

ANTI-DISCRIMINATION CENTER, INC.

“ONE COMMUNITY, NO EXCLUSION”

Nov. 23, 2011

VIA EMAIL

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Dear Mr. Johnson:

This letter represents ADC’s summary comments on the document annexed to your Oct. 25, 2011 report as Exhibit 3, a document that holds itself out as an “affirmative marketing plan” (“AMP”). Unfortunately, the AMP follows a now-familiar path: Westchester has no interest in creating *effective* affirmative marketing; as with the “Model Ordinance,” the County’s idea is to see how much of the status quo can be left in place. Because the AMP is so far from being even minimally satisfactory, we focus on broad themes of inadequacy rather than setting forth a line-by-line critique. We are, of course, available to discuss the matter at a finer level of granularity in the context of your urgent need to promulgate a real plan.

As a preliminary matter, we emphasize that the Consent Decree cannot be vindicated if elements of plans such as an AMP are looked at in isolation from the context out of which they emerge. Westchester has rejected each and all of the material premises, goals, and objectives of the Decree; its officials have publicly indicated their objection to the requirement that Affordable AFFH Units be marketed outside of Westchester; and others that reliably carry water for the County have demonstrated that their main concerns are providing assurances that units won’t really have to go to eligible African-American and Latino families currently living in New York City. As such, extra care is required to make certain that an AMP is not mere window-dressing, bur rather an actual program designed to achieve the goal of maximizing desegregation opportunity.

1. Making false assumptions about the target population for the units. No one thus far has seemed to want to recognize that those who will likely be living in the units will probably *not* be low-income households.¹ Only 10 percent of units will be rentals where household income cannot exceed 50 percent of area median income (“AMI”). For Westchester, that is in excess of \$53,000. 40 percent of units will be rentals where household income can be up to 65

¹ We include in this the Furman Center, whose April 2011 Affirmative Marketing Report prefigured some of the limitations in the Westchester AMP (and previous iterations of the AMP). The utility of that Furman report needs to be reconsidered in light of the various points raised throughout this letter.

percent of AMI, or approximately \$70,000. And 50 percent of the units will be ownerships units where household income can be up to 80 percent of AMI, or in excess of \$85,000.

In other words, it is highly likely that the overwhelming percentage of families coming to live in Affordable AFFH Units under the Decree will have household income somewhere between \$60,000 and \$90,000. Yet nothing has been done to think about or plan for how to attract such families, let alone such families who are African-American or Latino. This failure has profound implications.

Any marketer will tell you that, on an aggregate level,² the most effective means by which to reach an audience at one income level is not necessarily the same as the most effective for reaching families at other income levels (the same is true in terms of what features may tend to be more attractive to one income band than another). But developing and utilizing such information is simply not a part of either element of the draft AMP.

An illustration of the problem: over the last 27 months, the siting of units and the prospective marketing of units has purported to rely on the premise that prospective residents would need easy access to mass transportation.³ In fact, however, a very high percentage of families with incomes in the \$50,000 to \$90,000 range own one or more automobiles (even in the New York metropolitan area) and may be more interested in moving to Westchester areas other than those located near train stations. The premise was and is fundamentally flawed.

2. Desperately seeking to avoid opening the door to New York City residents. As with many other aspects of Consent Decree enforcement (or avoidance), there are many elephants in the room. One has to do with the importance of reaching eligible families living in New York City. The outcome of the negotiations that led to the Consent Decree required marketing to households in geographic areas outside of Westchester with “large non-white populations.” Consent Decree, ¶ 33(e). Such marketing is not optional.

The purpose was both remedial and practical. Remedial in the sense that Westchester developed residentially with minority residents excluded either deliberately or as a result of the maintenance of patterns that were initially deliberately created. Practical in the sense that there is tremendous potential for affirmatively marketing of these units in New York City. Even if one takes only household income caps between 50 percent and 80 percent of Westchester AMI (*i.e.*, excludes all households below 50 percent of Westchester AMI), one finds more than 215,000 eligible African-American and Latino households in New York City.

The promise of those numbers from the Consent Decree’s point of view is a peril from Westchester’s point of view. Nothing has been done to prioritize such marketing. On the

² Within an income band, there is, of course, individual variation.

³ In fact, of course, the real advantage of focusing on such sites from Westchester’s point of view is to exclude from the universe of Affordable AFFH Units large, ultra-White swaths of Westchester where additional development would require the modification of existing zoning requirements.

contrary, Westchester is still treating the five boroughs of New York City as those they were — individually or in the aggregate — demographically equivalent to Putnam, Rockland, and Fairfield counties. They're not (the non-Latino African-American population of Putnam per Census 2010 data is 2.1 percent).

There is nothing in either element of the AMP that seriously seeks to identify the means by which to reach these 215,000 African-American and Latino families, let alone anything that seeks to encourage those families to consider Westchester as a home.

The AMP leaves entirely unclear what, if any, effort will be made to reach affordable housing, religious, community, and other groups based in New York City as part of genuine outreach (or to reach local New York City officials, for that matter). Nothing is specified in terms of how to link in to New York City's own efforts to market affordable housing.

In fact, the AMP shows that such efforts that are made will continue to be Westchester-centric.⁴ That violates the Consent Decree.

3. Closing one's eyes to what may attract or inhibit applications from families that are members of groups traditionally excluded from highly white areas of Westchester.

One can't market effectively if one doesn't seek information from one's target audience. Westchester hasn't done so, and the AMP has no plan to do so.

