U.S. 15 (1988) (per curiam); *United States v. City of Parma*, 661 F.2d 562, 575–76 (6th Cir. 1981) (zoning restrictions on building height and requirements for number of parking spaces adversely affected construction of low-income housing); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 566–68 (E.D. La. 2009) (moratorium on multi-family housing had disparate impact on racial minority); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 565–68 (N.D. Tex. 2000) (ban on development of apartments or multi-family housing, and unjustified large lot requirements, adversely affected racial minorities and perpetuated racial segregation).

Indeed, the County has acknowledged this fact. For instance, in its August 2010 proposed Implementation Plan, the County described the “model ordinance” it had proposed pursuant to paragraph 25 of the Settlement as including a “series of zoning provisions which are intended . . . to ensur[e] the provision and promotion of fair and affordable housing development throughout the County”; similarly, the County listed “promoting . . . inclusionary zoning” through the model ordinance as one of the actions it had taken to identify sites for Affordable AFFH Units. Westchester County Fair & Affordable Housing Implementation Plan (Proposed), dated Aug. 9, 2010, at 9, 22–23. The County also noted that the form of legal action undertaken pursuant to paragraph 7(j) of the Settlement would depend on “an evaluation of . . . [among other things] the zoning and land use regulations and approvals applicable” in the defendant municipality. *Id.* at 14. The County expressly stated that “inclusionary zoning” will be responsible for creation of Affordable AFFH Units. *Id.* at 19. And in describing the process for approving housing developments, it noted zoning as a “constraint” that could affect the “viability of a proposal.” *Id.* at 20.

Despite these admissions of the reality of the effect of zoning on the development of Affordable AFFH Units, the County has refused to identify specific zoning practices that may hinder the development of such units and that accordingly may be subject to challenge by the County, or to provide a process for addressing those practices. That refusal is inconsistent with the County’s obligation to pursue such challenges; to use “all available means as appropriate” to address municipalities’ lack of promotion, or active hindrance, of the development of Affordable AFFH Units; and to “use all available means,” including “financial and other incentives” to municipalities, to achieve the objective of developing Affordable AFFH Units and to encourage municipalities as well to promote that objective. Settlement ¶ 7(i), (j). It is further inconsistent with the Settlement’s acknowledgment that “all possible actions” to be taken by the County “to meet its obligations . . . includ[e] . . . promoting inclusionary and other appropriate zoning by municipalities.” *Id.* ¶ 15. Evaluating zoning issues is certainly an action the County is capable of, as it routinely makes recommendations and observations regarding proposed zoning actions or land-use regulations within the County, apparently in response to referrals from local

jurisdictions seeking the County's views in accordance with N.Y. General Municipal Law §§ 239-m and 239-n.⁴

In essence, the County's position is that certain zoning practices may hinder the development of Affordable AFFH Units; that it is required to contest such zoning practices, and to use "all available means" to achieve the development of those units and take "all possible actions" including promotion of inclusionary zoning—but that it will not even take the first and most basic step of identifying the specific zoning practices that municipalities should amend or eliminate, despite its capacity to do so. That position is untenable, and inconsistent with the County's commitment in signing the Settlement to "good faith and fair dealing." *Handschu*, 2007 WL 1711775, at *10 n.10. Additionally, as explained above, the Settlement should be interpreted in light of its purposes and the circumstances of its adoption, *Broadcast Music*, 275 F.3d at 175; *Showtime*, 912 F.2d at 576; and the Settlement's purposes manifestly include affirmatively furthering, and overcoming impediments to, fair housing. The County's passive approach to identifying obstacles to fair housing or to the achievement of its agreed-to obligations undercuts the terms and objectives of the Settlement.

Moreover, the County's approach is inconsistent with the expectations you have previously expressed in your Monitor's Reports. The Report of February 11, 2010, stated that the County's Implementation Plan should, to be consistent with paragraph 7(j) of the Settlement, "include a clear strategy for how the County will employ carrots and sticks to encourage compliance by municipal governments," and also include "the County's plan for monitoring local approval processes and municipalities' cooperation with the County's efforts to implement the Stipulation." Amended Monitor's Report for the Period of Aug. 10, 2009 Through Feb. 10, 2010, at 8–9. And, referring to the same paragraph 7(j), the July 7, 2010, Report states that the County "should consider requiring municipalities to report on obstacles to developing Affordable AFFH Units, including steps that can be taken to overcome these obstacles. Noncompliance with this reporting requirement would trigger the penalties available for overall failure to comply with the terms of the Stipulation. At a minimum, the IP should include the County's plan for monitoring local approval processes and municipalities' cooperation with the County's efforts to implement the Stipulation." Monitor's Report for Period of Feb. 11, 2010 Through July 6, 2010, at 16–17.⁵

⁴ See letter of June 7, 2010 (included in County's 2010 2Q Report) from Acting Planning Board Commissioner to Town of New Castle (recommending elimination of restrictions regarding unit size and proximity); letter of Sept. 27, 2010 (included in 2010 3Q Report) to Town of Pound Ridge (noting lack of zoning district permitting multi-family housing and lot-size requirement three times that of any other municipality); letter of Nov. 3, 2010 (included in 2010 4Q Report) to Town of Cortlandt (noting lack of rationale for size restrictions on apartments); letter of June 27, 2011 (included in 2011 2Q Report) to Town of North Salem (recommending removal of age restriction).

⁵ Similarly, Section V of the template provided for the County's quarterly reports requires the County to identify "efforts to promote municipal policy changes." Despite that, the County has not included any information on this topic in its quarterly reports except as it pertains to the model ordinance.

The County's failure to specify zoning practices that may hinder development of Affordable AFFH Units, or to specify changes that must be made to those practices and the County's response, indicates that it has no strategy at all, much less a "clear" one, for encouraging compliance by municipalities. It further indicates that the County has no plan for monitoring municipal action and cooperation, as the County cannot or will not even say what it is monitoring for. Thus, the County's inaction is inconsistent with the Settlement both on its face and as elaborated by the Monitor's Reports.

