

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA <i>ex rel.</i> | : |
| ANTI-DISCRIMINATION CENTER OF           | : |
| METRO NEW YORK, INC.,                   | : |
|   | : |
| Plaintiff,                              | : |
|   | : |
| v.                                      | : |
|   | : |
| WESTCHESTER COUNTY, NEW YORK,           | : |
|   | : |
| Defendant.                              | : |
| -----                                   | X |

No. 06 Civ. 2860 (DLC)  
ECF Case

**MONITOR’S THIRD BIENNIAL ASSESSMENT OF WESTCHESTER  
COUNTY’S COMPLIANCE**

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## **Introduction**

This report of the Monitor is respectfully submitted pursuant to Paragraph 15 of the Stipulation and Order of Settlement and Dismissal (“Settlement”) entered in this matter on August 10, 2009.<sup>1</sup> This is the third biennial assessment (“Third Biennial Assessment” or “Assessment”) required by the Settlement and reports on significant developments related to the efforts of the County of Westchester (“County”) to comply with the obligations set forth in the Settlement. This Assessment covers the period January 1, 2014 through December 31, 2015.

The Report relies principally on the following sources of information: (i) information contained in the County’s eight quarterly compliance reports concerning its implementation of the Settlement in calendar years 2014 and 2015;<sup>2</sup> (ii) County responses

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<sup>1</sup> In accordance with Paragraph 40 of the Settlement, the Monitor had a conference call on April 26, 2016 with representatives of the County and the United States Department of Justice to discuss remedial recommendations and other matters included in the Report.

<sup>2</sup> The County is required to submit quarterly compliance reports pursuant to Paragraph 28 of the Settlement. The County submitted four quarterly reports covering its compliance with the Settlement in calendar year 2014: the report submitted on May 12, 2014 covers the first quarter of 2014 (“2014 Q1 Report”); the report submitted on July 21, 2014 covers the second quarter of 2014 (“2014 Q2 Report”); the report submitted on October 21, 2014 covers the third quarter of 2014 (“2014 Q3 Report”); and the report submitted on February 11, 2015 covers the fourth quarter of 2014 (“2014 Q4 Report”). These reports are attached hereto as Exhibits 1, 2, 3, and 4. The County submitted four quarterly reports covering its compliance with the Settlement in calendar year 2015: the report submitted on May 12, 2015 covers the first quarter of 2015 (“2015 Q1 Report”); the report submitted on August 11, 2015 covers the second quarter of 2015 (“2015 Q2 Report”); the report submitted on November 10, 2015 covers the third quarter of 2015 (“2015 Q3 Report”); and the

to the Monitor's requests for information; (iii) meetings with County and municipal officials; (iv) depositions conducted pursuant to this Court's order dated August 27, 2014; and (v) site visits with County and municipal officials, developers, and housing advocates.

The Report is divided into six sections. Section I assesses the County's compliance with the Settlement's affordable housing development benchmarks. Section II discusses the status of the County's affirmative marketing, public education, and other outreach efforts. Section III discusses the Community Design Institutes, an initiative developed by the Monitor to provide alternative ways for communities to work through the challenges of building AFFH affordable units. Section IV discusses zoning and other local regulatory issues, including reports on zoning prepared by the Monitor at the request of the United States Department of Housing and Urban Development ("HUD") and the Chairman of the County Board of Legislators ("BOL"). Section VI addresses the costs incurred by the Monitor in overseeing compliance with the Settlement.

As with previous biennial reports, the County's record of compliance is mixed, with evidence of significant steps backward. Briefly surveying the disputes since 2010 reveals a record of confirmed breaches of the Settlement compounded by what the Monitor considers to be breaches or evidence of bad faith, now awaiting judicial review. Even with these compliance problems, the County has made progress in providing affordable Affirmatively Furthering Fair Housing ("AFFH") homes.

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report submitted on January 21, 2016 covers the fourth quarter of 2015 ("2015 Q4 Report"). These reports are attached hereto as Exhibits 5, 6, 7, and 8.

The Settlement was entered to resolve litigation brought in light of the County's failure to produce an adequate Analysis of Impediments ("AI") that considered the impact of race and ethnicity in housing choice; the provisions reflect an effort to bring about systemic change. Chief among them are (i) the requirement to achieve certain benchmarks with respect to the building of affordable AFFH housing; (ii) the requirement to promote inclusionary zoning in all eligible municipalities; (iii) the duty to complete an AI consistent with the terms of the Settlement; (iv) the duty to market the new housing units to those least likely to apply; and (v) the duty to educate the public about the benefits of integration. During the most recent assessment period, the County has failed to do two things essential to structural reform. First, the County has failed to complete an AI consistent with the terms of the Settlement. Second, the County has failed to take steps to provide incentives, or engage in litigation, to ensure that all of the eligible communities adopt the Model Zoning Ordinance or otherwise make their zoning more inclusive.

Following the County's release of the quarterly report for the quarter ending December 31, 2014, the Monitor found that the County had failed to meet its benchmarks for financing affordable AFFH housing units. The question whether that finding will become the basis of a penalty is now before the Court. In 2015, the County satisfied the Paragraph 7 benchmarks.

As described in greater detail below, the County has not satisfied its obligation to promote inclusionary zoning by using, among other things, economic incentives and litigation to urge the adoption of the Model Zoning Ordinance. Indeed, it can fairly be

argued that the County has taken the opposite tack by declaring, with no analysis, that none of the municipal ordinances are exclusionary and claiming that an insistence on that analysis was an attempt to tear up local zoning. The County's failure to satisfy its public education obligation is discussed in detail in a report issued earlier this year. *See* Monitor's Report Regarding Westchester County's Compliance With Paragraph 33 (c) of the Stipulation and Order of Settlement and Dismissal ("Public Statements Report"), March 17, 2016 (ECF No. 562).

In the first two biennial reports, the Monitor noted incremental improvements in the number of municipalities that had modified their zoning regulations to become more inclusive. *See* Monitor's First Biennial Assessment of Westchester County's Efforts and Progress Related to the Obligations Set Forth in the Stipulation and Order of Settlement and Dismissal, at 23–24, June 26, 2014 (ECF No. 391); Monitor's Second Biennial Assessment of Westchester County's Compliance ("Second Biennial Assessment"), at 56–57, June 26, 2014 (ECF No. 478). That positive trend all but halted during the last reporting period as the County refused to analyze municipal zoning as required by the Settlement,<sup>3</sup> and adopted a strident and misleading campaign alleging that HUD was attempting to destroy local zoning. *See* Public Statements Report.

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<sup>3</sup> *See Cty. of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 802 F.3d 413, 433 (2d Cir. 2015) (“[T]he County reached the same boilerplate conclusion for every municipality—namely, that the local zoning laws did not have a disparate impact on minorities and did not pose an impediment to affirmatively furthering fair housing with respect to race.”).

**I. Developing Units Required by the Settlement**

**A. County Efforts to Meet Annual Benchmarks**

The Settlement provides that there must be at least 750 “Affordable AFFH Units” developed in 31 Westchester municipalities that meet specified demographic criteria by August 10, 2016. Settlement ¶ 7. To ensure that the goal would be met, the Settlement provided interim benchmarks for financing and for building permits; by the end of 2015, the County was required to ensure that at least 525 Affordable AFFH Units had building permits and 600 Affordable AFFH Units had financing in place. Settlement ¶ 23.

On May 8, 2015, the Monitor issued a report finding that the County had not complied with its obligation to have financing in place for at least 450 affordable units by the end of 2014. *See* Monitor’s Supplemental Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the 2014 Calendar Year (“2014 Supplemental Report”), May 8, 2015 (ECF No. 507). As described more fully in Section II. C. *infra*, the shortfall was a result of the County’s inclusion of 28 Affordable AFFH Units from the Chappaqua Station development, a development for which, in the Monitor’s view, financing is not “in place.” The County objected to the 2014 Supplemental Report and, on November 19, 2015, Magistrate Judge Gorenstein issued a Report and Recommendation (“R&R”) overruling the Monitor’s finding. The Government has objected to the R&R and the finding has been fully submitted for review by this Court.

The County has represented that, as of December 31, 2015, there were 649 Affordable AFFH Units with financing in place and 588 Affordable AFFH Units with

building permits, satisfying both interim benchmarks, Ex. 8, 2015 Q4 Report, at 1, and representing an increase in both: (i) the number of units with financing in place of 250 units (62.7%) from the Second Biennial Assessment; and (ii) the number of units with building permits of 203 units (52.7%) since the Second Biennial Assessment. Second Biennial Assessment, at 19.

