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, 06 Civ. 2860 (DLC) (GWG)

v.

WESTCHESTER COUNTY, NEW YORK,

Defendant.
.....x

RESPONSE OF THE UNITED STATES TO THE MONITOR'S REPORT REGARDING WESTCHESTER COUNTY'S COMPLIANCE WITH PARAGRAPH 33(C) OF THE CONSENT DECREE

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- Of Counsel—

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Plaintiff the United States of America (the "Government") respectfully submits this response to the Monitor's Report Regarding Westchester County's Compliance with Paragraph 33(c) of the Stipulation and Order of Settlement and Dismissal, issued on March 17, 2016 (the "Report").

PRELIMINARY STATEMENT

The Monitor's Report raises a strikingly similar issue to that resolved by *United States ex rel. ADC v. Westchester County*, 712 F.3d 761 (2d Cir. 2013), in which the Second Circuit held that the County Executive's decision to veto legislation that would have prohibited discrimination on the basis of source of income constituted a breach of his obligation under the Consent Decree to "promote" the legislation, under paragraph 33(g). Here, the County Executive again breached a requirement that he "promote" a specific goal under the Consent Decree — specifically, that the County "create and fund campaigns to broaden support for fair housing and to promote the fair and equitable distribution of affordable housing in all communities." (Consent Decree ¶ 33(c).) In violation of this obligation, the County, through its County Executive and others, sought to undermine support for fair housing by exaggerating and misleading the public as to whether and how their communities might be changed by a review of exclusionary zoning, and by grossly inflating both the number of units and the cost to taxpayers. These misstatements did not "promote the fair and equitable distribution of affordable housing"— indeed, they did the opposite — and therefore breached the County's obligations under the Consent Decree. Accordingly, the Court should order the remedial relief recommended in the Report.

STATEMENT OF FACTS

A. The False Claims Act Action and Settlement

The Government respectfully assumes the Court's familiarity with the background facts of this case, as set forth in *County of Westchester v. Dep't of Housing & Urban Dev.*, 802 F.3d 413 (2d Cir. 2015) ("*Westchester IV*"); *County of Westchester v. Dep't of Housing & Urban Dev.*, 778 F.3d 412 (2d Cir. 2015) ("*Westchester III*"); *United States ex rel. ADC v. Westchester County*, 712 F.3d 761 (2d Cir. 2013) ("*Westchester II*"); and this Court's opinions in *County of Westchester v. Dep't of Housing & Urban Dev.*, 06 Civ. 2860 (DLC), 2015 WL 4388294 (S.D.N.Y. July 17, 2015); and *United States ex rel. ADC v. Westchester County*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007); 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (together, "*Westchester I*").

B. Provisions of the Consent Decree Applicable to the Current Dispute

The new dispute concerns paragraph 33 of the Stipulation and Order of Settlement and Dismissal entered in this case on August 10, 2009 (the "Consent Decree"):

> 33. As part of its additional obligations to AFFH, the County also shall:
>
> (a) solicit CDBG proposals that would AFFH from community leaders, public interest groups, and others;
>
> (b) advertise the rights of all persons to fair housing and avenues to redress allegations of housing discrimination, including informing the public that complaints may be filed with the Westchester County Human Rights Commission ("HRC") and requiring County agents to refer housing discrimination complaints and any information about possible violations of fair housing laws to the HRC and to HUD;
>
> (c) 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;
>
> (d) educate realtors, condominiums and cooperative boards, and landlords with respect to fair and affordable housing activities;

> (e) 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, and include in all agreements between the County and a developer requirements that the developer meet these same affirmative marketing requirements and hire consultants(s) to carry out outreach activities, where appropriate;
>
> (f) centralize the intake of potential home buyers for affordable housing that AFFH, working in conjunction with local non-for-profit organizations and community organizations, and through that centralized service provide, *inter alia*, information concerning home-buyer counseling, community resources, job data by municipality, affordable housing developments under construction and in development;
>
> (g) promote, through the County Executive, legislation currently before the Board of Legislators to ban "source-of-income" discrimination in housing;
>
> (h) pay for consultants and public education, outreach, and advertising to AFFH, as described in this paragraph, out of County resources and CDBG funds over five years, exclusive of the amounts set forth in paragraphs 2, 3 and 5, in an amount not less than four hundred thousand dollars ($400,000); and
>
> (i) incorporate each undertaking set forth in this paragraph in the County's AI.

(Consent Decree ¶ 33; a copy of the Consent Decree is attached as Exhibit A to the Declaration of David J. Kennedy, May 9, 2016 ("Kennedy Decl.").) The County has previously been found in breach of this paragraph, specifically paragraph 33(g). *See Westchester II*, 712 F.3d at 771 ("[W]e hold that the County breached its duty to promote under the consent decree.").