To bring the County into compliance with the Settlement, with respect to the second dispute the Monitor should require the County to develop a strategy for addressing municipalities' failures to act to promote the objectives of the Settlement, or their actions that hinder those objectives. Particularly, the Monitor should require the following actions:

1. Identification of specific zoning issues in particular municipalities that unjustifiably hinder the development of Affordable AFFH Units and the County's obligation to affirmatively further fair housing and, accordingly, will be challenged by the County. The specific zoning practices which must be evaluated by the County include 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 on the number of 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; limitations on townhouse development; and infrastructure barriers related to zoning such as the absence of sewer systems that are impediments to the development of rental housing or to affordable housing.

2. Identification of a process for notifying municipalities of zoning issues that unjustifiably hinder the County's obligations under the Settlement, and of the changes that must be made and of the consequences (including specific action by the County) of municipalities' failure to make them within three months of notification.

3. The development of a strategy to involve municipal decisionmakers in consultation regarding required changes in zoning and land use restrictions.

4. A description of how these requirements, in the future, will be included in contracts or other written agreements between the County and municipalities.

Thank you for your consideration.

Very truly yours,

PREET BHARARA
United States Attorney

By: /s/ Benjamin H. Torrance
BENJAMIN H. TORRANCE
Assistant United States Attorney
Telephone: 212.637.2703
Fax: 212.637.2702
E-mail: benjamin.torrance@usdoj.gov

cc: Robert Meehan, Esq. (by e-mail)

Exhibit 5

October 21, 2011

By electronic mail and regular mail

James E. Johnson, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022

*Re: Dispute Submission - United States ex rel.
Anti-Discrimination Center v. Westchester Co.*

Dear Mr. Johnson:

Enclosed is the County's written reply to the submission on behalf of the United States.

Respectfully submitted,



Robert F. Meehan

RFM:lh
cc w/encl: Benjamin H. Torrance, Esq.
Assistant United States Attorney

Michaelian Office Building
148 Martine Avenue, 6th Floor
White Plains, New York 10601

Telephone: (914)995-2660

Website: westchester.gov.com

Plaintiff,
v.
WESTCHESTER COUNTY, NEW YORK,
Defendant.

STATE'S SUBMISSION REGARDING
THE DISPUTE FOR RESOLUTION
BY THE MONITOR

WESTCHESTER COUNTY, NEW YORK,
Defendant.

-----x

REPLY

Robert F. Meehan
Westchester County Attorney
Attorney for Westchester County
148 Martine Avenue, 6th Floor
White Plains, NY 10601
(914) 995-2690

Of counsel:
James F. Castro-Blanco, Chief Deputy County Attorney
Carol F. Arcuri, Deputy County Attorney
Linda Trentacoste, Associate County Attorney
Shannon S. Brady, Associate County Attorney
Adam Rodriguez, Senior Assistant County Attorney

(“Settlement”).

As set forth below, the County is in compliance with the Settlement. Thus, the Government’s insistence that the County take specific actions that are: (1) not required by the Settlement; (2) contrary to well-established law; and (3) premature, is completely frivolous.

Consequently, it is imperative that the instant dispute and the Government’s unjustified action in failing to accept the County’s Analysis of Impediments dated July 2011 (“AI”) be resolved in favor of the County and against the Government, so that the County’s time, funds and efforts may be fully devoted to accomplishing the objectives of the Settlement to affirmatively further fair housing (“AFFH”).

SCOPE OF THE DISPUTE

In your letter dated August 19, 2011, you specified that your review relates to the County’s revised AI, including “source of income” legislation and other related issues. Ignoring your directives, the Government attempts to dictate and limit the issues currently before you as Monitor by focusing solely on the two specific issues it has referred for review. However, the County requested that the Monitor review issues relating to the impasse that exists between the County and the Government over the AI. In accordance with Paragraph 14 of the Settlement, you, as Monitor, have the authority to resolve disputes between the County and the Government and to issue a written report to address the matters in dispute. The Government’s attempt to

will respect to source of income legislation, the Government cites to Paragraph 55 of the Settlement which provides:

As part of its additional obligations to [affirmative further fair housing], the County also shall: ...

(g) promote, through the County Executive, legislation currently before the Board of Legislators to ban “source of income” discrimination in housing;... and

(i) incorporate each undertaking set forth in this paragraph in the County’s AI.

Government Position Statement (“Govt Stmt”), p. 2.

Thereafter, the Government notes that “a consent decree must be interpreted according to the ‘plain meaning of the language and the normal usage of the terms selected’. [citing]

Mastrovincenzo v. City of New York, 435 F.3d 78, 103 (2d Cir. 2006) (quotations marks and alteration omitted); *accord Berger v. Heckler*, 771 F.2d 1556, 1558 (2d Cir. 1985).” Govt Stmt,

p. 2. However, the Government’s argument is not based upon the express terms of the Settlement, but rather on its desire to expand the scope of the Settlement to satisfy its own purposes. Such expansion is contrary to the basic principle of such settlements as set forth in *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971), where the United States Supreme Court stated that “the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.”

A. Settlement Requires *Promotion*, not *Adoption*

The language of the Settlement with respect to the source of income legislation does not require that such legislation be adopted, but instead requires that the legislation before the

‘source of income’ discrimination in housing”). Significantly, the word “promote” was utilized in connection with the source of income legislation while “adopt” was utilized with respect to the County’s policy statement. In this fully integrated settlement, any interpretation of its terms must start with the actual words utilized. The fact that one section requires adoption, while the other section requires promotion clearly illustrates that there is a distinction between the two provisions and the County’s responsibilities in connection thereto.

In one point of its argument, the Government claims that it really meant to obligate the County to adopt source of income legislation. *See* Govt Stmt, p. 3 (“The only reasonable reading of the duty to ‘promote’ legislation was to promote it until it was enacted.”). Yet in another point, the Government concedes that “the Settlement indeed requires promotion . . . rather than passage [of source of income legislation but] . . . only because the Settlement did not constrain the Board.” Govt Stmt, p.4 fn. 3. Consequently, following this argument, the County was not constrained by the Settlement to adopt the source of income legislation and therefore the County Executive’s exercise of his veto power was not in violation of the Settlement. The Government’s inconsistent arguments should not detract from the plain meaning and the distinctions between the use of the terms “promote” and “adopt”.