There are 79 active development sites the County represents will have at least one eligible Affordable AFFH Unit, distributed across 27 of the 31 eligible municipalities. *See* Ex. 8, 2015 Q4 Report, at 1. When completed, the County expects these sites to create 845 Affordable AFFH Units, more than the 750 mandated by the Settlement, assuming necessary approvals are obtained. *Id.* A total of 362 of the 845 Affordable AFFH Units are located in census blocks that, in 2000, had neither African American nor Hispanic residents. *Id.*

The County further reported that 334 Affordable AFFH Units distributed across 17 developments are completed and occupied, an increase of 161 units (93.1%) since the Second Biennial Assessment. *See* Second Biennial Assessment, at 20.

Notwithstanding the County's representations in its quarterly reports, the Monitor has determined that the units of two developments—Chappaqua Station and The Cambium—should not count towards the Settlement's annual benchmarks for the year-end 2015. *See infra* at Section I.C.2. However, even when taking these deficiencies into account, the County remains above its current annual benchmark requirement and, therefore, is currently in compliance with Paragraph 23.

**B. Distribution of Units Across Municipalities**

Although the Settlement points towards an equitable distribution of affordable AFFH units throughout the County, it does not require developers to build units in particular locations. “In the County’s facilitation of the development of the Affordable AFFH Units, priority shall be given to sites within qualifying municipalities and census tracts that are located in close proximity to public transportation. No sites, however, shall be excluded from consideration because of lack of public transportation access.”

Settlement ¶ 7(g). The County’s record of equitably distributing proposed units across the 31 eligible municipalities has steadily improved since the Monitor first identified the risks of concentration in his third annual status report to the Court. *See* Monitor’s Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the 2012 Calendar Year, at 9–11, February 25, 2013 (ECF No. 429). The County’s Third Quarter 2012 report showed that 70% of the proposed AFFH units were to be located in just four communities (Cortlandt, New Castle, North Salem, and Somers), and that there were no proposed units in 12 eligible municipalities. *See id.* at 9.

The Monitor noted progress on this front in a subsequent report. By the end of March 2014, the number of eligible municipalities without proposed units had decreased to eight, and the four municipalities with the highest projected concentration of AFFH units accounted for 55% of the proposed units. *See* Second Biennial Assessment, at 21. Nevertheless, at the time, the Monitor noted that there remained room for the County to strengthen its record. *Id.* at 23.

The Monitor's annual status report filed last year noted continued improvement. The four municipalities that, by year-end 2014, had the highest projected concentration of AFFH units (Buchanan, Cortlandt, North Salem, and Somers) accounted for 347 AFFH units out of a total of 718 AFFH units, or 48.3% of the proposed units. *See* Ex. 4, 2014 Q4 Report, at App'x I-1. Only six eligible municipalities lacked any proposed units. *Id.* at 1. Seven municipalities (Buchanan, Cortlandt, New Castle, North Salem, Rye City, Somers, and Yorktown), however, accounted for 515 proposed AFFH units, or 71.7% of the total proposed units, indicating that there continued to be room for improvement. *Id.* at App'x I-1.

In 2015, the County's progress continued. The four municipalities that, by year-end 2015, had the highest projected concentration of AFFH units (Somers, Yorktown, Cortlandt, and North Salem) accounted for 351 AFFH units out of a total of 845 AFFH units, or 41.5% of the proposed units. *See id.* 1. Only four eligible municipalities lack any proposed units. *See* Ex. 8, 2015 Q4 Report, at 1. Seven municipalities (Buchanan, Cortlandt, New Castle, North Salem, Rye City, Somers, and Yorktown), however, accounted for 530 proposed AFFH units, or 62.7% of the total proposed units. *See id.* App'x I-1.

Another indicator of the equitable distribution of affordable housing throughout the County is the size of each proposed development—concentrating affordable housing in a few large developments is, for several reasons, less desirable than distributing affordable housing units throughout several, smaller developments. The County's record on this score has also shown improvement. Of the 79 development sites now built,

approved, or proposed, 68 (86.1%) contain one to 25 units in total. *See* Ex. 8, 2015 Q4 Report, at App'x I-1. This is an improvement from the figure reported in the Second Biennial Assessment, when 71% of the developments had 25 units or less. Second Biennial Assessment, at 22. Most significantly, nearly three-quarters of the less concentrated developments have between one and five AFFH units. *See* Ex. 8, 2015 Q4 Report, at App'x I-1.

The County should continue its efforts to develop units more broadly.

### **C. County Inquiries and Responses Thereto**

During 2014 and 2015, the County submitted funding advisories regarding proposed developments to be counted towards the Settlement's 750-unit requirement. The advisories and inquiries received since the filing of the Second Biennial Assessment, and the Monitor's responses, are attached hereto as Exhibits 9 to 50. Two of the developments are addressed in more detail below:

#### **1. Chappaqua Station**

Chappaqua Station is a proposed 28-unit affordable housing development to be located at 54 Hunts Lane, in the Village of Chappaqua, Town of New Castle. The building would be located on a small parcel of land (0.34 acres) between a major highway (the Saw Mill River Parkway), a bridge, and railway tracks (the Chappaqua Metro-North Railroad station is immediately adjacent to the site). The development was proposed by Conifer Realty, LLC ("Conifer").

In the spring of 2010, the Town of New Castle rezoned the site to allow for transit-oriented workforce housing. *See* June 15, 2012 Letter from Town of New Castle Supervisor Susan E. Carpenter to James E. Johnson, attached hereto as Ex. 51. Conifer subsequently inquired about the site; it had no prior involvement in the Town's decision to rezone the site for housing. Letter from Andrew V. Bodewes to James E. Johnson ("July 12, 2012 Letter"), attached hereto as Ex. 52. Conifer purchased the site in September 2010. By October 2011, the State had awarded financing for the project, the Town of North Castle had endorsed the project, and the County had informed the State of the County's intention to provide significant project funding. *See* Ex. 52, July 12, 2012 Letter; *id.* at attachment (Feb. 7, 2011 Letter from Edward Buroughs to Brian Lawlor).

In February 2012, the County, the Town of New Castle, and Conifer asked the Monitor to visit the proposed site. Second Biennial Assessment, at 60. In subsequent correspondence with Conifer, the Monitor identified several specific concerns about the site's location and configuration, and questioned whether the development, as proposed, would further the goals of the Settlement. *See*, April 12, 2012 Letter from James E. Johnson to Andrew Bodewes, attached hereto as Ex. 53; July 12, 2012 Letter from James E. Johnson to Andrew Bodewes, attached hereto as Ex. 54. In response to these concerns, and after several consultations with the Monitor, Conifer continued efforts to revise its plan and address the Monitor's concerns. Second Biennial Assessment, at 60. On September 7, 2012, the Monitor stated: (i) that the changes to the design were sufficient to overcome the Monitor's initial reservations, (ii) that the proposal furthered the goals of the Settlement, and (iii) if the plan then before the Monitor received municipal approval,

the units would count against Settlement requirements. *See* September 7, 2012 Letter from James E. Johnson to Andrew V. Bodewes, attached hereto as Ex. 55.

a. Public Opposition

In July 2012, the Town opened public hearings on the project and several residents and town officials raised questions about the proposed site. Second Biennial Assessment, at 61–62. Nevertheless, the Monitor, Conifer, and Town officials continued to discuss the development, and Conifer continued to modify its design in response to the public’s concerns. More than one year later, on September 10, 2013, the New Castle Town Board granted Conifer a special permit to develop Chappaqua Station. *See* Resolution, Town of New Castle Town Board, Conifer Special Permit Approval, September 10, 2013, attached hereto as Ex. 56. The special permit, however, identified certain variances that Conifer Reality would need to obtain from the New York State Hudson Valley Regional Board of Review (“Regional Board”) before the Town Building Inspector could issue a building permit, *id.* § 2.8.6, and further provided that “[o]ther variances may be required upon further review, upon receipt of a complete Building Permit application, and/or upon final design.” *Id.* § 2.8.6.1.

At the time of filing of the Second Biennial Assessment, in June 2014, the approval process was stalled; Conifer “ha[d] been seeking, without success, New York State building code approval.” Second Biennial Assessment, at 62. A slate of candidates opposed to Chappaqua Station won the November 2013 Town election; Town officials had begun to make public statements opposing development of the very same land their

predecessors had rezoned for residential use. *Id.* at 63. The Regional Board held two hearings in 2013, but made no decision by the end of that year. *Id.* On December 16, 2013, the County Board of Legislators voted to reject County funding for the proposal. *Id.* at 62. On February 3, 2014, Conifer filed a Fair Housing Complaint with HUD alleging discrimination by several Town Officials. *See* February 3, 2014 Complaint, attached to February 3, 2014 Letter from Randolph M. McLaughlin to Robert Norrington, attached hereto as Ex. 57.

Reviewing the status of the development in 2014, the Monitor noted:

[T]he history of the Chappaqua Station approval process provides a case study of the potential difficulty of building affordable housing in Westchester . . . [T]he developer has worked diligently over a two-year period to meet the concerns of the residents, town officials, and the Monitor. . . . While the County and municipal officials initially indicated their support for the proposal, that support has wavered considerably, adding to the uncertainty and expense of the project. The uncertainty and costs not only threaten the viability of the Conifer development, but may serve to deter other potential developers who could be considering building affordable housing in the Town of New Castle and elsewhere in Westchester County.