C. Procedural History

On June 26, 2014, the Monitor filed an application pursuant to paragraphs ¶¶ 13(g) and 58 to take certain depositions, consistent with his obligations to report to the Court on the County's compliance with the Consent Decree. Specifically, the Monitor is entitled to obtain "any information appropriate to determine whether the County has taken all possible actions to meet its obligations" under the Consent Decree. (Consent Decree ¶¶ 15, 16.) Among the reasons

that the Monitor gave for the application were that "[o]fficials and employees of the Office of the County Executive, including the County Executive himself, have for years repeatedly made public statements and engaged in other communications disparaging the Settlement terms, the goals of fair housing and integrated communities, and certain parties to the Settlement," in a manner inconsistent with Consent Decree ¶ 33(c). (*See* ECF No. 482, at 7.) At a conference on July 24, 2014, the Court approved that application on the record, and memorialized its approval by order dated August 27, 2014 (*See* ECF No. 504.)

D. The Monitor's Report

The Monitor's Report ably summarizes the statements made by the County Executive and other County representatives. Accordingly, the United States respectfully refers the Court to the Report for a full factual recitation, and summarizes the essential points here.

1. *The County's Belated "One Community Campaign"*

First, the Report noted that the County had failed to develop a public education campaign until the depositions taken pursuant to the Court's authorization. Although the Consent Decree was approved in 2009, it was not until 2012 that the County took the belated step of distributing posters prepared by other entities, such as HUD and the National Fair Housing Alliance. (Report at 10.)[1] The County also tried to develop its own public information campaign in 2012, but focus groups coordinated by Westchester Residential Opportunities ("WRO") evaluated the County's efforts as "arrogant," "juvenile," "uppity," "doesn't make sense," "elitist," "racist," "snobby," "patronizing," "condescending," "amateurish," and "just bad all around." (Report Exh. 12.) As

[1] As the Monitor correctly observes, the distribution of these posters may meet the County's obligations under Paragraph 33(b) of the Consent Decree, requiring the County to advise residents of avenues for complaints, but not Paragraph 33(c), which requires the County to conduct its own public information campaigns. (Report at 52–53.)

the County Executive's spokesman conceded, the focus groups "hated" Westchester's campaign. (Report at 11.) Rather than learn from these criticisms, the County abandoned the required public education campaign, and instead did nothing — until this Court authorized the Monitor to conduct depositions on the subject. Indeed, in his June 2015 deposition the County Executive was unable to recall any public outreach campaign related to the County's obligations under the Consent Decree; similarly, Deputy Commissioner of Planning Norma Drummond also testified in June 2015 that she could not recall any public outreach campaigns intended to meet the County's obligations. (Report at 51.)

On June 2, 2015, the Monitor requested that the County provide specific information about any public education campaign (Report Exh. 68), and the County's efforts to comply with paragraph 33 of the Consent Decree, moribund for nearly three years, sprang back to life. The County spokesman first testified about the "One Community Campaign" in his second deposition, on September 18, 2015, and the County first mentioned the campaign in its quarterly report for July 1, 2015 through September 30, 2015. (Report Exh. 16, at 14.) As the Monitor noted, "The One Community Campaign is the first public education campaign undertaken by the County that specifically mentions the benefits of diversity" (Report at 13) — six years after the County agreed to "public outreach specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities." (Consent Decree ¶ 33(c).)[2] The Report further contrasted these belated and meager efforts with other public information campaigns conducted by the County, not to mention the constant efforts by the County Executive to disparage the Consent Decree. (Report at 7–10; 54-55.)

[2] The County asserted in a letter to the Monitor that the first step to develop the campaign was taken on or about September 20, 2012 (Report Exh. 19), but did not say what that step was.

Having analyzed at length the County's failure to "create and fund campaigns" (Consent Decree ¶ 33(c)), the Monitor proposed that the Court order the County to hire a public communications consultant to comply with this provision of the Consent Decree (Report at 56).

2. *The County Executive's Statements Regarding the Consent Decree*

The Report also noted a large number of statements by the County Executive that effectively amounted to a public disinformation campaign about the Consent Decree, in derogation of the County's obligation to "create and fund campaigns to broaden support for fair housing and to promote the fair and equitable distribution of affordable housing in all communities." (Consent Decree ¶ 33(c).) The County Executive has, to the contrary, made a variety of statements that misstated the position of the Government or the requirements of the Consent Decree in a manner calculated to lessen, rather than broaden, "support for fair housing" and to discourage, rather than promote, "the fair and equitable distribution of affordable housing in all communities."

(i.) "HUD wants to dismantle local zoning"

As the Report illustrates, one of County Executive Astorino's most common talking points is that a goal of HUD is to "dismantle" local zoning. As neither HUD nor the Department of Justice has, at any point in this litigation, ever taken such a position, it is not clear what has prompted this particular assertion.