The Settlement undeniably constrained the County, including the County Board of Legislators, to ensure the passage of the position statement. (*See* Settlement Paragraph 31). Moreover, the Settlement itself was expressly “subject to final approval . . . by the County

legislation that was “*currently before*” the County Board of Legislators in August of 2009.¹

B. Settlement Requires Promotion of the Source of Income Legislation “Currently” Before the County Board of Legislators.

While the Government focuses on the plain meaning of the word “promote” in Paragraph 33(g), it completely ignores the plain meaning of the word “currently” in the same paragraph. The relevant dictionary definition of “currently” is “at the present time; now; of the immediate present; in progress; circulating and valid at present”. Am. Heritage Dict. Of the Eng. Lang. (4th ed.).

Strictly adhering to the plain language of the entirety of Paragraph 33(g) of the Settlement, as agreed to by the parties in 2009, the County has clearly complied with Paragraph 33(g). The previous County Executive promoted the legislation that was *currently before* the County Board of Legislators in 2009, and such undertakings were fully incorporated in the County’s AI. The County Executive’s obligation to “promote” the legislation “currently before” the Board of Legislators when the Settlement was signed in August 2009, ended when the County Board of Legislators’ session expired on December 31, 2009.

It is undisputed that the legislation that the current County Executive vetoed in 2010 was not the same legislation that was “currently before” the County Board of Legislators in 2009. In

¹ The Government argues that once the Board actually passed the legislation the County “Executive was obliged to ‘promote’ it by signing it”. Govt Stmt, p. 4, fnnt 3. If that had been intended by the parties, it could have been easily and plainly stated, for example, “once the legislation currently before the board is adopted, the County Executive shall approve it.” But that is not what it says and the Government should not be permitted to unilaterally rewrite the agreement.

Settlement. Requiring the County to promote newly submitted source of income legislation would be imposing new and additional obligations upon the County.

C. The Settlement Does Not Usurp the Powers of the County Executive

The Government's position that the Settlement completely usurps the incumbent County Executive's discretion to veto any subsequently proposed source of income legislation is unfathomable, especially where both the State and Federal Governments have been unable to adopt similar legislation. Further, the Government mischaracterizes the content and intent of the County Executive's veto message of the source of income legislation. While the Government attacks the County Executive's exercise of his right to veto the source of income legislation, it thereafter concedes that he could have had "legitimate grounds for a veto".² Gov't Stmt, p. 3, ¶3. The Government's position is inconsistent and therefore unsupported.

The Government misinterprets the County Executive's rationale for vetoing the source of income legislation as inconsistent and implausible. The text of the County Executive's veto message belies the Government's misstatement. As indicated in the veto message, the legislation "will not [in the form introduced in 2010] advance the cause of providing affordable housing in the County and through potential unintended consequences may even hinder that cause."

Thereafter, the County Executive provided compelling grounds to substantiate his veto of the

² As indicated previously, neither the Federal nor the State government has been able to adopt similar legislation. Former New York State Governor Paterson vetoed the legislation for similar grounds advanced by the County Executive.

contrary to the United State Supreme Court's decision in *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004) which stated that "public servants ... must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities ... and [are required] to bring new insights and solutions to problems of allocating revenues and resources." Accordingly, the Settlement cannot be interpreted to usurp the powers of the County Executive.

D. The Government's Request to Mandate the Introduction of New Source of Income Legislation Substantially Similar to the 2009 Version is Futile.

The Government's request to mandate the current County Executive to reintroduce legislation that has already failed is futile. The legislation pending in 2009, promoted by the former County Executive, never passed and, in fact, died at the end of the legislative session. Furthermore, the 2009 version which was introduced to the new County Board of Legislators in 2010 was substantially amended by the County Board. Without any data to support the viability of source of income legislation in Westchester County, the mere introduction of the 2009 version is futile.

Accordingly, the County urges the Monitor to find that the County has complied with Paragraph 33(g) of the Settlement and has acted reasonably in connection with any proposed source of income legislation.

HUD's fair housing planning guide requires that the AI contain specific plans to challenge local zoning ordinances prior to exhausting all other strategies. More importantly, the Government fails to point to any specific provision of the Settlement which supports its request that the Monitor "require the County to develop a strategy for addressing municipalities' failures to act to promote the objectives of the Settlement, or their actions that hinder those objectives".

In order to determine the County's obligations under Paragraph 7 at issue in this dispute, it is necessary to examine the plain language of Paragraph 7 which is located in the section entitled "County's Development of Affordable AFFH Units", and provides that:

...the County shall, within seven (7) years of the entry of this Stipulation and Order, *ensure the development of at least seven hundred fifty (750) new affordable housing units* that meet the terms and conditions set forth in this paragraph ("affordable AFFH Units"):

(i) The County shall use all available means as appropriate to achieve the *objectives set forth in this paragraph*, including, but not limited to, developing financial or other incentives for other entities to take steps to promote the objectives of this paragraph, and conditioning or withholding the provision of County funds on actions that promote the objectives of this paragraph.

(j) In the event that a municipality does not take the actions needed to promote the *objectives of this paragraph*, or undertakes actions that hinder the *objectives of this paragraph*, the County shall use all available means as appropriate to address such action or inaction, *including, but not limited to, pursuing legal action*. The County shall initiate such legal action as appropriate to accomplish the purpose of this Stipulation and Order to AFFH.

County to follow with respect to ensuring the development of at least 750 Affordable AFFH units. In essence, these paragraphs define the “carrot” and “stick” provisions regarding the manner in which the County can obtain municipalities’ compliance with the terms of the Settlement. The County’s July 2011 AI contains extensive information and data relating to the County’s strategy in connection with local zoning ordinances.³ Focusing on the plain language of these paragraphs, it is clear that legal action, though acknowledged as a possibility, is considered a last resort. Clearly, legal action is unwarranted prior to the exhaustion of administrative remedies. In fact, it would be illogical for any individual or entity whose plan would not fit under any particular zoning ordinance to initiate legal action without first applying for a variance or seeking an alternative site.