Second Biennial Assessment, at 63–64.

b. Events Since 2014

As described above, despite the fact that the Town Board granted Conifer a special permit in September 2013, construction could not begin until the issuance of certain variances by the Regional Board and the issuance of a building permit by the Town Building Inspector. On November 24, 2014, the Westchester Board of Legislators approved conditional financing for Chappaqua Station. The County funding is, however, expressly “subject to the approval of *all* required State and municipal variances.” Exs. 58

& 59, Westchester County, N.Y., Act Nos. 213-2014, at § 1; 214-2014, at § 1 (emphasis added). In other words, without Regional Board and Town approval of the variances, the funding is not available.

On January 22, 2015, following a lengthy review process, the Regional Board approved four building and fire code variances required by the special permit. *See* Tom Auchterlonie, *State Board Approves Variances For Chappaqua Station*, CHAPPAQUA DAILY VOICE, January 22, 2015, attached hereto as Ex. 60. The Regional Board of Review granted the variances over the opposition of Town Supervisor Robert Greenstein and Town Building Inspector William J. Maskiell, who testified against Conifer's petition. *See* Letter from Randolph M. McLaughlin to James E. Johnson, at 4, February 23, 2015, attached hereto as Ex. 61.

Nevertheless, even after the Regional Board's approval of the variances, Chappaqua Station continued to face additional municipal requirements. One obstacle, only recently cleared, concerned expiration of the special permit. New Castle contended that the special permit granted to Conifer had expired on or about March 20, 2015, and that Conifer needed to apply for an extension before commencing construction. *See, e.g.*, Letter from Edward J. Phillips to Randolph M. McLaughlin, February 5, 2015, attached hereto as Ex. 62. In opposition, Conifer argued that the special permit was valid for 25 years and therefore an extension request was unnecessary. *See, e.g.*, Ex. 61, February 23, 2015 Letter from R. McLaughlin to J. Johnson. Conifer sued New Castle on February 20, 2015, seeking a declaratory judgment upholding its interpretation on the question of expiration. *See* Verified Complaint, *Conifer Realty, LLC v. Town of New Castle*, No.

52286/2015 (N.Y. Sup. Ct. Feb. 20, 2015), attached hereto as Ex. 63. The County did not intervene or file an amicus brief in the lawsuit. On May 6, 2015, the Court granted the Town's motion to dismiss the complaint. *See* Decision & Order, *Conifer Realty, LLC v. Town of New Castle*, No. 52286/2015 (N.Y. Sup. Ct. May 6, 2015), attached hereto as Ex. 64. Shortly thereafter, Conifer requested a two-year extension from the Town. On May 26, 2015, the Town agreed to extend the duration of the special permit for eighteen months (until November 2016). *See* Town of New Castle Town Board, Resolution Extending Time to Complete Improvements Pursuant to Town Code § 60-430(M), attached hereto as Ex. 65.

More than four years after the Monitor was first asked to review a proposal for a site rezoned by the municipality on its own initiative, the development remains stalled. Conifer has yet to receive a building permit from the Town. The granting of permits appears to be within the sole discretion of Town Building Inspector William Maskiell, who has "expressed serious concerns about the safety" of the Chappaqua Station proposal and submitted testimony to the Regional Board of Review about the developer's "fail[ure] to create an acceptable safety margin for the public, first responders and the occupants of the proposed building." Letter from Edward J. Phillips to Department of State, Division of Code Enforcement and Administration, February 17, 2015, attached hereto as Ex. 66. Moreover, Conifer's Vice President alleges that in a meeting in March 2015, Maskiell stated that he would "not perform any work on [Conifer's building] permit application or the drawings until the \$152,000 permit fee was paid," at which point "the drawings 'would go all the way to the bottom of the pile.'" Letter from

Andrew V. Bodewes to William J. Maskiell, April 2, 2015, attached hereto as Ex. 67. Further, even if Mr. Maskiell were to grant the building permit, the special permit states that “[o]ther variances may be required upon further review, upon receipt of a complete Building Permit application, and/or upon final design.” Ex. 56, Special Permit Approval, at § 2.8.6.1.

On May 8, 2015, the Monitor issued his Supplemental Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the 2014 Calendar Year (“2014 Supplemental Report”) (ECF No. 507). The 2014 Supplemental Report concluded that because the County’s grant of funding to the Chappaqua Station project is conditioned on approval of all required variances, and because these variances had not been approved by the end of 2014, “the County breached the Paragraph 23 interim benchmark requirement that financing be ‘in place’ for at least 450 units by the end of 2014.” *Id.* at 11. The Supplemental Report also found the County in breach of Settlement Paragraphs 7(i) and (j) (which require the County to “use all available means” to address New Castle’s opposition to Chappaqua Station) because rather than take any meaningful action to end the impasse, the County “ha[d] chosen to be a spectator to New Castle’s efforts to hinder” the Settlement’s objectives. *Id.* at 20.

Soon after the Monitor filed the Supplemental Report, the County filed an objection. On November 19, 2015, Magistrate Judge Gorenstein issued a Report and Recommendation overruling the Monitor. Report and Recommendation (“R&R”), Nov. 19, 2015 (ECF No. 544). Judge Gorenstein concluded that the County was not in breach of Paragraph 23, holding that the language conditioning funds on approval of variances

“does not operate to affect the availability of money to build the project.” R&R, at 19–20. Judge Gorenstein also ruled that the County was not in contempt under Paragraphs 7(i) and (j) because the County’s failure to “use all available means as appropriate” was not the kind of “clear and unambiguous” violation of a court order that justifies a contempt finding in the Second Circuit. *Id.* at 22–24.

On January 22, 2016, the Government filed an objection to Judge Gorenstein’s R&R; the County replied on March 8, 2016.

## 2. The Cambium Condominium (Town of Mamaroneck)

The Cambium Condominium is a newly-constructed 149-unit luxury condominium development located in the Town of Mamaroneck. *See* Executive Summary of the Cambium Condominium Development (“Executive Summary”), attached hereto as Ex. 68. The County proposed the purchase of ten housing units within the condominium such that they could be designated as “workforce housing,” available to eligible households earning up to 80% AMI, and to remain affordable for at least 50 years. *Id.* The County has requested that the Monitor credit the units against the County’s Settlement obligations. To do so, the Monitor would have to find that the units qualified for a waiver under Paragraph 13(h) of the Settlement because the development had received either final land use or financing approval before the Settlement.

HUD challenged the applicability of Paragraph 13(h) because the units in question were, in the view of HUD, “viable” without County support. The County disagreed. Ultimately, on January 29, 2016, HUD determined that nine of the ten

proposed affordable units would not be counted toward the Settlement’s benchmark of 750 affordable housing units.

As stated above, Paragraph 7 of the Settlement requires the County to, within seven years from the date of the Settlement, “ensure the development of at least 750 new affordable housing units” (“AFFH Units”) that meet certain terms and conditions set forth in Paragraph 7(a)–(h). Paragraph 8 of the Settlement requires that this 750-“AFFH Unit” requirement cannot be satisfied with “affordable units in housing developments that ha[d] received preliminary or final land use or financing approval at the time of the [Settlement].” Nevertheless, Paragraph 13(h) grants the Monitor “authority to ... [d]eem units otherwise excluded ... under Paragraph 8” as AFFH Units, if the County can provide “*compelling evidence*” that “the development is no longer viable and the County can resuscitate the development ... by providing financing or other specified means within the County's control.” Settlement ¶ 13(h) (emphasis added).

In August 2015, the County requested that the Monitor grant a Paragraph 13(h) waiver for Cambium. *See* Letter from Kevin J. Plunkett to James E. Johnson, August 20, 2015, attached hereto as Ex. 69; *see also* Ex. 68, Executive Summary.

The Monitor forwarded the County’s letter (alongside several funding advisories from Westchester regarding other projects) to HUD, requesting “a written response articulating [HUD’s] views ... concerning whether the Monitor should approve or disapprove the units ... .” Letter from James E. Johnson to Holly M. Leicht and Glenda L. Fussá, September 25, 2015, attached hereto as Ex. 70. HUD subsequently raised several questions regarding various pertinent aspects of the development. *See* Letter

from Holly M. Leicht to James E. Johnson, at 2–3, October 23, 2015, attached hereto as Ex. 71.