Nevertheless, County Executive Astorino has claimed that HUD is "trying to use the settlement as a hammer to dismantle local zoning." (November 30, 2011, *see* Report Exh. 44.) More specifically, "[t]he federal government is trying to force me as County Executive to sue each municipality to abolish even basic zoning protections[.]" (April 23, 2013, *see* Report Exh. 25, at 22; *see also* Report Exh. 35, at 1:36.23–1:55.10 ("[The] federal government is requiring

. . . that the County sue the municipalities to abolish any restrictions in the zoning code that would prohibit height restrictions, density . . . .” (May 15, 2013)). As the Court is no doubt aware, however, the Government has never made any applications in the seven-year history of this case to require the County “to sue each municipality” in order to “abolish any restrictions in the zoning codes” (or for any other reason). Further, according to the County Executive, “HUD wants NO restrictions — in any neighborhood — on height, size, acreage, density, number of bedrooms, and lack of water or sewers.” (Report Exh. 25, at 22 (emphasis in original)); *see also* Report Exh. 34, at 3:21.02–3:42.18 (“[HUD is] demanding now that the County basically go after every municipality to abolish local zoning. Which in their view, any restrictions in a zoning code . . . should be eliminated[.]” (May 14, 2013)). In an effort to relieve the County Executive’s confusion on the matter, by letter dated May 31, 2013, HUD Deputy Secretary Maurice A. Jones wrote to the County Board of Legislators and explained that “HUD has never suggested that the County must ‘dismantle’ zoning in any neighborhood.” (Report Exh. 36.)

In his deposition, County Executive Astorino provided this explanation for his assertions:

> Q. HUD asked you to sue 31 municipalities to abolish zoning protections? Where has it done that?
>
> A. The threat exists because in the settlement it says “as appropriate.” I don’t believe it’s appropriate. I don’t think we’re anywhere near something like that.
>
> Q. So the settlement says “as appropriate.” I’m asking you for any correspondence from HUD that says to sue each municipality to abolish basic zoning protections. And there is none, is there?
>
> A. Basic zoning protections?
>
> Q. That’s your speech.
>
> A. So can I explain?
>
> Q. Sure.

> A. It is clear to me that HUD has injected itself along the way, linking zoning to this settlement.[3] They have said in their letter of May 13th, 2011, outside the four corners of the agreement, making new demands on the County, which we don't agree to, for a lot of reasons, and, yes I do believe there is a direct link —
>
> MR. JOHNSON: [Court reporter,] can you read the County Executive the question again.
>
> A. You asked me and allowed me to —
>
> Q. You're not answering the question.
>
> . . . .
>
> Q. Have you received any —
>
> MR. CASTRO-BLANCO: Objection to form.
>
> Q.— correspondence from HUD telling you to sue each municipality?
>
> A. That would have to be the Law Department that can answer that question. *I have no knowledge of it*, but the Law Department may, but it is clear in my —
>
> Q. You answered the question.

(Report Exh. 47 at 226:12–227:21, 228:18–229:3 (emphasis added).)[4]

In its most recent ruling, moreover, the Second Circuit expressly rejected the County's assertion that HUD had ever predicated funding upon changes to local zoning:

> HUD did not at any point tell the County that its CPD funds would only be released if certain municipalities in the County *changed* their zoning laws. Instead, HUD required the County to assess and analyze *whether* certain zoning laws in the jurisdiction impeded fair housing and, if so, to identify a plan to overcome the effects of such impediments.

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[3] *But see County of Westchester IV*, 802 F.3d at 432 ("Because exclusionary zoning can violate the [Fair Housing Act], and because HUD is required to further the policies of that statute, it was reasonable for HUD to require the County to include in its AI an analysis of its municipalities' zoning laws.").

[4] In the errata sheet, the County inserted "That was your answer," before "You answered the question." (Report Exh. 47.)

County of Westchester IV, 802 F.3d at 433–34 (emphasis in original). The consequence of the ruling was that the County lost approximately $12.5 million in funds for FY2013 and FY2014, on top of the $7.4 million it lost for FY2011 and the $5.2 million it lost for FY2012. In his 2016 State of the County speech, County Executive Astorino boasted that the dismissal of the County's two lawsuits and the loss of $25 million was "a significant legal victory" for the County. (Kennedy Decl. Exh. B, at 15.)[5]

(ii.) "The County's target is really 10,768" AFFH units

The Consent Decree requires the County to "ensure the development of at least seven hundred fifty (750) new affordable housing units." (Consent Decree ¶ 7.) The County Executive, however, has repeatedly advised the public that HUD has sought to enlarge that requirement to 10,768 units. The County Executive contended in his April 23, 2013 State of the County address, for example, that HUD and the Monitor have sought to enlarge the requirements under the Consent Decree such that "[t]he County's target is really 10,768" AFFH units, at a cost of "between $700 million and $1 billion." (Report Exh. 25, at 22-23; *see also id.* at 23 ("Let me say the number again — 10,768 housing units.").) The County Executive further held town hall events (summarized at greater length in the Report at 37-43) that featured charts asserting that HUD was requiring the County to build 10,768 units rather than 750 units.

As with the County Executive's other misstatements, HUD and the Monitor have labored to set the record straight. In his May 31, 2013, letter, Deputy Secretary Jones noted the 10,768 figure and explained that "HUD is not requiring the County to build this number of units."