The plain language of the Settlement suggests that legal action may be appropriate to compel compliance only “*if municipalities hinder or impede the County in its performance of duties...*”. Emphasis supplied, Settlement, p. 2. To date, no municipality has hindered or impeded the County in the development of affordable AFFH units, nor does the Government point to any such actions (or inactions). In fact, some municipalities are affirmatively furthering fair housing on their own initiatives. See letters attached to the August 18, 2011 County’s Quarterly Report for 2Q 2011, Appendix V-2; see also article entitled “Steps on Affordable

³ See e.g., July 2011 AI, pp. 194-212 and Appendix 9 entitled Affordable Housing Ordinance & Zoning Review. See also, County’s October 7, 2011 Statement of Position, p. 8.

abide by the express terms of a consent decree and may not impose supplementary obligations on the parties even to fulfill the purposes of the decree more effectively [citations omitted].” *Perez v. Danbury Hosp.* 347 F.3d 419, 424 (2d Cir. 2003).

The Government’s position statement contains numerous quotes from the County’s August 9, 2010 proposed Implementation Plan (“IP”), which are taken completely out of context. For example, the first full paragraph on page 6 of the Government’s response is rife with examples of the out of context quotes. The Government claims that the County has “acknowledged” the “fact” that zoning is an obstacle to fair housing:

For instance, in its August 2010 proposed Implementation Plan, the County described the “model ordinance” it had proposed pursuant to paragraph 25 of the Settlement as including a “series of zoning provisions which are intended . . . to ensure[] the provision and promotion of fair and affordable housing development throughout the County

This quote appears at page 9 of the County’s proposed August 9, 2010 IP. Read in context, it is clear that the language was cherry picked by the Government and does not stand for the proposition for which it is offered. The Government purposefully omits the preceding sentences describing more fully the purpose of the model ordinance:

Recognizing this context, the materials produced by the County in compliance with the Stipulation are not intended to operate as a fully-integrated zoning code or to otherwise act as a substitute for those long-standing codes. Rather, what has been produced are a series of zoning provisions which are intended, collectively, to serve as a supplement to existing municipal zoning codes in Westchester County municipalities for the purposes of ensuring the provision and promotion of fair and affordable housing development throughout the County of Westchester.

municipalities to ensure the provision of fair and affordable housing development.

Next, the Government states that the “County also noted that the form of legal action undertaken pursuant to Paragraph 7(j) of the Settlement would depend on ‘an evaluation of . . . [among other things] the zoning and land use regulations and approvals applicable’ in the defendant municipality.” The entire quote, in context at page 14 of the IP, describes that should legal action become necessary (Government’s quotes underlined),

[w]hat form such legal action might take will depend upon an evaluation of a number of facts and circumstances including the inaction or the obstructive actions of the municipality involved in the context of the particular zoning and other land use regulations and approvals applicable in that particular jurisdiction.

Finally, the Government stated that “in describing the process for approving housing developments, it noted zoning as a ‘constraint’ that could affect the ‘viability of a proposal’”, *citing* page 20 of the IP. The quote, in context (with the Government quotes underlined), reads as follows:

Proposals may undergo multiple local reviews and approval by various boards for different aspects of the proposed development. Each municipality has a unique process for conducting its planning, zoning and other reviews, allocating responsibilities pursuant to their local ordinances. Beyond the planning approval required (subdivision, site plan approval, etc.), there may also be Architectural Review Boards, Historic Review Boards, Conservation Advisory Committees and other public boards which could have input to the final approvals given for a development. These boards, of local resident volunteers, can place constraints on a proposal, which could have an impact on the viability of the proposal.

Govt Stmt, p. 6. The focus herein should be solely on what the Settlement *requires* of the County.

Nothing in the Settlement requires the County to target or proactively challenge specific zoning practices through litigation. Furthermore, the Government's current position is contrary to the assurances that the Government expressly provided to the County in its September 21, 2009 letter. Indeed, the Government acknowledges that the Settlement is a "fully-integrated document that speaks for itself... The decision to initiate litigation as appropriate, described in Paragraph 7(j), is one for the County to make". Exhibit B to the County's October 7, 2011 submission. According to the plain language of Paragraph 7(j) of the Settlement, legal action is a consideration only when a municipality (1) fails to take actions needed to promote the objectives of this Paragraph or (2) undertakes actions that hinder the objectives of developing the 750 affordable housing units. The Government is proposing that the County develop a hypothetical litigation strategy which is not required by the Settlement. Without identifying a specific AFFH project to juxtapose against a specific set of zoning ordinances, the development of such a hypothetical litigation strategy would be an exercise in futility.

The identification of zoning provisions that might hinder an undefined affordable AFFH housing proposal would, in and of itself, involve assumptions, speculation and conjecture. Virtually every zoning code provision is, by its nature and purpose, restrictive in some sense. Indeed, residential zoning could theoretically hinder any affordable AFFH project where the

emerge, then, on a case-by-case basis” citing *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977)), *aff’d*, 488 U.S. 15 (1988)(*per curiam*).

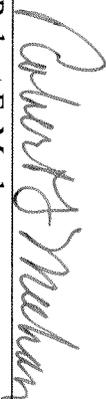
The Government has not cited, nor can it cite, to a case which successfully litigated a zoning ordinance with respect to development of a purely hypothetical project. Indeed, as noted in *O’Shea v. Littleton*, 414 U.S. 488, 513, 94 S.Ct. 669, 684 (1974):

Abstract injury is not enough. It must be alleged that the plaintiff ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged statute or official conduct. *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). The injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’ *Golden v. Zwickler*, 394 U.S. 103, 109-110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941); *United Public Workers v. Mitchell*, 330 U.S. 75, 89-91, 67 S.Ct. 556, 564-565, 91 L.Ed. 754 (1947). Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. *Bailey v. Patterson*, 369 U.S. 31, 32-33, 82 S.Ct. 549, 550-551, 7 L.Ed.2d 512 (1962); *Indiana Employment Division v. Burney*, 409 U.S. 540, 93 S.Ct. 883, 35 L.Ed.2d 62 (1973). See 3B J. Moore, *Federal Practice*, 23.10-1, n. 8 (2d ed. 1971).