The County responded to HUD’s questions in December. *See* Letter from Kevin J. Plunkett to James E. Johnson, December 18, 2015, attached hereto as Ex. 72. The County argued that several reasons justified giving the County credit for the units, pursuant to Paragraph 13(h). First, the County focused on the distinction between rental and ownership units, noting that absent purchase by the County, the ten affordable units would be “the only rental units in the [d]evelopment.” *Id.* at 3. Allowing the residents to own their units would, the County argued, place them “on equal footing with the rest of the unit owners, with the opportunity to join the condo board ... .” *Id.* Quoting the Monitor’s Second Biennial Assessment, the County concluded, “This inclusion in ownership ... goes far beyond ‘mere bricks and mortar,’ and furthers the assimilation of the affordable unit residents into the community, while removing the potential “stigma” of being the only renters in the [d]evelopment.” *Id.*

Second, the County argued that, as required by Paragraph 13(h), “financial viability of the Development is also questionable at this juncture,” such that “the County’s purchase of the units ... could be critical for the continued feasibility of the Development.” *Id.* (emphasis provided). As evidence for this assertion, the County pointed to “continual” construction delays and the fact that “sales of units ... have been slow” even as the developer has been reducing prices. *Id.* at 3–4. In a footnote, the County both conceded that “the Developer has made claims that there are no financial difficulties,” and argued that this position is “wholly expected” given that an admission

of financial difficulties “could” make the units sell even more slowly than they were. *Id.* at 3 n.2.

The next month, HUD confirmed its view that the nine units were not eligible for a waiver under Paragraph 13(h). *See* Ex. 73, January 29, 2016 Letter, at 3. HUD argued that the County’s statements “do not represent evidence that the units are no longer viable,” noting that neither “delays in construction” nor “slow sales of units” is sufficient to “render the development not viable.” *Id.* at 2. Notably, construction is under way and units are being marketed and continue to sell.

As stated above, the standard for granting a waiver under Paragraph 13(h) is exacting: the County must show “*compelling evidence*” that, *inter alia*, “the development is no longer viable.” The County has failed to satisfy that burden. The assertions that, for example, “a cash infusion ... *could* be critical,” “price reductions *may* be placing units at preconstruction pricing levels,” and “upkeep and maintenance ... *could* be impacted by financial woes” are, at best, speculative. Besides evidence that sales of units are slower than expected, the County offers no specific indications of the development’s financial health, despite the fact that, as potential beneficiaries of a \$2.5 million “cash infusion,” the developer has a significant incentive to provide such information. The County’s explanation of the developer’s apparent reluctance to do so (that admission of “financial difficulties ... *could* impact” unit sales) is, again, highly speculative, and, in no sense, “*compelling evidence*.” In sum, the evidence supporting the waiver application does not meet the compelling evidence standard. The County is not entitled to the waiver.

**D. Completed Affordable AFFH Units Have Increased Diversity**

For each completed AFFH development as of December 31, 2015, the County provided a report containing demographic data about the 334 completed units. Of the first 334 occupied AFFH units, with respect to race, 191 of the heads of household report that they are White (57%); 82 households report that they are Black or African-American (25%); and, with respect to ethnicity, 76 (23%) households indicate that they are Hispanic. Ex. 8, 2015 Q4 Report, at 5. These figures are comparable to figures reported in the Second Biennial Assessment, where, of the 173 AFFH homes occupied at the time, 35% reported having a head of household who was Black or African American, and with regard to ethnicity, 21% identified themselves as Hispanic. Second Biennial Assessment, at 33. The Monitor will continue to review demographic trends as more developments are completed and occupied.

**E. County Efforts to Identify Sites**

In its 2014 and 2015 quarterly reports, the County reported that it had held meetings with municipal officials, landowners, and developers to discuss the development or redevelopment potential of sites for the creation of Affordable AFFH Units. The County also described its own efforts to identify sites. *See, e.g.*, Ex. 8, 2015 Q4 Report, at 7–10; Ex. 4, 2014 Q4 Report, at 7; Ex. 3, 2014 Q3 Report, at 8.

The County also described the ways in which it evaluated sites, including consideration of proximity to schools and other community resources, the developer's qualifications, and an underwriting analysis. *See, e.g.*, Ex. 4, 2014 Q4 Report, at 8. The

County should continue to focus on the site selection criteria discussed in the Monitor's April 2011 report when evaluating potential developments. *See* Monitor's Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the Period of October 25, 2010 through April 25, 2011, at 11–12, April 25, 2011 (ECF No. 336).<sup>4</sup>

## II. Community Design Institute

From the first months after the parties entered the Settlement, community members and municipal leaders raised the following concerns: (i) there were few sites that could be developed without encountering both significant environmental and infrastructure challenges; and (ii) that affordable housing would have a negative impact on the look, feel, and fiscal health of the communities. The record of housing development addressed above, though, is proof that, in many instances, those challenges could be overcome. The record also provides evidence that potential problems were raised as a pretext for opposition to affordable housing under any circumstances. Others identified challenges without any apparent agenda and appeared deeply concerned about working through the obstacles identified. The Community Design Institute was launched to develop appropriate tools to address those challenges.

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<sup>4</sup> In the report filed April 25, 2011, the Monitor outlined various criteria for site selection, including, among other things, that: (i) sites should be in or near largely or completely non-minority residential neighborhoods; (ii) sites isolated from non-minority residential neighborhood by visual or other barriers are undesirable; (iii) the configuration of the site or the design of the buildings should not inherently stigmatize or isolate residents as low income; and (iv) multifamily buildings should be located within walking distance of public transportation. *Id.* at 11–12.

As stated in previous reports, the Monitor commissioned a report entitled Collaboration & Affordable Housing: Policy, Design and Practice (“Design Report”),<sup>5</sup> prepared by the Monitor’s design consulting team: Dr. Adam Lubinsky, Principal, WXY Architecture, and Urban Design Professor William Morrish of The New School’s Parsons School for Design (collectively, “Design Experts”). As first reported in the 2013 Status Report and the 2014 Second Biennial Assessment, the Monitor worked with the Design Experts to develop a series of workshops that culminated in the Design Report that could be used with the goal of assisting municipalities, developers, and community members with a stake in the look, location, and feasibility of affordable housing in Westchester. The Design Report provided guidance on how to run a process and make decisions that would aid in the development of affordable housing in Westchester.

Section One of the Design Report framed the discussion of design solutions to obstacles to the development of affordable housing. It described the Design Experts’ work in identifying trends in Westchester such as the movement toward communities with walkable town centers. The Design Experts noted the decline in the use of cars and the increase in the number of people working from home. The analysis of trends served to provide a basis for better understanding the impact of the trends on the implementation of mixed use housing with affordable units. The Design Report also set forth the principles for successful design of affordable housing:

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<sup>5</sup> A copy of the Design Report was filed with the Court on May 21, 2015 (ECF No. 511).

- Preserve what's already there
- Support inclusive communities up front
- Change the dialogue locally
- Make room for rentals
- Simplify the development process
- Develop sustainable and walkable communities
- Create a community, not just a building
- Embrace new technologies
- Leverage financial institutions
- Develop new sources of subsidy.

Design Report, at 12.

Finally, the Design Report described the Community Design Institutes (“CDI”) conducted in Westchester in the Spring of 2014. Led by the Design Experts, over 100 people from many municipalities attended these workshops. The CDIs introduced a problem-solving mechanism that used both computer simulation tools and hand-held models to enable the participants to visualize the content and implications of the planning decisions of a variety of stakeholders. The case studies were based on actual parcels of land and were chosen to address solutions to common obstacles to developing affordable housing in Westchester, namely, how to redevelop largely abandoned office parks and how to address wastewater issues that have hampered affordable housing construction in northern parts of the County. The modeling software enabled participants to work in a virtual world and to see the results of their collaboration and negotiation without delay.

The design approach is not a Settlement requirement and created no additional obligations for either the County or municipalities going forward. The County, nevertheless, wrote in opposition to the effort, noting in a letter to the Monitor its “specific concerns [about] timing, usefulness, funding, scope and a general sense that the proposal, even if it is well intentioned, would in fact impede compliance with the [Settlement].” See Letter from Kevin J. Plunkett to James E. Johnson, March. 8, 2013, attached hereto as Ex. 74. Notwithstanding the County’s critique, the CDI does illuminate an alternative path forward. Indeed, several municipalities have begun discussions with the Design Experts to use this approach as they analyze properties with a view toward development.