[5] County Executive Astorino further complained of the "unlimited resources of the federal government to tie up the County with legal maneuvers. Once in court, stay in court." (Kennedy Decl. Exh. B, at 16.) However, it was the County, not HUD or DOJ, that filed the two lawsuits in this Court, *see* 13 Civ. 2741 (DLC), 15 Civ. 1992 (DLC), and three appeals to the Circuit, *see* 13-3087, 15-979, 15-2294 (2d Cir.).

(Report Exh. 36.) In response, the County Executive issued a press release asserting that HUD's letter reiterating that the Consent Decree requires 750 AFFH units instead "confirm[s] that [HUD] expects Westchester to go beyond the settlement's 750 units." (Report Exh. 38.)[6] Accordingly, the Monitor wrote to the County on June 12, 2013, requesting that the County Executive remove his misleading statements from the County's website. (Report Exh. 1.) The County refused. (Report Exh. 39.)

At his deposition, the County Executive provided this support for his assertions:

> Q. . . . Do you see where it says, "Through the use of the funds set forth in paragraphs 2 and 5 the County shall, within seven years of the entry of this stipulation and order, ensure the development of at least 750 new affordable housing units"?
>
> Mr. Astorino, do you have an understanding of the word "at least," the phrase "at least"?
>
> A. Yes.
>
> Q. What does that mean to you?
>
> A. A minimum of 750.
>
> Q. Since the entry of this settlement are you aware of anytime the Monitor has petitioned the Court to change this order?
>
> A. I don't recall, but that would be an issue the County Law Department would deal with.
>
> Q. Are you aware of anytime that HUD has moved the Court to change the terms of this order?
>
> A. I don't recall but, if I may, I would like to expand upon that.
>
> Q. No, actually. Let's keep the "yes" or "no" answers, please.

[6] The Consent Decree does provide for a modification in the number of AFFH units where both parties consented to the modification, and the modified number was approved by the Monitor and ordered by the Court. (Consent Decree ¶ 15.) No such modification has been proposed by either party.

(Report Exh. 47, at 217:10–218:12.) Similarly, Commissioner of Planning Edward Buroughs testified as follows:

> Q. The County's obligation remains 750, correct?
>
> A. Yes.
>
> Q. And it has always been 750. Isn't that correct?
>
> A. That's my understanding.

(Report Exh. 55, at 63:22–64:3.) None of the individuals deposed could supply any basis for the total number of AFFH units being anything other than 750.

(iii.) "The cost is between $700 million and $1 billion"

The Consent Decree provides that the County will spend $51.6 million to ensure the development of 750 AFFH units. (Consent Decree ¶¶ 3, 23.) The County Executive contended in his April 23, 2013 State of the County address, however, that the requirements under the Consent Decree were "really 10,768" units at a cost of "between $700 million and $1 billion." (Report Exh. 25, at 23.) Deposition testimony, however, revealed that there was no more of a foundation for the $1 billion estimate than there was for the 10,678 number; which is to say, none. At his deposition, County Executive Astorino explained the basis for his statement as follows:

> Q. . . . "Put a dollar figure on building 10,768 units and the cost is between 700 million and one billion." How is that figure calculated?
>
> A. I have to remember, but it was probably the — whatever the cost per unit was at the time, of 2013, of what it was costing us to build or how we would figure it out, multiplied by the amount.
>
> Q. Who made that calculation?
>
> A. I don't remember who made the calculation.

(Report Exh. 47, at 236:10–22.) Buroughs, for his part, conceded that he could not remember

how he came up with that figure, and that there was no documentary basis for the amount:

> Q. . . . "To put a dollar figure on it, the cost of building 10,768 units would be between $700 million and $1 billion. To come up with $1 billion, we would have to raise property taxes 200 percent."
>
> Did you ever do any calculations or do you know of anyone in the County that actually has done calculations related to this section of the speech? Anyone in your —
>
> Withdrawn. You can answer the question that's on the table.
>
> A. I — I can't remember specifically — I can't remember specific —
>
> MR. CASTRO-BLANCO: Specifically?
>
> THE WITNESS: Yeah, that's the word.
>
> I can't remember specific content, but I do think we did do calculations on average building cost.
>
> Q. So you think you may have — you think you did do calculations that supported this $1 billion figure?
>
> A. I think so, yes.
>
> Q. Have you produced those calculations?
>
> A. I don't know what you mean by "produced"?
>
> Q. That is, have you, in your search for documents, searched for the paper document or electronic document that reflects the calculations in this number —
>
> A. If there was —
>
> Q. —$1 billion on [this exhibit]?
>
> A. If there were such a document, it wouldn't have been found.[7]

(Report Exh. 55, at 73:5–74:21.) The Report correctly concluded that "the $1 billion price tag was a fiction based on applying simple arithmetic to a complete fabrication." (Report at 45.)

(iv.) "A high rise can be built on any street, even right door next to you."