The mere fact that zoning could potentially be an obstacle to affirmatively further fair housing does not, in and of itself, give the County standing to challenge such zoning in Court. The Government requests that the Monitor require the County to identify “specific zoning issues in particular municipalities that unjustifiably hinder the development of Affordable AFFH Units and the County’s obligation to affirmatively further fair housing and, accordingly, will be challenged by the County.” Govt Stmt, p.8. Such identification without a particular project

The County's AI fully complies with the requirements of the Settlement with respect to the promotion of the source of income legislation and has identified and analyzed issues and actions with regard to local land use regulations. As such, the Government is unreasonably withholding its approval of the AI. Consequently, the Monitor should resolve the instant disputes in favor of the County and the AI should be deemed approved so that the County's time, funds and efforts may be fully devoted to accomplishing the objectives of the Settlement to affirmatively further fair housing.

Dated: October 21, 2011
White Plains, New York


Robert F. Meehan
Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601
(914) 995-2690

⁴ “[A] plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court’s intervention. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of ‘a real need to exercise the power of judicial review’ or that relief can be framed ‘no (broader) than required by the precise facts to which the court’s ruling would be applied.’” *Citations omitted*.

June 25, 2010

Members of the Westchester County
Board of Legislators
148 Martine Avenue
White Plains, New York 10601

Dear Honorable Board:

Pursuant to Sections 107.71 and 209.151 of the Westchester County Charter, Local Law 3-2010 adopted by your Honorable Board on June 14, 2010 and presented to me on June 15, 2010, is hereby returned to the County Board with my disapproval for the reasons set forth herein.

The Local Law in question has been the subject of a lengthy and substantial debate. During the months of deliberations your Honorable Board attempted to address the concerns of all affected parties, however, in doing so has presented a Local Law that creates more ambiguity, uncertainty and unnecessary regulation. The Local Law will not, in this form, advance the cause of providing affordable housing in the County and through potential unintended consequences may even hinder that cause. Indeed several of your honorable members stated for the record that the Local Law served to be a "disincentive to landlords."

The Local Law also attempts to circumvent current federal regulations that specify that the Section 8 Housing Assistance Program (known also as the Housing Choice Voucher Program-the "Program") is a voluntary plan. The Committee report affixed to the Local Law cites the Program established by the United State Department of Housing and Urban Development. The Committee report fails to acknowledge the regulations and obligations that landlords have who elect to accept Section 8 tenants.

Likewise the Local Law raises a question of equal protection. If Federally assisted tenants are a discriminatory class akin to race, creed, age etc., why is that "discriminated" class entitled to exceptions? If Federally assisted tenants are to be elevated to a "protected" class within the County's Human Rights Law, why are they allowed to have so many exceptions to its applicability? The Local Law presented exempts certain property classifications (see Section 3-V (3)). Could this open the door to

Office of the County Executive

Michaelian Office Building
White Plains, New York 10601

Telephone: (914) 995-2900

E-mail: ce@westchester.gov

Packet Pg. 302

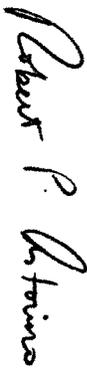
its interaction with the requirements of the Emergency Tenants Protection Act of New York State. While the provisions of the Local Law "sunset" in five years, the requirements of ETPA law does not, which could lead to confusion and potential unnecessary litigation.

The Local Law places an unfair burden upon limited income properties, including in some instances one and two family homes. Section 8 imposes upon landlords its own lease terms, specific maintenance and service requirements. Involvement of a bureaucratic maze into the landlord and tenant relationship is particularly a hardship on landlords of a single family home or someone who may own as few as two, two-family homes. The largest additional burden placed upon the landlord is the lost opportunity costs for viable tenants who are turned away in favor of a Section 8 tenant that cannot be rejected, but who may decide to forego the apartment and leave the landlord with no tenant. Once a landlord accepts the voucher the unit must be taken off the market for weeks or months while necessary inspections and paperwork are completed. Once that process is complete, the Section 8 tenant may, solely at the tenant's option, decide to move somewhere else and not accept the lease. It could be a double hit to a small landlord who lost a viable tenant, waited a month for approval of a Section 8 tenant and now is left with an empty apartment only to start the process all over again.

Finally, the Board has not considered the appropriateness of subjecting landlords to the scrutiny of the Human Rights Commission and the potential severe fine of \$50,000.

For these reasons, Local Law 3-2010 is returned herewith as vetoed with my objections so noted for the record.

Sincerely,



Robert P. Astorino
County Executive

Attachment: Local Law-Source of Income-7-12-10-FINAL (LL-2010-3 : LOCAL LAW - Source of Income)

to be if you are Muslim, you are going until proven innocent. New York, and Brooklyn in particular, is home to one of the largest Muslim populations in the nation. We face serious security challenges; unfortunately this approach by the Department may not only violate the law but also focuses resources on those who seek to do us harm," continued Parker.

Associated Press regarding alleged improper police practices by the NYPD warrants further investigation by the Attorney General. The fact that we live in a world of potential threats to security at home does not give anyone a license, let alone the New York City Police Department, to allegedly disregard the constitutional rights and liberties which make our nation free from improper intrusions into houses of worship, student associations and organized public opinion. To permit the police such unbridled power to disrupt the civil liberties of people innocent of any wrongdoing would make a mockery of what it means to be an American. Accordingly, I urge the Attorney General to launch a more critical investigation into the allegations raised by the Associated Press reporters," contended Senator Ruth Hassell-Thompson.

"The NYPD exists to enforce the law, not to ignore it. Racial profiling of any ethnic group and clandestine unconstitutional actions, for if true, stopped immediately," said Senator Valmarco Montenegro.