### **III. Marketing and Outreach**

#### **A. Central Intake System**

Over the last two years, the County’s Central Intake System has continued to be an important component of the County’s efforts to spread information about new affordable housing opportunities and the communities where such housing is located. *See* Second Biennial Assessment, at 17-19. As of year-end 2015, the County reports that there are 8,095 active registered accounts on the Central Intake System. *See* Ex. 8, 2015 Q4 Report, at App’x IV-2. Of these active registrants, 70% (5,645) identified their race and 30% (2,450) did not. Among those who identified their race, 39% (3,179) identified themselves as African American; 23% (1,831) as white; 2% (147) as Other Pacific Islander; 1% (105) as white and African American; 1% (66) as Asian Indian; 1% (52) as

American Indian or Alaskan Native; and 1% (52) as American Indian or Alaskan Native and African American. Additionally, 33% (2,666) of registrants indicated that they were Hispanic. *See id.*

## **B. Marketing**

Paragraph 33(e) requires the County to “affirmatively market affordable housing within the County and in geographic areas with large non-white populations outside, but contiguous or within close proximity to, the County.” As of year-end 2015, of the 8,095 active participants in the Central Intake System, 60% (4,818) were from Westchester County; 22% (1,780) were from Bronx County; 6% (486) were from New York County (Manhattan); 3% (238) were from locations outside of New York State and Fairfield County, Connecticut; 3% (235) were from Kings County (Brooklyn); and 1% were from Putnam (74), Dutchess (58), and Orange (45) counties, respectively. Ex. 8, 2015 Q4 Report, at App’x IV-2. Just 2% (163) of registrants were from Queens County, just 1% were from Fairfield (57) and Rockland (49) counties, and less than 1% (18) were from Richmond County, *see id.*, which are among the nine counties in the Marketing Area for Affirmative Fair Housing Marketing (“AFH Marketing Area”) identified in the Affirmative Fair Housing Marketing Plan approved by the Monitor (“Affirmative Marketing Plan”).<sup>6</sup> *See* Westchester County Affirmative Fair Housing Marketing Plan, at

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<sup>6</sup> As noted in the 2014 Annual Report, the County also analyzed the geographic distribution of individuals who submitted applications to two Affordable AFFH developments. The Bridleside development in the Town of North Salem attracted 943 applicants: 51% (483) from Westchester County; 17% (161) from Bronx County; 8% (80) from Putnam County; 6% (54) from New York County; 4% (40)

3, December 29, 2011, attached hereto as Ex. 75. The geographic distribution of applicants has remained largely unchanged throughout 2014 and 2015. *See* Ex. 1, 2014 Q1 Report, App'x IV-2 (indicating that 61% of registrants were from Westchester County, 22% were from Bronx County, 6% were from New York County, 3% were from locations outside of New York state, 3% were from Kings County, 2% were from Queens County, and 1% or less were from Putnam, Dutchess, Orange, Rockland, Fairfield, and Richmond counties). Although there are many reasons why people from other counties might elect not to move to Westchester, the Monitor's most recent annual report noted that the marketing strategies employed by the County did not appear likely to reach larger numbers of potential applicants outside of Westchester.<sup>7</sup> *See* Monitor's Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the 2014 Calendar Year ("2014 Annual Report"), at 31, April 1, 2015 (ECF No. 506). As

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from Kings County; 2% (22) from Fairfield County, Connecticut; 1% (9) from Rockland County; 1% (8) from Queens County; and less than 1% (1) from Richmond County. Ex. 3, 2014 Q3 Report, at App'x IV-4. The Comstock Heights home-ownership development drew 178 applications: 55% (98) from Westchester County; 19% (33) from Bronx County; 12% (21) from New York County; 4% (7) from Kings County; 4% (7) from Queens County; 2% (3) from Putnam County; and 0% from Rockland County, Richmond County, and Fairfield County, Connecticut. *See* Ex. 4, 2014 Q4 Report, at 15 & App'x IV-4.

<sup>7</sup> To better analyze the County's affirmative marketing efforts outside of Westchester, the 2014 Annual Report also noted that the County should collect data from Central Intake System registrants regarding how they discovered the website, much as it already does with respect to applicants to select affordable housing developments. *See, e.g.*, Ex. 4, 2014 Q4 Report, at App'x IV-4 (reflecting data about how Comstock Heights applicants learned of the development). No such information was included in the County's 2015 quarterly compliance reports.

discussed below, the Monitor questions the level of effort the County has expended to reach potential applicants who do not currently reside in Westchester.

The 2014 Annual Report noted that four of the six affirmative marketing activities identified by the County—“outreach on the County’s website,” “notices sent to the households signed up for Homeseeker information,” “email through the County’s List Serve,” and “postings on the County’s Twitter feed and on the County’s Facebook page”—do not appear reasonably calculated to target potential applicants who do not already reside in Westchester. *See* Ex. 3, 2014 Q3 Report, at 16. Although the County also reported engaging in “outreach to community agencies in the nine-county area,” *id.*, it provided limited information in its 2014 quarterly reports regarding those activities and what information it did provide suggested that outreach to community agencies alone does not reach meaningful numbers of potential new applicants outside Westchester. The 2014 Annual Report concluded that the County’s affirmative marketing efforts for the 2014 calendar year were “limited at best.” 2014 Annual Report, at 27.

In 2015, the County reported that it engaged in additional marketing activities through its Marketing Consultant, Housing Action Council. Ex. 5, 2015 Q1 Report, at 17-18. During the first quarter of 2015, Housing Action Council reported that it engaged in a number of marketing activities to promote developments on the County’s behalf, including participating in three housing fairs, holding three information sessions, hosting eight open houses for AFFH units, marketing available units to community organizations, union organizations, faith communities, and hospitals throughout the nine county marketing area. Ex. 5, 2015 Q1 Report, at App’x IV-4. Notably, the County did not

provide additional updates from Housing Action Council for the other three quarters of 2015.

Housing Action Council provided data on the places of residence of those who attended the information sessions and open houses Housing Action Council hosted during the first quarter of 2015, as well as two of the three housing fairs in which it participated during that time. In total, 149 individuals attended the open houses and information sessions, with 62% (92) from Westchester County, 21% (31) from Bronx County, 6% (9) from New York County, 3% (4) from Queens County, and 1% from Kings (2), Fairfield (2), and Rockland (1) counties. *Id.* The Fair & Affordable Housing Expo, held in Westchester County on March 14, 2015, drew approximately 600 participants. Of that number, only 329 provided names and addresses. The majority of those who provided names and addresses, 73% (239), were from Westchester County, while 17% (57) were from Bronx County, 3% (11) were from New York County, and 1% were from Kings (4), Rockland (4), Queens (2), and Fairfield (2) counties. *Id.* Of those who attended the Municipal Credit Union of New York's Home Buying Seminar, held in Manhattan on March 21, 2015, 56 completed Housing Action Council's interest forms. Of those 56, 90% (50) were from the counties in New York City, including 36% (20) from Kings County, 29% (16) from Bronx County, 18% (10) from Queens County, 7% (4) from New York County. Of the remaining 10%, 9% (5) were from Westchester County and 1% (1) were from New Jersey. *Id.*

The Housing Action Council participated in the Municipal Credit Union of New York's Home Buying Seminar and that appears to have been effective in reaching

potential applicants outside of Westchester County. The effort reached five times the number of individuals from Kings and Queens counties than did the Fair & Affordable Housing Expo. That outcome is not surprising given the geographic location of each event; travel to Westchester via public transportation for residents of Kings and Queens counties is markedly longer and more burdensome than is travel to Manhattan.

This data powerfully suggests that the geographic location of the events at which the County markets the AFFH units impacts its ability to reach a broad spectrum of potential applicants. Accordingly, the Monitor recommends that the Court direct the County to participate in marketing events in each county within the nine-county marketing area and report in each quarter whether such participation has taken place.

The 2014 Annual Report also noted that distributing press releases is an effective way to market affordable housing opportunities, particularly if the press releases are distributed to news media websites serving the AFFH Marketing Area, and recommended that the County distribute press releases more frequently than it did in 2014—such as once per month. The 2014 Annual Report examined both the frequency and breadth of the County’s distribution of press releases outside of Westchester County. The Monitor also noted that the County provided insufficient information to determine whether the County’s press releases were being distributed outside of Westchester County. The County has since reported that, in 2015, the County’s press releases “are distributed broadly to news agencies within and outside of Westchester County including agencies that service specific racial and ethnic groups.” Ex. 5, 2015 Q1 Report, at 15. The County further reported that, “[t]o ensure broad reach, the County’s media list during the first

quarter of 2015 included 11 television, 17 print and four radio media outlets that operate or have a presence outside of Westchester County.” *Id.*

The 2014 Annual Report noted that the County issued only one press release in 2014 regarding the “Homeseeker” website. By contrast, the County issued *five* press releases critical of the Settlement, HUD, or the Monitor in that same timeframe. *See* Ex. 1, 2014 Q1 Report, at App’x VII-1; Ex. 2, 2014 Q2 Report, at App’x VII-1; Ex. 3, 2014 Q3 Report, at App’x VII-1; Ex. 4, 2014 Q4 Report, at App’x VII-1. Despite the Monitor’s recommendation that the County increase the frequency of its press release distribution, the County followed a similar pattern in 2015, issuing only two press releases regarding the “Homeseeker” website, while issuing *eight* press releases critical of the Settlement, HUD, or the Monitor in that same timeframe. *See* Ex. 5, 2015 Q1 Report, at App’x VII-1; Ex. 6, 2015 Q2 Report, at App’x VII-1; Ex. 7, 2015 Q3 Report, at App’x VII-1; Ex. 8, 2015 Q4 Report, at App’x VII-1. In both 2014 and 2015, the press releases regarding the “Homeseeker” website were issued in the first quarter in connection with the Fair & Affordable Housing Expo, held in March of each year. *See* Ex. 1, 2014 Q1 Report, at App’x VII-1; Ex. 5, 2015 Q1 Report, at App’x VII-1. In the remaining three quarters of each year, the County issued no press releases promoting the “Homeseeker” website. *See* Ex. 2, 2014 Q2 Report, at App’x VII-1; Ex. 3, 2014 Q3 Report, at App’x VII-1; Ex. 4, 2014 Q4 Report, at App’x VII-1; Ex. 6, 2015 Q2 Report, at App’x VII-1; Ex. 7, 2015 Q3 Report, at App’x VII-1; Ex. 8, 2015 Q4 Report, at App’x VII-1. The Monitor once again recommends that the Court direct the County to broadly distribute press releases announcing the “Homeseeker” website and available AFFH units

every quarter to ensure it is meeting its Paragraph 33(e) obligations to affirmatively market affordable housing not only within the County, but also “in geographic areas with large non-white populations outside, but contiguous or within close proximity to, the County.”