The Consent Decree contains no provision that high-rise buildings must be built, to

[7] In the errata sheet, the County changed "wouldn't" to "would." (Report Exh. 55.)

provide for AFFH units or for any other purpose, and neither HUD nor any agency of the Government has ever taken the position that the County must build high-rise buildings. Notwithstanding the absence of any such obligation or statement, County Executive Astorino has maintained on several occasions that, for example, HUD was seeking to ensure that "[a]partments, high-rises or whatever else the federal government or a developer wants can be built on any block in America." (September 6, 2013, *see* Report Exh. 42.) In his 2013 State of the County address, County Executive Astorino contended that because HUD was allegedly seeking to abolish local zoning, "[a] five-story building — or higher — could be put on your street." (April 23, 2013, *see* Report Exh. 25.) The County Executive further repeated this allegation at "Ask Astorino" events across the County. (Report at 45-47.)

At his deposition, however, the County Executive conceded that HUD had not actually endorsed the position he attributed to it:

> Q. . . . Has HUD proposed building higher than five-story buildings during the course of this settlement?
>
> MR. CASTRO-BLANCO: Objection to form.
>
> A. To my knowledge, no, but, again, I want to be able to respond to the question in greater length so you understand why I'm answering the way I'm answering.
>
> Q. I asked you a simple question.

(Report Exh. 47, at 230:10–20.) The Deputy Commissioner of Planning, Norma Drummond, not only concurred that HUD had not required the development of any high-rises, but also agreed that HUD had neither demanded that more than 750 AFFH units be built or $1 billion spent:

> Q. . . . Are you aware of any proposal by HUD to put in place a five-story building by HUD?
>
> A. By HUD? No, not to my knowledge.

> Q. Are you aware of any requirement in the Consent Decree to build more than 750 housing units?
>
> A. I believe the agreement states — this Consent Decree states at least 750.
>
> Q. Okay.
>
> A. But that's the best of my knowledge.
>
> Q. Are you aware of any requirement put in place by HUD that the County spend $1 billion on developing affordable housing?
>
> A. A requirement by HUD to spend one billion? No.

(Report Exh. 54, at 88:24–89:19.) Assessing all the testimony and evidence, the Report concluded that the County, primarily through its County Executive Robert Astorino, "made statements that were demonstrably false or so lacking a basis in fact as to violate the implied duty to engage in good faith with respect to efforts to educate the public." (Report at 1.) These statements, moreover, substantially mitigated "the impact of what may be most charitably described as a delayed and decided measured public education campaign required by Paragraph 33(c) of the Settlement." (Report at 2.)[8]

ARGUMENT

POINT I

THE COUNTY'S PUBLIC DISINFORMATION CAMPAIGN CONSTITUTES A BREACH OF THE CONSENT DECREE

A. The Legal Framework

The Consent Decree "embodies an agreement of the parties" and is also "an agreement

[8] By letter of March 22, 2016, the Monitor suggested there may be a conflict of interest for County counsel to represent certain employees. By Order of March 23, 2016, the Court invited the parties to address the issue. County counsel did not state at any deposition that they represented any employees in their individual capacities. While there is disagreement in the testimony of the witnesses, there does not yet appear to be a conflict involving the employees' individual interests. *See Dunton v. County of Suffolk*, 729 F.2d 903, 748 F.2d 69 (2d Cir. 1984).

that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992). 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); *see also United States v. Broad. Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001) (requiring that "'deference. . . . . be paid to the plain meaning of the language of a decree and the normal usage of the terms selected.'") (quoting *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985)). As the Second Circuit explained in *Westchester II*, 712 F.3d at 767, consent decrees "reflect a contract between the parties (as well as a judicial pronouncement), and ordinary rules of contract interpretation are generally applicable." *Doe v. Pataki*, 481 F.3d 69, 75 (2d Cir. 2007). The Court must consider the contractual provision not in isolation, "but in the light of the obligation as a whole and the intention of the parties as manifested thereby." *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 397 (2d Cir. 2009) (citation and internal quotation marks omitted); *see also Westchester II*, 712 F.3d at 767 (citing cases).

B. The County Breached the Consent Decree by Abandoning Its Public Information Campaign

The County's failure to proceed with a public information campaign constitutes a breach of its obligations under paragraph 33(c) of the Consent Decree. The record amassed by the Monitor makes plain that the County mounted an inadequate effort that it promptly abandoned. The County was not entitled to simply give up after its first disastrous public information campaign, because its obligation to engage in public education efforts was a continuing one. *See 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, 493 (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"). And while the County has now announced a "One Community Campaign," the campaign comes nearly seven years late, appears largely prompted by the Monitor's inquiries rather than a desire to comply with the Consent Decree, and has been greatly undermined by the misstatements made by the County Executive.

C. The County Executive's Statements Did Not "Promote" Fair Housing

1. *The County Executive's Statements Sought to Mislead the Public*

As detailed above, four prominent types of assertions made by the County Executive were without any basis in fact.