Senator Gustavo Rivera echoed these concerns. "Local law enforcement relies on the trust and cooperation of all communities in New York, including the Muslim community. That trust is critical in order for NYPD to do its job, but unfortunately, that trust is eroding as reports of questionable behavior and surveillance have made Muslim New Yorkers feel that local law enforcement has used profiling to make assumptions and target their community. I encourage the Attorney General to look into these questionable tactics in order to ensure that all New Yorkers' civil rights are protected and to foster an environment where New Yorkers feel that local law enforcement is working to protect all of our communities."

Hundreds of thousands of Muslim Americans are a part of the fabric of New York City. They are our neighbors, physicians, policies of Commissioner Ray Kelly and Deputy Commissioner David Cohen reflect a view that Muslims are a fifth column. Not only is this false but as heads of other law enforcement agencies noted, this approach will alienate communities and reduce cooperation with police. My colleagues and I look forward to the results of Attorney General Schneiderman's investigation."

About Senator Parker Senator Kevin S. Parker is intimately familiar with the needs of his ethnically diverse community, that consists of 311,000 constituents in Flatbush, East Flatbush, Midwood, Ditmas Park, Kensington and Boro Park. He represents the largest expatriate Pakistani community in the United States, the majority of whom are Muslim. He is the Ranking Member of the Senate Energy and Telecommunications Committee, former Majority Whip and First Vice Chair of the Association of Black, Puerto Rican, and Asian Legislators.

MESSAGE FROM

Steps on Affordable Housing

By PETER SWIDERSKI

This message seeks to describe a number of initiatives underway in the village on affordable housing as well as the village's role in complying with the requirements of a lawsuit, which Westchester County settled around the issue of affordable housing.

First, some background: In Westchester County, affordable housing is defined, specifically, as rental or purchase property that can be afforded by certain income levels, depending upon whether you are an individual or family. There are various categories of affordable housing, based on the percentage of the median income of a Westchester resident, currently set at \$73,300 for an individual and \$104,700 for a family of four. Rental housing is considered affordable if it can be managed by those who make 50% or 60% of the median income, while ownership homes are considered affordable if the mortgage payments can be managed by a family making 80% of the median income.

Hastings has a range of housing: approximately 2,000 regular free-standing

homes and about 1,000 apartments, a decreasing number of which are rental. Market forces ensure that every year, fewer of these housing units are considered affordable. While New York State regulates some rental units, most housing considered affordable is vulnerable to market forces and can increase in price. Keeping Hastings "affordable" is more than a nice idea; it's crucial to preserving one element of Hastings' diversity, as well as providing housing for people who work here.

To that end, the Hastings Affordable Housing Committee ("HAHC"), established by the Board of Trustees and functioning since 1998, has worked for years to try to identify suitable plots of land to build affordable housing, as well as work to encourage an environment where affordable housing can be built. The HAHC, staffed by volunteers, has built a total of 18 units of affordable housing so far - and this housing is built to stay affordable for 99 years, as part of the terms of the lease or deed. Other projects are in the works; some initiated by the HAHC and at least one by a private developer. We'll touch on these later.

With this as background, I want to describe the Westchester County Settlement and the impact it will have on us. In 2009, Westchester County settled a lawsuit, which accused the County of, among other things, inadequate efforts to market federally funded affordable units broadly enough to achieve increased racial diversity. As part of the settlement, the County agreed to set aside \$50,000,000 to help subsidize the development of 750 units of affordable housing that would be built in 31 communities in Westchester that fell below a certain threshold of diversity. Hastings was identified as one of those communities. Also, the County agreed it would develop and then urge the implementation in these local communities of a set of model laws (ordinances) that would emphasize the creation of "affordable affirmatively furthering fair housing" (AAFFH), a real mouthful which essentially means units rented or purchased would be affordable at the 50% and 60% and 80% thresholds mentioned above. Moreover, those units cannot be preferentially reserved for a community's workers (e.g. for its firemen and teachers) like we do now in Hastings for affordable housing, but rather must be marketed broadly within the village, and also outside the community in order

to attract individuals who will increase a community's racial diversity.

Hastings already has a set of laws and policies that meet some of the criteria in these model ordinances. For example, we currently establish that any new multi-unit housing with ten or more units must set aside 15% for either affordable housing or a combination of affordable and what is known as "workforce housing", intended for residents employed by the village or school system. This is a more aggressive threshold than even the County requires. However, our rules and policies, already among the most progressive in the County, will need some further modification and enhancement to be in line with the spirit of the model ordinances.

Pace University, using external grant funding, has done a preliminary analysis of our existing codes and has compared them to the model ordinances. This Wednesday, at 7:00 at the Community Center, the experts from Pace will walk members of the Affordable Housing Committee, the Planning and the Zoning Boards through what the potential changes could be; this is an open meeting and residents are welcome. Based on the outcome of this walk-through, I've asked the Hastings Affordable Housing Committee to draft

to preserve and enhance that diversity.
Peter Swiderski is the mayor of
Hastings-on-Hudson.
Direct email to: msw@hastingson.org.

to preserve and enhance that diversity.
Peter Swiderski is the mayor of
Hastings-on-Hudson.
Direct email to: msw@hastingson.org.

to preserve and enhance that diversity.
Peter Swiderski is the mayor of
Hastings-on-Hudson.
Direct email to: msw@hastingson.org.

to preserve and enhance that diversity.
Peter Swiderski is the mayor of
Hastings-on-Hudson.
Direct email to: msw@hastingson.org.

OpEdSection

ED KOCH COLUMN

The Obama Administration Should Not Be Impeded By the City and State From Implementing Its Program to Deport Criminal Illegal and Legal Aliens

By ED KOCH

I read the op ed of Nicholas D. Kristof in the New York Times of October 6th with its headline caption, "Is Israel Its Own Worst Enemy?" I concluded on finishing that article that it is Nicholas Kristof who is truly an enemy of Israel.

As is fashionable nowadays, Kristof blames Israel for the lack of progress in the peace process with the Palestinians, claiming, "Nothing is more corrosive than Israel's growth of settlements."

