UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC.,	
Plaintiff,	No. 06 Civ. 2860 (DLC)
v.	
WESTCHESTER COUNTY, NEW YORK,	
Defendant.	

RESPONSE OF THE UNITED STATES TO WESTCHESTER COUNTY'S OBJECTION TO MONITOR'S REPORT AND RECOMMENDATION

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Plaintiff

DAVID J. KENNEDY
BENJAMIN H. TORRANCE
Assistant United States Attorneys
86 Chambers Street
New York, New York 10007
Telephone: 212.637.2703
Fax: 212.637.2702
E-mail: benjamin.torrance@usdoj.gov
david.kennedy2@usdoj.gov

– Of Counsel –

Table of Contents

Preliminary Statement

Plaintiff the United States of America (the "Government") respectfully submits this memorandum of law in response to Westchester County's Objection (the "Objection") to the Report and Recommendation of James E. Johnson (the "Monitor"), dated November 14, 2011.[1]

The thrust of the County's Objection is that the County Executive may unilaterally excuse himself from compliance with a Court-ordered settlement. The County's arguments are legally baseless and distort the plain meaning of the settlement's terms. The Court should reject the County's Objection and sustain the Report.

Background

A. The False Claims Act Action and Settlement

This action was initially brought in 2006 in the name of the United States by the Anti-Discrimination Center of Metro New York Inc. ("ADC") as a *qui tam* relator under the False Claims Act, 31 U.S.C. § 3729 *et seq.* The complaint alleged that the County had applied for, and received, Community Development Block Grants ("CDBG") and other funds from the Department of Housing and Urban Development ("HUD"), a condition of which was that the County affirmatively further fair housing as set forth in 42 U.S.C. §§ 5304(b)(2) and 12705(b), and certify to HUD that it was doing so. As part of that obligation, the County was required to conduct an analysis of the impediments to fair housing choice within its jurisdiction, and to take appropriate actions to overcome the effects of any impediments identified through that analysis. 24 C.F.R. § 91.425(a)(1)(i). ADC's relator complaint alleged that the County had falsely certified that it had complied with these conditions on funding, as its analysis of impediments had failed to evaluate impediments to "fair housing" by disregarding racial or ethnic discrimination or

---

[1] A copy of the Monitor's Report is annexed hereto as Exhibit A.

segregation. HUD's Fair Housing Planning Guide 2–8 (1996), however, defines this analysis to include "actions, omissions or decisions" that restrict housing choices or have the effect of doing so based on "race, color, religion, sex, disability, familial status, or national origin," including "[p]olicies, practices, or procedures that appear neutral on their face."

In February 2009, this Court partially granted summary judgment to ADC. *See* 668 F. Supp. 2d 548 (S.D.N.Y. 2009). The Court held (among other things) that according to the undisputed evidence, the County had not analyzed race in conducting its analysis of impediments, but instead did so "through the lens of affordable housing, rather than *fair* housing and its focus on protected classes such as race." *Id.* at 561–62. Thus the County's certifications, required for CDBG and other funding, were false. *Id.* at 565.[2] The County made these false statements to obtain approximately $52 million in funds from HUD. Complaint-in-Intervention of the United States, ¶ 71. Under the treble damages provision of the False Claims Act, 31 U.S.C. § 3729(a)(1), the County was therefore liable for over $150 million in damages.

Following the Court's decision, the Government interceded with the parties in an attempt to reach a settlement. On August 10, 2009, the Government intervened and elected to proceed with the action, pursuant to 31 U.S.C. § 3730(c)(3), and filed a complaint in intervention alleging violations of the False Claims Act by the County. The Government's complaint also alleged violations of the Housing and Community Development Act, 42 U.S.C. § 5311, and sought mandatory and injunctive relief under that statute. Simultaneously, the Government submitted a Stipulation and Order of Settlement and Dismissal (the "Settlement") between the Government

[2] The Court reserved for trial the question of whether the County's false certifications were presented knowingly. *Id.* at 567–68.

and the County, which (among other things described below) dismissed both the Government's and ADC's complaints. Settlement ¶ 57.[3]

B. Provisions of the Settlement

The Settlement provides for both monetary and injunctive relief in return for the resolution of the Government's claims in this action. With respect to monetary relief, the County paid the Government $30 million, with $21.6 million of that amount credited to the County's account with HUD, to be made available back to the County for development of housing in accordance with the Stipulation. Settlement ¶¶ 2–3. The County also committed to secure an additional $30 million over six years for such housing development. *Id.* ¶ 5.

As to specific injunctive relief, the Settlement appoints a Monitor with the powers necessary to achieve the Settlement's purposes of affirmatively further fair housing. *Id.* ¶¶ 9–13. Those powers include the authority to review County actions and recommend additional actions needed to ensure compliance with the Settlement. *Id.* ¶ 13. The Monitor also has authority to resolve disputes (like this one) between the Government and the County. *Id.* ¶ 14. And the Monitor is required to assess the County's efforts and progress every two years beginning at the end of 2011, considering whether the County "has taken all possible actions to meet its obligations," including "promoting inclusionary and other appropriate zoning by municipalities by offering incentives, and, if necessary, taking legal action." *Id.* ¶ 15.