First, the County Executive's assertion that "HUD wants to dismantle local zoning" is inaccurate. By letter dated May 31, 2013, HUD Deputy Secretary Jones explained that "HUD has never suggested that the County must 'dismantle' zoning in any neighborhood." (Report Exh. 36.) And when asked at his deposition whether there had been any effort by the Government to compel the County to sue all municipalities to abolish all local zoning, County Executive Astorino conceded, "I have no knowledge of it." (Report Exh. 47 at 228:18–229:3.)

The enforcement actions of the Government have, to the contrary, focused on assessing whether there have been violations of state and federal law, applying *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 936-38 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (per curiam), and related fair-housing rules, and under state law, applying *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 107 (1975). Such enforcement action is entirely appropriate, given that "unlawful practices [prohibited by the Fair Housing Act] include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient

justification." *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2521-22 (2015). To the extent that County Executive Astorino believes that local zoning decisions must be immune from fair-housing enforcement, his objection lies not with HUD, but with the law. The County Executive's opposition to enforcement of the fair housing laws does not "broaden support for fair housing," nor does it "promote the fair and equitable distribution of affordable housing in all communities." (Consent Decree ¶ 33(c).)

Second, the County Executive's statements that the County's target "is really 10,768" AFFH units are misleading. The Consent Decree requires the County to "ensure the development of at least seven hundred fifty (750) new affordable housing units." (Consent Decree ¶ 7.) Both Deputy Secretary Jones and the Monitor have asked the County Executive to stop misleading the public that 750 is actually 10,768. (Report Exhs. 1, 36.) And in his deposition, the County Executive failed to provide any basis for his claims. (*See* Report Exh. 47, at 217:10–218:12.)

Third, and similarly, the County Executive's statement that "[t]he cost is between $700 million and $1 billion" sought to mislead the public. That calculation was apparently based on the inaccurate estimate of 10,768 AFFH units. (*See* Report Exh. 47, at 236:10–22; Report Exh. 55, at 73:5–74:21.) This statement, in particular, did not "promote the fair and equitable distribution of affordable housing," because it was made to scare taxpayers into concluding that as a result of the costs of the Consent Decree, "we would have to raise property taxes 200 percent." (Report Exh. 25, at 23.) Informing taxpayers that their property taxes will increase by 200 percent in order to provide fair and affordable housing neither "broaden[s] support for fair housing" nor "promote[s] the fair and equitable distribution of affordable housing in all communities" (Consent Decree ¶ 33(c)) — again, it does precisely the opposite.

Fourth, the County Executive's statement that "a high rise can be built on any street, even right door next to you," sought to mislead the public. At his deposition, both the County Executive and the Deputy Commissioner of Planning conceded that they were unaware of any such demand by HUD. (*See* Report Exh. 47, at 230:10–20 ("To my knowledge, no[.]"); Report Exh. 54, at 88:24–89:19 ("No, not to my knowledge.").)

2. *The County Executive's Misstatements Breached the County's Duty to Promote*

The Second Circuit has already established that the obligations of the Consent Decree "place[ ] an affirmative duty" on the County and its Executive. *Westchester II*, 712 F.3d at 769. In particular, the Second Circuit has ruled that "'[t]he ordinary meaning of 'promote' includes 'to bring or help bring into being,' or 'to contribute to the growth, enlargement, or prosperity of,' or to 'encourage,' or 'further.'" *Id.* at 768 (quoting *United States v. Awan*, 607 F.3d 306, 314 (2d Cir. 2010)). In finding that the County Executive breached his duty under paragraph 33(g) to promote certain legislation, the Circuit explained that "promotion requires affirmative action by the obligated party to help bring the object in question into being. While promotion does not require insurance, promotion is also not met by taking no action or taking an action that detracts from, rather than furthers, the end goal." *Westchester II*, 712 F.3d at 769. Just as the veto of source-of-income legislation was "wholly inconsistent with the County Executive's duty to promote," so too were the County Executive's statements, which constituted a public disinformation campaign rather than an effort to broaden support for fair and affordable housing. As the Monitor aptly noted, "the County cannot claim to have discharged its duty to educate the public about the benefits of integration and fair housing while repeatedly disseminating false and misleading information about efforts to achieve those very goals." (Report at 7.)

The County Executive's misstatements, moreover, complicated the work of the Monitor

in resolving zoning concerns with the thirty-one municipalities affected by the Consent Decree. The Report noted how the County inserted itself into the otherwise cooperative process of zoning analysis and review between the Monitor and the municipalities, seeking to thwart the accomplishment of the objectives of the Consent Decree without need for litigation. (Report at 23–24.) Wittingly or not, some of the language employed by the County Executive — particularly the prospect of abolishing zoning entirely so as to permit "high-rises" next door — is often used to inflame and exacerbate racial tensions. *See, e.g.*, *MHANY Mgmt., Inc. v. County of Nassau*, __ F.3d __, 2016 WL 1128424, at *22 (2d Cir. Mar. 23, 2016). Using this sort of language, particularly where it is false, undermines the goals of broadening support for fair and affordable housing, a goal the County committed itself to when it entered the Consent Decree.