Why? One million, five-hundred-thousand Muslims live in Israel. Why do the Palestinian Authority and its supporters like Kristof believe that the West Bank should be "Judeanized" or that Jews may not live in a part of Jerusalem when they have lived in all parts of Jerusalem for 3,000 years until the Jordanians drove them out in 1948? Why, when a two-state solution comes into being and borders are agreed upon and Jews are located on the Palestinian side, shouldn't Jews have the choice of remaining on as Palestinian citizens or resident aliens or leaving?

Nothing offended me more and showed Kristof's true colors and antagonism to Jews than his claim that the Obama administration "humiliated itself" at the U.N. by making it clear that it will veto any effort to create a Palestinian state outside of direct negotiations between the parties. What is humiliating about

insisting that the Palestinians recognize the state of Israel and negotiate all of their differences? Is Kristof implying that Obama is being pressed into taking that stance against his will, or against the will of the American people? Is he implying that the Jews forced him into taking that position?

Kristof calls for the pre-1967 borders with land swaps. Does he tell us how that is possible when Hamas (half of the Palestinian Authority) the Quartet, U.S., Russia and European Union label as a terrorist organization) believes it is entitled to occupy Tel Aviv and its charter states every Jew entering Palestine after 1917 must be expelled. Has Kristof ever criticized Hamas' charter and its numerous acts of terrorism intended to accomplish this goal?

Kristof ever addressed that outcome? The criticism that Kristof lodges against Hamas is "And Hamas not only represses its own people, but also managed to devastate the peace movement in Israel. That's the saddest thing about the Middle East: hardliners like Hamas empower hardliners like Mr. Netanyahu." As Ronald Reagan once said, "There he goes again," equating terrorists with Israeli "hardliners." Surely, Kristof knows the difference.

Kristof criticizes the fact that Israeli citizens have become more conservative on "border[s] and land issues." Why shouldn't they? Former Israeli Prime Ministers Ehud Barak and Ehud Olmert offered to settle borders giving the Palestinian state 97 percent of the West Bank which they rejected. Many supporters of Israel believe Palestinians are not interested in a two-state solution, one Jewish and one Palestinian, but seek instead a return of Palestinians to Israel so as to ultimately overwhelm the Jewish state and make it a Muslim state. Has

The County's Settlement is not a burden for us - rather it provides us with an opportunity to affirm more vigorously our commitment to creating affordable housing where we can. Market forces will do what they will - we cannot control those anymore than we could the tides or

and its military lay down their arms and submit to threats of violence rather than defend their people. What an outrage. I have no doubt he is repelled by the deaths of innocent civilians in Syria at the hands of the Syrian army, but expresses no qualms at what would follow to the Jews of Israel were the Arab armies or terrorists to enter a vanquished Israel.

Kristof attacks Israel for "burning bridges" with Turkey. I believe it is Turkey that has effectively declared war on Israel. Recently, Turkey expelled Israel's ambassador and Turkey's prime minister Erdogan stated he will send Turkey's navy to break the Israeli blockade of Gaza, a blockade a U.N. commission has just said is legal under international law and intended to prevent the Hamas government in Gaza from bringing even more rockets and other arms from Iran into Gaza. So if the Israeli navy continues the blockade, and the Turkish navy seeks to break it, and there is a naval clash, clearly Kristof will blame Israel for protecting its people from attack, the first obligation of any government.

Kristof closes with his usual disingenuous "mea culpa," saying, "Some of my Israeli friends will think I'm unfair and harsh, applying double standards by focusing on Israeli shortcomings while paying less attention to those of other

Kristof closes with his usual disingenuous "mea culpa," saying, "Some of my Israeli friends will think I'm unfair and harsh, applying double standards by focusing on Israeli shortcomings while paying less attention to those of other

Continued on page 33

Continued on page 33

Continued on page 33

Continued on page 33

Exhibit 6



United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

By mail and electronic mail

October 21, 2011

James E. Johnson, Esq.
Debevoise & Plimpton, LLP
919 Third Avenue
New York, New York 10022

Re: United States ex rel. Anti-Discrimination Center v. Westchester County, 06 Civ. 2860

Dear Mr. Johnson:

The United States (the “government”), plaintiff in the above-named action, respectfully submits this letter in reply to Westchester County’s statement of its position in the disputes referred to the Monitor by the parties. As set forth in further detail below (although we respond to only the most pertinent points of disagreement), the County’s statement fails to demonstrate that the disputes referred to you should be resolved in their favor. Accordingly, the Monitor should require the County to take the actions set out in the government’s opening submission.

Source-of-Income Legislation

In maintaining that it has satisfied its obligation to “promote” source-of-income legislation, the County contends that “the Government’s” position “improperly deprives the powers of future Westchester County elected officials, and interferes with their ability to respond to the priorities and concerns of their constituents.” County Statement 12; *accord id.* 13. But missing from the County’s argument is any acknowledgment that it is the County—specifically, the County’s elected officials—who made the commitment to promote source-of-income legislation. There is nothing extraordinary, improper, or undemocratic about holding the County to the promises it made in a court-approved stipulation and order, and whatever limitations exist on the County’s future actions result from its own agreement to the Settlement. Similarly, the County asserts that the legislation could “have an adverse affect [*sic*] upon the County’s ability to affirmatively further fair housing,” County Statement 16¹—a position that is not only unexplained and

¹ At several places in its statement, the county asserts that holding it to its commitments in the Settlement will hinder other objectives of the Settlement or the furtherance of fair housing. County Statement 5, 8. The government will not accept the position, now or in the future, that the

(continued...)

unjustified by any evidence,² but contradicted by the County's agreement in the Settlement that promotion of the legislation would be one of its "additional obligations to [affirmatively further fair housing]." Settlement ¶ 33.

The County now claims that source-of-income legislation is "unwarranted." County Statement 12. But nothing in the Settlement makes the County's commitments contingent on a showing that the legislation is needed (much less does it provide a standard for assessing such a need). The County also notes that neither New York State nor the federal government has adopted source-of-income legislation, which presumably it takes to mean that the bill it agreed to promote is unnecessary or inadvisable. County Statement 15. That, however, is irrelevant to the commitment the County undertook to promote the legislation—and, of course, if federal or state prohibitions on source-of-income discrimination were in place there would be no need for a County ordinance to the same effect.