The County's failure is not surprising. If, for example, the same tools used every day to understand and shape consumer behavior in other areas were applied here, Westchester might well find out that a variety of its tactics send the "you're not welcome" or the "you won't be part of the community" message:

- promoting developments that are 100 percent subsidized rather than mixed-income;
- promoting developments that are in unpopulated, undesirable, or otherwise isolated locations;
- not countering (or even encouraging) voices of exclusion and resistance to change (like those complaining that affordable housing would yield too many children or that housing should only be for local residents); and
- not making clear that Westchester will actively work to ensure that everyone is — and is made to feel — welcome.⁵

⁴ Sometimes the don't-worry-it-won't-have-to-be-NYC-people is delivered very bluntly. Just the other day, here was Rose Noonan's message in connection with a unit in Pleasantville: "There's equal opportunity for everyone to apply. The person could even be living in Connecticut." See Westchester Journal News article, Nov. 21, 2011, *available at* <http://lohud.us/t6501Y>.

An AMP not only has to be based on (and develop) information from an prospective audience, it has to present a real plan for *actually encouraging members of that audience* to move to the least African-American and Latino census blocks within eligible communities. This should not be difficult: these locations surely have a lot to offer. But let's be serious: an ad in the *Amsterdam News* about one development for which the deadline for application is only weeks away is not going to do the trick. Getting people tuned in to the advantages that a community may offer requires active effort, and the AMP has no plan to offer that encouragement.⁶

4. Making an AMP like a non-compliant AI: ignoring the crucial role of municipal resistance. There are many ways that municipal resistance to affordable housing with maximum desegregation potential undercuts the promise of the Consent Decree. Just the fact of that resistance sends a message to those traditionally excluded that they continue not to be welcome. Westchester's refusal to take on exclusionary zoning compounds that message. And, substantively, the maintenance of exclusionary zoning reduces the opportunity to develop in places and in ways that would be maximally attractive from the point of view of affirmative marketing.⁷ (In any serious effort, developers would be encouraged to identify development sites they would like to pursue if not constrained by exclusionary zoning.) But the AMP is entirely silent about any steps that need to be taken to overcome exclusionary zoning.

5. Offloading tasks to individual developers that those developers can't perform (or shouldn't be trusted to perform). The lack of centralization of applications and marketing reduces the opportunities available to each family and the opportunities to reinforce any initial marketing that has been done (the AMP does not provide for advertising for developments of fewer than 50 units, but begs the question of how metro-area marketing can be done for those smaller developments). In fact, it means that individual developers are left to try to develop relationships throughout the metropolitan area (a classic reinvent-the-wheel problem). It means that there are more opportunities for wink-and-a-nod marketing by individual developers that only bows in the direction of genuine affirmative efforts.

⁵ Given the history of Westchester County, and, now, the history of Westchester's resistance to the Consent Decree, we are not suggesting that every African-American and Latino family would be equally open to moving to areas of traditional exclusion. But one part of the solution is to make clear that it is a new day and another part is to explore how to motivate some small portion of an eligible population to be what has sometimes been called "pioneers." Neither element is part of the AMP.

⁶ This is most true in terms of families not currently in Westchester, but also is true in terms of reaching minority families in Westchester. Nothing in the AMP makes, or identifies a plan to make, a pitch along the lines of, "Here's why you should be moving to Westchester" (or to a particular town or development).

⁷ To the extent that high cost reflects the "market's view" of community desirability, that's precisely where one wants to encourage greater inclusion. Conveniently, the economics work well, too: contrary to the view that has apparently prevailed thus far, it is in those areas where the cross-subsidy from market-rate units to affordable units would be greatest...provided, that is, that the current unreasonable restrictions on density were modified.

It means that Westchester, ultimately, is not doing very much. As we said back in connection with Westchester's first iteration of an Implementation Plan (released in Jan. 2010), you can look at the six pages of the County's portion of the AMP, and you really have no assurance that anything specific (or specifically useful) is actually going to get done. A similar point could be made about the remaining 25 pages applicable to individual developers.

In short, there are certainly general features that one wants in an AMP to prevent unfairness, but nothing up to the task of countering the large inhibitions to interest from African-American and Latino families that exist as a result of historical and current behavior in and by Westchester.

Funding and preferences. The AMP has no provision for requiring participating developers to contribute to a fund that would increase the resources available to the County to engage in affirmative marketing.

To the extent that an AMP purports to allow preferences if the universe of qualified households under the preference is more racially or ethnically diverse than the demographic composition of the locality,⁸ that approach violates Consent Decree, ¶ 25(d)(i) (barring all selection preferences that do not AFFH). The comparison is misplaced: the proper one measures the impact of a preference against the universe of eligible households (both size and composition) that would be yielded without having any preference at all. Ignoring this fact fundamentally rewrites the Decree.

* * *

If there is one theme that we have tried to sound, it is that the enforcement of a federal court order is no place for pretending. Not for pretending that there has been progress; not pretending that the barriers to success aren't high; not pretending that the pretty-please method has worked or will work.

What would affirmative marketing look like if it were real, not pretend? Given the paucity of affordable housing in the region, and assuming for the moment that the interest of only a modest percentage of eligible African-American and Latino families was aroused by the possibility of affordable housing in "choice communities," that would mean that tens of thousands of such families would have already indicated their interest. Have they? Is Westchester seeking or planning those kinds of numbers? I think not.

Very truly yours,

[Signed]

Craig Gurian

⁸ Which, as we understand it, is the view you have endorsed.