3. *The County Cannot Invoke the First Amendment to Excuse Its Breach*

The County has previously contended that the First Amendment permits it to breach the public education and outreach provisions of the Consent Decree. As a preliminary matter, the dispute here does not implicate the First Amendment because the County voluntarily agreed to its educational obligations under the Consent Decree, specifically paragraph 33(c). Rejecting the County's argument that the County Executive could not have bound himself to promote the legislation prohibiting source-of-income legislation, the Second Circuit concluded that

> for the County to now claim that it was without power to do what it expressly represented was in its power as it sought to avoid hundreds of millions of dollars in liability is all the more problematic. In entering into the consent decree, the County chose to bind itself to these terms "rather than have the District Court adjudicate the merits."

Westchester II, 712 F.3d at 772 (quoting *Badgley v. Santacroce*, 800 F.2d 33, 38 (2d Cir. 1986)). Even if the County had First Amendment rights, the County waived its right to undermine support for fair housing when it agreed to "broaden support for fair housing," and its right to

deter the fair and equitable distribution of affordable housing when it agreed to "promote the fair and equitable distribution of affordable housing in all communities." (Consent Decree ¶ 33(c).)

First Amendment rights may be waived by agreement. "The Supreme Court has repeatedly recognized that constitutional rights may be legitimately waived in certain instances." *Legal Aid Soc'y v. City of New York*, 114 F. Supp. 2d 204, 226 (S.D.N.Y. 2000) (citing cases). Courts will find a waiver where "the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver." *Erie Telecomm., Inc. v. City of Erie, Pa.*, 853 F.2d 1084, 1096 (3d Cir. 1988); *see also Morris v. New York City Employees' Ret. Sys.*, 129 F. Supp. 2d 599, 609 (S.D.N.Y. 2001) ("In the civil context, a party waiving constitutionally protected rights — even when doing so through the execution of a contract — must also be made aware of the significance of the waiver."). That test is easily met here: the County was obviously represented by counsel when it entered the Consent Decree, the Consent Decree was reached after extended litigation and negotiation, the signatories to the Consent Decree certified that they were authorized by the parties to agree to its terms (Consent Decree ¶ 54), both counsel for the County and the County Executive at the time signed the Consent Decree, and the County Board of Legislators approved it. Consequently, just as the County Executive retained no right to veto the source-of-income legislation, there is no basis for the County to assert now that it retained a First Amendment right to negate its express and agreed-to educational obligations.

Several courts of appeals have ruled, moreover, that local government units such as the County have no First Amendment rights. *See United States v. American Library Ass'n*, 539 U.S. 194, 210-11 (2003) (plurality op.) (leaving question open, but citing *Warner Cable Commc'ns, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990); *Student Gov't Ass'n v. Univ. of*

Mass., 868 F.2d 473, 481 (1st Cir. 1989); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 & n.7 (1973) (Stewart, J., concurring)). As for the County Executive and other County employees, they speak on behalf of the County in this regard, and thus for the same reasons cannot invoke the First Amendment to protect any efforts to undermine or defy the County's Court-ordered commitments in the Settlement. *Cf. Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

Even to the extent County employees act within their limited First Amendment rights to speak as private citizens, they "by necessity must accept certain limitations on [their] [First Amendment] freedom," and expression that "contravene[s] governmental policies or impair[s] the proper performance of governmental functions" may be curtailed or regulated. *Id.* at 418; *cf. United States ex rel. Anti-Discrimination Center v. Westchester County*, 2012 WL 1574819, at *10 n.7 (S.D.N.Y. May 3, 2012) (issue regarding County Executive's veto of required legislation is not his legal authority to do so, but the "legal consequences" of taking action that violates the Consent Decree). Any assessment of the degree to which County employees have impaired the County's compliance with its obligations must also take into account the employee's rank and policymaking or public-contact duties: the Second Circuit has expressed doubt that "the Constitution ever protects the right of a public employee in a policymaking position to criticize her employer's policies or programs simply because she does not share her employer's legislative or administrative vision." *Lewis v. Cowen*, 165 F.3d 154, 165 (2d Cir. 1999) (citation and quotation marks omitted); *accord McCullough v. Wyandanch Union Free School Dist.*, 187

F.3d 272, 279 (2d Cir. 1999); *McEvoy v. Spencer*, 124 F.3d 92, 102-03 (2d Cir. 1997). That admonition applies equally to the County Executive himself.

POINT II

THE RELIEF REQUESTED IN THE REPORT IS AN APPROPRIATE REMEDY FOR THE COUNTY'S BREACH OF THE CONSENT DECREE

A. The Court's Powers to Order Compliance

Where, as here, the evidence establishes that the County is in breach of its obligations under the Consent Decree, the Court should order the County to comply. *See, e.g.*, *Frew v. Hawkins*, 540 U.S. 431, 440 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."); *Spallone v. United States*, 493 U.S. 265, 276 (1990) (courts have inherent power to enforce compliance with their consent decrees). "Until parties to such an instrument have fulfilled their express obligations, the court has continuing authority and discretion — pursuant to its independent, juridical interests — to ensure compliance." *EEOC v. Local 580, International Ass'n of Bridge, Structural & Ornamental Ironworkers*, 925 F.2d 588, 593 (2d Cir. 1991); *see also United States v. Local 359, United Seafood Workers,* 55 F.3d 64, 69 (2d Cir. 1995) ("[A] consent decree is an order of the court and thus, by its very nature, vests the court with equitable discretion to enforce the obligations imposed on the parties.").