Finally, the County claims that the Settlement does not require adoption of the legislation, but only promotion by the County Executive. As explained in the government's opening letter, Gov't Statement 4 n.3, that is only because the Settlement did not constrain the County Board of Legislators, only the County itself. Moreover, it is immaterial to the main question in this dispute: whether the County, acting through the Executive, promoted the legislation; as described in the opening submission, it did not, and the County advances no facts now to disturb that conclusion.³

For those reasons, and those in the government's opening letter, the dispute regarding source-of-income legislation should be resolved in the government's favor.

Exclusionary Zoning

The County's position on the second dispute, regarding municipal zoning practices, relies entirely on a mischaracterization of what the government has sought. The County asserts that the government has demanded that the County "detail a hostile campaign against the municipalities" and "specifically reference and threaten premature and frivolous litigation against currently cooperative local municipalities." County Statement 10–11. Obviously, the government has asked for no such thing. What the government has asked for is reasonable, supported by the

¹ (...continued)

County may choose among its obligations, or that requiring it to meet those obligations will be to blame for the County's failure to meet others.

² The law-student note cited by the County hardly suffices. In any event, the note argues only that source-of-income discrimination laws are preempted by federal statute, acknowledging that the courts to have considered the issue have unanimously adopted the opposite view.

³ The County also cites two upcoming studies of housing discrimination. County Statement 16. But as its AI submission acknowledged, those studies will not assess source-of-income discrimination; for the studies to do so would require an "expan[sion]" of their scope. July 11, 2011, AI submission at 195–96.

Settlement, and consistent with the Monitor's prior recommendations: to identify exclusionary zoning practices that are impediments to fair housing, and to specify a strategy to overcome those impediments that would—as plainly contemplated by the Settlement—include legal action in certain identified situations. Nothing about that requires the County to speculate or to prepare hypothetical lawsuits; the necessary strategy would merely require identification of the types of situations that would lead to litigation. That is entirely reasonable, and would fairly and clearly communicate to municipalities what actions are needed, and the consequences of not taking such actions. In short, it would state a “clear strategy for how the County will employ carrots and sticks to encourage compliance by municipal governments,” including “the County's plan for monitoring local approval processes and municipalities' cooperation with the County's efforts to implement the Stipulation.” Amended Monitor's Report for the Period of Aug. 10, 2009 Through Feb. 10, 2010, at 8–9.

No such plan or strategy has been provided by the County. Although the County suggests it has done so by citing numerous pages of its AI submission, County Statement 5–7 & n.3, in fact those references provide (at best) only vague and generalized descriptions of land-use and zoning practices and their effect on fair-housing development.⁴ Even if there were more substance to these statements, such that they placed municipalities on notice of what the County expects, they provide absolutely no means of encouraging municipalities to adhere to them. And while the County has indicated it is willing to identify specific exclusionary zoning by December 2012, then review those zoning practices, then communicate “recommendations on changes” to municipalities so that local officials can take corrective action, County Statement 8, this course of action is insufficient: it contemplates a year-and-a-half delay before even identifying problematic zoning issues,⁵ then fails to specify actions (beyond “recommendations”) the County will take to overcome these impediments to fair housing.

In particular, while the County's AI submission discusses general litigation principles (at 204–05), the County has limited itself to legal action where an individual project is “blocked or hindered by a local ordinance,” County Statement 6. That narrow reading improperly shifts the burden to developers. An exclusionary zoning practice standing alone may be an impediment to the development of Affordable AFFH Units, as rational developers would be loath to undertake the planning necessary for a development knowing in advance that it would be barred by a zoning ordinance (or, at the least, require a costly process to seek a variance). Yet the County would require exactly that before litigating. That falls short of the County's commitment to take

⁴ As representative examples: “Excessive, i.e. unnecessarily restrictive limits on density, may limit the development potential for affordable housing developments.” “Zoning ordinances should not add unnecessary conditions on the definition of a dwelling unit.” “Moratoria should not be used to impede the development of affordable housing.” “Each municipality should have provisions to allow the development of multi-family housing.” AI submission at 150–51. Only the last of these states more than a vague principle, and even that is so unspecific as to give no real guidance to municipalities.

⁵ December 2012 is, of course, not only a year and a half after the County's latest AI submission, but more than three years after the entry of the Settlement. The County should have taken these actions long ago.

appropriate legal action against municipalities that “do[] not take actions needed” to promote, or “undertake[] actions that hinder,” development of housing units under paragraph 7(j) of the Settlement.

Finally, HUD’s Fair Housing Planning Guide (“FHPG”) is fully consistent with the government’s position here. *Contra* County Statement 7. The Guide refers several times to zoning as a possible impediment to fair housing that must be addressed in an AI. *E.g.*, FHPG at 2-9 (“zoning and land use policies” are “information needed for conducting an AI”); 2-31 (listing “[z]oning and site selection” as impediment to fair housing choice to be addressed in AI); 4-5 (listing “[l]ocal zoning laws and policies” as an “AI subject area”).⁶

Accordingly, the Monitor should require the County to take the steps outlined in the government’s initial submission to develop a strategy regarding municipalities’ actions. More specifically, the County must identify specific problematic zoning issues, not by December 2012 as stated in the AI submission, but within a reasonable time: by February 29, 2012, at the latest. By that date it must also back its recommendations for corrective action by specifying steps the County may take and a timeline for doing so.

Thank you for your consideration.

Very truly yours,

PREET BHARARA
United States Attorney

By: /s/ Benjamin H. Torrance
BENJAMIN H. TORRANCE
Assistant United States Attorney
Telephone: 212.637.2703
Fax: 212.637.2702
E-mail: benjamin.torrance@usdoj.gov

cc: Robert Meehan, Esq. (by e-mail)

⁶ The County cites the Guide at page 3-11 to say the actions identified in the FHPG are not “required,” but Chapter 3 of the Guide by its terms only applies to states and state-funded jurisdictions; the County’s grants are governed by Chapter 4.