**C. Public Outreach and Public Statements by the County Executive**

Paragraph 33(c) of the Settlement requires the County to “create and fund campaigns to broaden support for fair housing and to promote the fair and equitable distribution of affordable housing in all communities, including public outreach specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities.” As noted in the 2014 Annual Report, this obligation requires the County to take *active steps* to increase support for fair housing and facilitate an equitable distribution of affordable housing in eligible municipalities.

The Monitor criticized public statements by the County Executive that undercut the goals of the Settlement and could be read to cast integration as a threat, *see* Second Biennial Assessment, at 15–17. On June 26, 2014, the Monitor filed a Motion to Compel seeking authority to depose County officials, including the County Executive, about those public statements. On August 27, 2014, the Court granted the Monitor authority to take sworn, videotaped depositions of Deputy Commissioner of Planning Norma Drummond, Commissioner of Planning Edward Buroughs, Communications Director for the County Executive Ned McCormack, and County Executive Robert Astorino. *See* Order, August 27, 2014 (ECF No. 504); Transcript of July 24, 2014 Proceedings, August 1, 2014 (ECF

No. 500). Parallel to the depositions, the Monitor sought the production of documents regarding the County's public statements. After protracted negotiations regarding search terms and production deadlines, the County made its first production of documents in connection with the depositions on December 5, 2014, and continued to make rolling productions in 2015.

Mr. Buroughs was deposed on May 22, 2015 for three hours; Mr. McCormack was deposed on May 29, 2015 for three hours; Ms. Drummond was deposed on June 3, 2015 for three hours; and Mr. Astorino was deposed on June 24, 2015 for seven hours. During the depositions of Mr. Astorino and Mr. McCormack, the Monitor learned that the County had not produced relevant information, including video recordings of the County Executive's speeches. These materials were subsequently produced. Given the County's belated productions and the significance of the information they contained, the Monitor filed an application on August 11, 2015 for more time to depose Mr. Astorino and Mr. McCormack. *See* Letter from James E. Johnson to Honorable Denise L. Cote, August 11, 2015 (ECF No. 537). Pursuant to the Court's order, the Monitor conducted supplemental depositions of Mr. Astorino and Mr. McCormack on September 15, 2015 and September 18, 2015, respectively. Mr. Astorino's deposition lasted three hours and Mr. McCormack's deposition lasted 90 minutes.

On March 17, 2016, the Monitor issued the Public Statements Report. That report assessed the County's compliance with its Paragraph 33(c) obligations and concluded that the County's public statements—specifically, those of County Executive Astorino—violated the County's Paragraph 33(c) obligation. The facts underlying the Monitor's

conclusion and the recommendations issued to remedy the violation are detailed in the Public Statements Report.

**D. Remedial Steps**

The Monitor has filed recommendations to remediate the County's breach of its public education obligations. As to the marketing shortcomings identified above, the Monitor recommends that the Court order the County to: (i) broadly distribute press releases announcing the "Homeseeker" website and available AFFH units every quarter; and (ii) participate in marketing events in each county within the nine-county marketing area and report in each quarter whether such participation has taken place.

**IV. Zoning**

The Settlement contains several provisions that address potential and actual structural obstacles to building affordable AFFH housing. Two provisions within the Settlement address the need for the eligible municipalities to make structural changes to zoning and other local land use regulations. The first is the requirement that the County promote the adoption of a Model Zoning Ordinance. Settlement ¶ 25(a). While municipalities made early progress in adopting the Model Zoning Ordinance, the pace of adoption has slowed to a crawl.

The second means to address the structural obstacles to developing affordable housing is the requirement that the County complete an AI acceptable to HUD. Settlement ¶ 32. Among other things, the AI would involve a thoroughgoing review of zoning regulations to ensure that they are not exclusionary. It would not be limited to a

zoning review, but would examine other factors that had an impact on housing choice for blacks and Hispanics. The County has failed to produce an AI acceptable to HUD. *See Cty. of Westchester*, 802 F.3d at 433.

**A. Adoption of the Model Zoning Ordinance**

Paragraph 25(a) of the Settlement requires the County to promote the adoption of a Model Zoning Ordinance by the eligible municipalities by providing economic incentives and, if necessary, bringing litigation. The County did, in fact, develop a Model Zoning Ordinance that conformed to the Settlement in 2010. *See* Westchester County Fair and Affordable Housing Implementation Plan, Appendix D-1(i): Model Ordinance Provisions (“Model Zoning Ordinance”), August 9, 2010, attached hereto as Ex. 76. Shortly thereafter, County staff began a process of working with the municipalities to move to adopt the ordinance. In each of the years 2011 and 2012, many municipalities adopted the zoning ordinance. Six communities adopted the zoning ordinance in 2011: New Castle, Ossining, Scarsdale, Yorktown, Rye Brook, and Tarrytown. Ex. 77, 2011 Q4 Report, at 17. Five more followed in 2012: Irvington, Bedford, Pleasantville, North Salem, and Ardsley. Ex. 78, 2012 Q4 Report, at 19. Only three municipalities adopted the Model Zoning Ordinance in 2013: Hastings on Hudson, Pound Ridge and the Town of Mamaroneck. Ex. 79, 2013 Q4 Report, at 17. Only the Town of North Castle adopted the Ordinance in 2014. Ex. 4, 2014 Q4 Report, at 18. No town or village adopted the Ordinance in 2015. Ex. 8, 2015 Q4 Report, at 16–17. After the town supervisor attended one of the CDI sessions sponsored by the Monitor and

discussed below, Lewisboro did, however, adopt certain provisions informed by the Ordinance in 2015. *See* Letter from Peter Parsons, Supervisor, Town of Lewisboro, to James E. Johnson, Nov. 19, 2015, attached hereto as Ex. 80. The remaining municipalities have not adopted the Ordinance and Yorktown recently announced that it was considering repealing its ordinance. Letter from Michael J. Grace, Supervisor, Town of Yorktown, to James E. Johnson, Apr. 13, 2016, attached hereto as Ex. 81. The County did not report undertaking any activities to provide incentives to the outstanding municipalities to adopt the Model Zoning Ordinance. *See* Ex. 8, 2015 Q4 Report, at 16–18.

**B. Analysis of Impediments and Efforts to Remediate Exclusionary Zoning**

During this reporting period, the County was engaged in a bitter war of words and litigation with HUD over HUD's refusal to accept the County's AI and its decision to withhold CDBG and Home funds. As that dispute dragged on, HUD and the Chair of the Board of Legislators, Michael Kaplowitz, asked the Monitor to take on one aspect of the AI: to analyze local zoning regulations in light of *Berenson* and *Huntington* in the hopes that the County might adopt that analysis, incorporate it into the AI, and meet the demand for an AI acceptable to HUD. The two reports are summarized below. Together, they found that ten municipalities had exclusionary zoning. The quarterly reports show that the County provided no incentives to encourage the identified municipalities to change their zoning.

As the Second Circuit noted:

The Settlement required the County to complete, within 120 days, an analysis of impediments to fair housing choice (“AI”) deemed acceptable by HUD. The decree specifically required that the AI . . . 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; [and] (ii) the appropriate actions the County will take to address and overcome the effects of those impediments.

*Cty. of Westchester*, 802 F.3d at 419 (quoting Settlement, ¶ 32(b)(i)–(ii)).

The AI serves purposes other than forming the basis for a grant of federal funds.

As stated in the Fair Housing Planning Guide, the AI also:

- 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.

U.S. Dep’t of HUD, Fair Housing Planning Guide (1996), at 2–8.