Directing the County to comply with its obligations is fully appropriate because "[c]ourts have an affirmative duty to protect the integrity of a court decree where the performance of one party threatens to frustrate the purpose of the decree." *Barcia v. Sitkin*, No. 79 Civ. 5831, 2007 WL 222003 (RLC), at *3 (S.D.N.Y. Jan. 25, 2007) (citing *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985)). Moreover,

> the court has inherent power to enforce consent judgments, beyond the remedial "contractual" terms agreed upon by the parties. Unlike a private agreement, a consent judgment contemplates judicial interests apart from those of the litigants. Until parties to such an instrument have fulfilled their express obligations, the court has continuing authority and discretion—pursuant to its independent, juridical interest—to ensure compliance.

Local 580, 925 F.2d at 593; *see also Westchester I*, 2012 WL 1574819, at *7 (quoting *Local 580*); *United States v. Dist. Council of N.Y.C. and Vicinity of the United Bhd. of Carpenters*, 972 F. Supp. 756, 762 (S.D.N.Y. 1997) (same). Thus, "though a court cannot randomly expand or contract the terms agreed upon in a consent decree, judicial discretion in flexing its supervisory and enforcement muscles is broad." *Local 580*, 925 F.2d at 593. Protecting the integrity of a judicially approved consent decree "justifies any reasonable action taken by the court to secure compliance." *Davis*, 278 F.3d at 79 (citing *Berger*, 771 F.2d at 1568).[9]

B. The Court Should Order the Relief Requested in the Report

The Report recommended that the Court "declare the following facts to be true: (i) that HUD has not attempted to dismantle local zoning; (ii) that the cost of compliance with the Settlement is not $1 billion, but $51.6 million; (iii) that HUD never sought to build high-rise apartment buildings in Westchester's residential neighborhoods; and (iv) that Westchester has a duty to ensure the development of at least 750 AFFH units." (Report at 3.) The Report further recommended that the County be required to distribute these findings to all municipalities covered by the Consent Decree, to post these findings on the County's website, and to unseal the

[9] Although the cases cited here discuss only orders denominated as "consent decrees," the same logic, and the same power and duty of the Court to enforce the orders, applies to the Stipulation and Order in this action, which specifically provides for this Court's continuing jurisdiction to enforce it (Consent Decree ¶ 58). *See Ferrell v. HUD*, 186 F.3d 805, 814 (7th Cir. 1999) (court's power to modify decree applied to stipulation); *Jenkins ex rel. Jenkins v. Missouri*, 103 F.3d 731, 741 (8th Cir. 1997) (same).

videotapes of certain depositions taken in connection with this matter. (Report at 56.) As to the County's failure to conduct public education campaigns, the Report recommended that the County hire a public communications consultant.

The Monitor's recommendations should be adopted by the Court. The Declaratory Judgment Act provides that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). "By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). The Court should therefore enter an order finding that the County has breached the Consent Decree and declare the facts asserted by the Monitor to be true, and contrary to the County's representations.

The County should further be required to disseminate the Court's granting of declaratory relief, both to the municipalities covered by the Consent Decree and on the County's website. Courts routinely direct parties to provide notice of rulings to non-parties that may affect those non-parties; indeed, this Court issued such an Order on April 26, 2016, and directed the Monitor to provide a copy of that Order to the Town of New Castle. (ECF No. 575.)

Unsealing the videotapes of the depositions of County Executive Astorino, Deputy Commissioner of Planning Drummond, and Director of Communications McCormack, as the Monitor recommended (Report at 56), would be consistent with the County Executive's stated belief in the 2016 State of the County speech that "'debate on public issues should be uninhibited, robust, and wide-open.'" (Kennedy Decl. Exh. B, at 16 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citing "the background of a profound national

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"))).

Finally, the Monitor's recommendation that the Court order the County to hire a consultant for its public information campaign would serve the purposes of the Consent Decree. "The court's interest in protecting the integrity of such a decree " 'justifies any reasonable action taken by the court to secure compliance.'" *Local 359*, 55 F.3d at 69 (quoting *Berger*, 771 F.2d at 1568). The County's initial campaign was independently derided as "arrogant," "juvenile," "racist," "condescending," and "just bad all around," among other things (Report Exh. 12), suggesting that the County and the success of the Consent Decree may benefit from some additional knowledge and expertise.

CONCLUSION

The Court should order the remedial relief requested in the Report.

Dated: New York, New York
May 9, 2016

Respectfully submitted,

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