HUD notes in the Fair Housing Planning Guide that the AI involves an assessment of conditions, both public and private, affecting fair housing choice for all protected classes. Among those conditions is local need. It is worth noting that Westchester has not had a local needs assessment since 2004, and the County Executive continues to deny that even that assessment is a County document. *See, e.g.*, Astorino Dep. 116:13–116:19, Sept. 15, 2015 (Ex. 40 to Public Statements Report (ECF No. 562-40)). The County’s 2016 capital budget allocated \$100,000 to be used to fund a housing needs assessment, but those funds have not yet been released. *See* Housing Needs Assessment (BPL28), 2016 Adopted Capital Budget and Five Year Capital Program, attached hereto as Ex. 82; Mark Lungariello, *Fair housing advocates protest at Astorino’s office*, THE JOURNAL NEWS, April 23, 2016, attached hereto as Ex. 83.

As noted in the Second Biennial Assessment, the “Fair Housing Planning Guide specifically discusses the necessity of conducting a review of local zoning codes as part of an acceptable AI, due to the potential for certain provisions of a zoning code to serve as impediments to fair housing.” Second Biennial Assessment, at 40–41. In 2013, the County completed its eighth and apparently last attempt at such an analysis, which found that none of the eligible communities had zoning regulations that were exclusionary.

### C. The Monitor’s Zoning Analysis

In 2014, the Monitor issued zoning reports applying the standards set forth in *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975)<sup>8</sup> and *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988).<sup>9</sup> The Monitor’s reports sought to assess the caliber of zoning information the County provided to the Monitor and to conduct an independent evaluation of impediments to fair housing. The two reports found that a total of ten communities had some form of exclusionary zoning. Municipal responses to the reports have varied; some municipalities have taken remedial steps to address the deficiencies highlighted in the reports, others have engaged in a dialogue with the Monitor, and still others have objected to the reports’ contents. Brief summaries of the Monitor’s analyses follow.

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<sup>8</sup> Monitor’s Final Report on Westchester County’s Analysis of Municipal Zoning (“*Berenson Report*”), Sept. 13, 2013 (ECF No. 452).

<sup>9</sup> Memorandum, *Monitor’s Huntington Analysis of Westchester County Municipal Zoning* (“*Huntington Report*”), September 8, 2014, attached hereto as Ex. 84.

1. *Berenson* Report Progress

Released in 2013, the *Berenson* report explored the question of whether any of the eligible communities had zoning ordinances that acted as impediments to the development of affordable housing. Working with a team of housing consultants, the Monitor identified seven eligible municipalities—Croton-on-Hudson, Harrison, Lewisboro, Mamaroneck, Ossining, Pelham Manor, and Pound Ridge—that had zoning ordinances that limited affordable housing or made the development of affordable housing practically infeasible. *See Berenson* Report, at 35.

Representatives of each of these municipalities have since met with the Monitor and discussed reforms to their zoning codes that would provide improved access to affordable housing. After Mamaroneck revised its land use regulations in 2013, the Monitor in February 2014 determined that the revised regulations provided adequate opportunities for the development of affordable housing that will affirmatively further fair housing in the County. *See 2014 Annual Report*, at 31. Ossining and Pound Ridge also enacted revised zoning codes in a way that conformed to the model zoning ordinance and removed impediments to affordable housing. In April 2015, they too were removed from the list of communities found to have exclusionary zoning. *See id.* at 38-43.

Lewisboro, Pelham Manor, and Croton-on-Hudson have also met with the Monitor and have begun to make progress on zoning reforms. Lewisboro has adopted amendments to its zoning code that expand the potential use of accessory apartments and multifamily housing. Should the Department of Justice consider developing a list of priority targets for litigation, Lewisboro should be given substantial credit for these

changes. Croton-on-Hudson has stated that it is considering lifting the restriction on accessory apartments to seniors and making zoning changes to two commercial districts to allow mixed-use development.

Pelham Manor was considering adopting the model zoning ordinance, but in a setback, rejected a proposed zoning change that would have permitted mixed-use developments by special permit in one district. *See* Alex Wolff, *Manor Board Rejects Plan to Rezone Four Corners Area and Allow 6 Story Apartments*, THE PELHAMS – PLUS, Oct. 29, 2014, attached hereto as Ex. 85. Pelham Manor officials cited HUD's September 24, 2014 letter criticizing the Monitor's *Huntington* report as one basis for rejecting the proposed change. *Id.*

## 2. *Huntington* Report

The Monitor and the Housing Consultants collected, reviewed, and analyzed data provided by the County pursuant to a *Huntington* methodology that had the express approval of both the BOL Chairman and HUD. *See* Letter from James E. Johnson to Holly Leicht, June 5, 2014, attached hereto as Ex. 86; Letter from James E. Johnson to Holly Leicht, Honorable Michael B. Kaplowitz and Robert F. Meehan, at 1, May 27, 2014, attached hereto as Ex. 87. After the Housing Consultants prepared preliminary factual reports, each municipality was provided the opportunity to correct and comment on these reports. HUD and the County's executive and legislative branches were also given an opportunity to review the preliminary reports. Feedback from the municipalities, the County, and HUD was incorporated into the completed report.

On September 8, 2014, the Monitor issued a memorandum setting forth his preliminary analysis of the eligible communities in light of *Huntington*. Ex. 84, *Huntington* Report. Consistent with *Huntington*, applicable HUD regulations, and the report’s methodology, the report analyzed the discriminatory impact each municipality’s zoning code had on the County’s minority residents. The report did not make any findings with respect to whether any municipality drafted its zoning code with the intent to discriminate against minorities. *See, e.g.*, 24 C.F.R. § 100.500 (“Liability may be established under the Fair Housing Act based on a practice’s discriminatory effect . . . even if the practice was not motivated by a discriminatory intent.”); *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

The report identified six municipalities in which there was evidence of a *prima facie* violation of *Huntington*: Harrison, Larchmont, North Castle, Rye Brook, Lewisboro, and Pelham Manor. *See Huntington* Report at 5–7. These municipalities were determined to have zoning regulations that either: (1) perpetuate clustering by restricting multifamily or two-family housing to districts that have disproportionately high minority household populations; or (2) disparately impact the County minority household population by restricting the development of housing types most often used by minority residents.<sup>10</sup> *Huntington* Report at 5–6.

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<sup>10</sup> Larchmont, North Castle, and Rye Brook were determined to have evidence of a *prima facie* violation of prong (1) of the analysis only. Lewisboro and Pelham Manor were determined to have evidence of a *prima facie* violation of prong (2) of the analysis only. *Huntington* Report at 5–6. Evidence of a *prima facie* violation of both prongs was determined with respect to Harrison. *Id.*

The report noted that these findings were not the final step in the analysis. The *Huntington* framework provides for either the County or the municipality to come forward with evidence of a legitimate government purpose for the zoning regulations for which no less discriminatory alternative exists. While the County wrote to the Monitor before the report was completed that it did not believe the Monitor had “the authority to make legal conclusions on zoning issues either for the County or for any of the 31 eligible municipalities,” it did not respond to the report after its release. Letter from Kevin J. Plunkett to James E. Johnson, August 22, 2014, attached hereto as Ex. 88.

In the weeks immediately following the release of the *Huntington* report, the Monitor met with officials from Larchmont, North Castle, and Rye Brook to learn more about the municipalities and their zoning issues and to discuss potential actions to increase affordable housing and make their zoning codes more inclusive.

On September 24, 2014, HUD wrote to the Monitor to highlight several perceived errors in the report and requested that portions of it be withdrawn. *See* Letter from Glenda L. Fussá to James E. Johnson, September 24, 2014, attached hereto as Ex. 89. HUD stated, among other things, that the report: (i) impermissibly grouped black and Hispanic data and should have considered each group separately; (ii) departed from the *Huntington* standard by analyzing “clustering” rather than “patterns of segregation”; (iii) failed to define the term “*Huntington* threshold”; (iv) failed to conduct a “regional analysis” comparing municipal data to county data; (v) should have included a discussion of zoning code limitations on development size, restrictions that limit the number of bedrooms in a unit, and restrictions on lot size; (vi) inconsistently treated the data

presented in the Housing Consultants' factual report; and (vii) should not have contained determinations that purport to absolve municipalities of liability, discuss demographic changes between 2000 and 2010, or reference a given area's "desirability." *Id.* As a result of HUD's concerns, the Monitor's work with the municipalities was temporarily stopped.

The Monitor responded to HUD by letter dated September 26, 2014, noting two errors in HUD's criticism and questioning whether the letter represented the harmonized views of HUD and the Department of Justice. *See* Letter from James E. Johnson to Hon. Helen R. Kanovsky, September 26, 2014 (ECF No. 505). The Monitor then requested a consolidated response from the United States Government. *Id.*

By letter dated October 24, 2014, the Department of Justice wrote with a list of nine specific suggested changes to the *Huntington* report. Letter from David J. Kennedy to James E. Johnson, October 24, 2014, attached hereto as Ex. 90. The DOJ maintained that if the changes were made and if the revised report were adopted by the County, HUD would accept the report and the County would be deemed to have satisfied its AI obligation under the Settlement. *Id.* In a December 8, 2014 letter, the Monitor responded, "[w]e understand and appreciate your concerns and will work to accommodate them." Letter from James E. Johnson to David J. Kennedy, December 8, 2014, attached hereto as Ex. 91. Subsequently, it became clear that the County would no longer be seeking federal funds and the Monitor shelved the *Huntington* analysis to direct his resources to other compliance issues.

**D. County Failure to Promote**

The Settlement requires the County to promote the passage of the Model Ordinance. Settlement ¶25(a). “Promote” has been litigated earlier in this case. At a minimum, the County must take concrete steps “to help bring the object in question into being.” *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 712 F.3d 761, 769 (2d Cir. 2013). According to the Second Circuit, promoting that goal is “not met by taking no action or taking an action that detracts from, rather than furthers, the end goal.” *Id.* The Monitor is required to assess “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.” Settlement ¶15.

In no quarter did the County report that it had taken steps to provide incentives to encourage inclusionary zoning in any municipality. Quite the opposite of promoting “inclusionary and other appropriate zoning” as required by the Settlement, the County refused to undertake a rigorous analysis of municipal zoning and submitted what the Second Circuit deemed as boilerplate assertions that the zoning was not exclusionary. *See Cty. of Westchester*, 802 F.3d at 433. In other words, rather than promoting inclusionary zoning, the County essentially informed the municipalities that the zoning currently in place should not be challenged and then raised the spectre, detailed in the public statement report, that HUD threatened local zoning. The County Executive stated that “nameless, faceless bureaucrats in Washington, whom you will never see, could get control over local zoning.” Public Statements Report at 22.

As Mr. Astorino conceded in his deposition, the Model Zoning Ordinance does not call for the destruction of local zoning. *See* Astorino Dep. 278:21–279:2, June 25, 2015 (Ex. 47 to Public Statements Report (ECF No. 562-47)); Astorino Dep. 62:14–65:12, Sept. 15, 2015 (Ex. 40 to Public Statements Report (ECF No. 562-40)). Rather, it requires each community to examine its local zoning and ensure that it contains the following elements that AFFH: (i) a requirement that new development projects include a certain percentage of affordable units; (ii) standards for affirmative marketing of new housing developments; (iii) standards for expedited review and approval of affordable housing; and (iv) standards to ensure the continued affordability of newly-constructed units. *See* Ex. 76, Model Zoning Ordinance. To the extent that the County has undertaken any public encouragement of the adoption of the Model Zoning Ordinance, the force of the public statements against changes to local zoning and the positions that the County has litigated have, if anything, made further progress more difficult. *See* Section III above. Recently, activities in Yorktown suggest that the County’s posture has emboldened opponents to the goals of the Settlement. In 2011, Yorktown was among the first wave of municipalities that adopted the Model Zoning Ordinance. On April 5, 2016, at a televised Yorktown town board meeting, the following exchange occurred between Town Supervisor Michael Grace and a town resident:

**Resident:** I heard you mention that on May 5, you're going to try and change the law on affordable housing ... I'd just like to make you aware: There's this guy named Johnson, who's the monitor ...

**Grace:** Is he gonna come and beat me up? ...

**Resident:** He's gonna beat the town up and the taxpayers because you'll be getting a suit.

**Grace:** No he's not. . . .

I already got a letter from Mr. Johnson . . . and the bottom line is the federal government can go tell the County what to do because the County is the other party to their lawsuit. The Town of Yorktown is not. The federal government can't tell me anything. There's still municipal home rule in New York State. . . . [H]e's not gonna have my town act illegally vis-à-vis state law which is what I answer to and not the federal government. So let him have his fun.

*See*, Video of April 5, 2016, Yorktown Town Board Meeting, at 02:07:00, [http://yorktownny.granicus.com/MediaPlayer.php?view\\_id=1&clip\\_id=463](http://yorktownny.granicus.com/MediaPlayer.php?view_id=1&clip_id=463).

In a subsequent letter to the Monitor, Mr. Grace advanced the novel argument that “The model ordinance by requiring a certain number of units to be set aside in an ‘as-of-right’ development without compensation or consideration is . . . a locally imposed tax or impact fee which the Town *cannot legally impose* without New York State enabling authority.” Ex. 81, April 13, 2016 Letter from Michael J. Grace to James E. Johnson, at 2 (emphasis added). In other words, in five years, Yorktown has moved from adopting the Model Zoning Ordinance to the point that its officials are advocating a position that local enactment of a central provision of the ordinance is *illegal*.

Despite the fact that Yorktown officials have been public about this opinion for some time, this development has evidently evoked no response from the County. About this, the Settlement is clear: Paragraph 25(a)(i) requires the County to “promote” to municipalities a Model Zoning Ordinance that “shall include . . . a model inclusionary housing ordinance that requires new development projects to include a certain percentage of affordable units.” By failing to interject when a local official declares this provision of

the Settlement illegal under New York law, the County not only fails to “promote” the Model Zoning Ordinance, it signals to other municipal leaders that such arguments are valid and acceptable. In light of the County’s public statements about zoning, its failure to provide incentives to encourage the adoption of the Model Zoning Ordinance, and its refusal to conduct a rigorous analysis of municipal zoning regulations, the County is in breach of its duties under Paragraphs 32 and 25(a)(i) of the Settlement.

**V. Recommended Remedies for Zoning Deficiencies**

Paragraph 39 authorizes the Monitor to recommend steps or activities to improve the County’s performance of its duties under the Settlement. This report has shown that the County has failed to comply with the duty under Paragraph 32 to complete an AI that is acceptable to HUD and its duties under Paragraph 25 to promote inclusionary zoning. This report also has demonstrated that the County has failed to comply with its duty under Paragraph 25 to promote inclusionary zoning and provide incentives to promote the adoption of the model zoning ordinance by the eligible municipalities.

In order to appropriately remedy the County’s continuing breach of its Settlement obligations, the Monitor recommends that the Court order the following remedial plan:

(a) the County shall propose to the Monitor, within 30 days of the issuance of the Court’s order, a consultant qualified to prepare an AI as required by Paragraph 32 and HUD’s guidance;

(b) the Monitor shall have discretion to approve or reject the consultant chosen by the County and shall have authority, pursuant to Paragraph 17, to designate a different consultant if the Monitor determines that the County's selection is not satisfactory;

(c) upon the Monitor's approval of a consultant, the consultant shall prepare and submit an AI for HUD's review and approval within 120 days. The AI shall also be submitted to the Court.

(d) among other things, the AI should contain the following components: (i) a determination of affordable housing needs in Westchester County as of August 10, 2009, the date of the Settlement; (ii) an analysis of whether zoning regulations in the eligible municipalities act as impediments to fair and affordable housing; and (iii) a strategy for the County to overcome the identified impediments to fair and affordable housing;

(e) the County shall have an opportunity to review the AI prepared by the consultant prior to its submission to HUD;

(f) the County, having not reported to the Monitor that it has provided incentives, economic or otherwise, to the eligible municipalities to encourage them to adopt the Model Zoning Ordinance, should be ordered to implement the strategy to overcome the impediments identified by the AI on a timetable established by the Court;

(g) the Department of Justice is encouraged to bring litigation against municipalities that have been identified by the AI as having zoning that imposes impediments to fair and affordable housing in violation of federal law in the event that economic or other incentives do not accomplish those goals;

(h) seven municipalities continue to have zoning that could result in liability under either *Berenson* or *Huntington*: Croton-on-Hudson, Harrison, Lewisboro, Pelham Manor, Larchmont, North Castle, Rye Brook. In the absence of remediation, the Department of Justice is encouraged to give serious consideration to bringing legal action against one or more of these municipalities under either *Berenson* or *Huntington* or, in the case of Harrison, both. The DOJ may of course conclude that action against other municipalities is appropriate and nothing in this or other reports of the Monitor should, or is intended to, have preclusive effect as to the DOJ's right to bring such litigation; and

(i) pursuant to Paragraph 17(b) of the Settlement, the Monitor will seek an order requiring the County to pay all costs incurred in overseeing this remedial plan, including the cost of consultants retained by the County or Monitor to prepare the AI; such costs should not be counted against the cap on costs and fees set forth in Paragraph 17(b).

## **VI. Monitor Costs**

Debevoise & Plimpton LLP has handled this matter pro bono and absorbed \$4,028,836.94 in fees and expenses in 2014 and 2015. In addition to the Monitor, the firm has committed the time of one counsel and four associates. The Monitor's budget under the Settlement, \$175,000 for the year, has paid the costs of consultants, which have included two housing consultants, two architects, and a community liaison.

Dated: April 28, 2016  
New York, New York

Respectfully submitted,

/s/ James E. Johnson

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