In agreeing to the Settlement, the County agreed to undertake a wide range of actions to affirmatively further fair housing, under the Housing and Community Development Act, 42 U.S.C. § 1472. Among other things, the County agreed to ensure the development over seven

[3] For ease of reference, a copy of the Settlement is annexed hereto as Exhibit B.

years of 750 new affordable housing units, to be located in areas with low black and Hispanic populations. *Id.* ¶ 7. The Settlement further provides that the County must "use all available means as appropriate to achieve the objectives" of the housing-development paragraph. *Id.* ¶ 7(i). In particular, if "a municipality does not take actions needed to promote," or "hinder[s]," such objectives, the County is required to "use all available means as appropriate to address such action or inaction," including "pursuing legal action." *Id.* ¶ 7(j). The County also agreed to submit the required analysis of impediments ("AI"), which must be "deemed acceptable by HUD." *Id.* ¶ 32; this HUD requirement, prior versions of which lacked analysis of race-based impediments to fair housing, led this Court to conclude that the County's certifications had been false. The County agreed to include an identification and analysis of "impediments based on race or municipal resistance to the development of affordable housing," actions the County would take to address the effects of those impediments, and the need for mobility counseling. *Id.*

Two of the Settlement's requirements are at the heart of the present dispute. First, the Settlement requires the County, as part of its obligations to affirmatively further fair housing, to "promote, through the County Executive, legislation currently before the Board of Legislators to ban 'source-of-income' discrimination in housing," and to "incorporate" that undertaking in the County's analysis of impediments to fair housing choice within its jurisdiction. *Id.* ¶¶ 33(g), 33(i). Second, the Settlement requires the County to identify specific zoning practices within the County that hinder the development of Affordable AFFH Units (as that term is used in the Settlement) that the County will challenge; and also requires the County to establish a process for notifying the municipalities in which such practices exist of the changes that must be made and

of the consequences of their failure to do so. *Id.* ¶¶ 7(i), 7(j), 15. As detailed below, the Monitor correctly found that the County has failed to meet either of these requirements.[4]

C. The Parties' Actions Following the Settlement

In the two years since the entry of the Settlement, the Monitor has actively sought to ensure that the County is achieving the required terms and objectives. The Monitor has engaged with the County government, municipalities, the Board of Legislators, and HUD. Declaration of James E. Johnson dated July 29, 2011 ("Johnson Decl.") ¶¶ 4–7.[5] He has also obtained input from people outside of government, including the housing advisors and consultants he has retained, *id.* ¶¶ 10–13, developers, *id.* ¶ 24, 44, affordable-housing organizations, *id.* ¶ 24, and groups focused on civil rights and fair housing, *id.* ¶ 43. As part of his reporting requirements under the Settlement, the Monitor has filed extensive reports with the Court, on February 10, 2010 (dkt. nos. 327–28); on July 7, 2010 (dkt. nos. 329–30); October 25, 2010 (dkt. no. 334); on April 25, 2011 (dkt. no. 336); and on October 26, 2011 (dkt. no. 382).

Despite the Monitor's efforts, the County has failed to comply with the Settlement in several significant respects. For example, the County's analysis of impediments ("AI"), which the Settlement requires to be "deemed acceptable by HUD," has been unacceptable to HUD, despite the agency's repeated and detailed guidance and assistance. By letter dated July 13, 2011, HUD again concluded that the County's revised analysis of impediments still "does not meet the

---

[4] The failure of the County to perform its obligations under the Settlement, including the failures noted above, recently prompted ADC to file a motion to intervene and for contempt against the County. That motion was filed on May 31, 2011, and fully briefed with respect to the threshold issue of intervention, on September 16, 2011. The motion is now *sub judice*.

[5] This Declaration was submitted in connection with the Government's opposition to ADC's motion to intervene. For ease of reference, a copy is annexed hereto as Exh. C.

Settlement's requirements," as it did not incorporate the needed corrective actions, specified in a May 13, 2011 letter from HUD, regarding source-of-income legislation or exclusionary zoning.

When the present dispute arose, therefore, the County had failed to comply with two specific provisions of the Settlement. First, the County was obligated, through its Executive, to "promote . . . legislation currently before the Board of Legislators to ban 'source-of-income' discrimination in housing." Settlement ¶ 33(g). But other than letters from the former County Executive, the County Executive's office has apparently taken no steps to promote this legislation. Instead, the current Executive vetoed a version of that legislation, passed by the Board, on June 25, 2010. Second, the County was also obliged to establish a process for notifying the municipalities in which exclusionary zoning practices exist of the changes that must be made to such policies, and of the consequences of their failure to do so. *Id.* ¶¶ 7(i), 7(j), 15. The County failed to do so.

D. The Current Dispute

In a letter dated July 20, 2011, to the Monitor, the County invoked the dispute-resolution procedures of paragraph 14 of the Settlement. (Obj. Exh. H.) The County's notice letter explained that it was seeking the Monitor's assistance because HUD had suspended funding due to the inadequacy of the AI, but failed to specifically designate issues arising under the Settlement. (*Id.*) The Monitor acknowledged the request and asked the Government for its response. (Exh. I.) By letter dated August 18, 2011, the Government also invoked the dispute-resolution procedures of the Settlement, identifying the two relevant issues as the County's failure to promote legislation prohibiting discrimination on the basis of source-of-income, and the County's failure to establish a process for addressing exclusionary zoning practices.

The Monitor issued his Report on November 14, 2011, finding first that "the County is in breach of its obligation to promote certain 'Source of Income' legislation"; and second, that "the County should analyze zoning ordinances in connection with the AI and it is appropriate that such analyses be completed by February 29, 2012." (Report at 2.) The County's appeal followed.[6]

ARGUMENT

THE COURT SHOULD REJECT THE COUNTY'S OBJECTIONS TO THE MONITOR'S REPORT AND RECOMMENDATION

The Monitor's analysis of the County's failures under the Settlement was careful, correct, and reflects his years of experience in this matter. The Monitor's conclusions should be upheld.

A. Standard of Review

On appeal from a Monitor's Report and Recommendation, the Court shall conduct a de novo review of those portions of the Report to which objections are filed. *See* 28 U.S.C. § 636(b)(1) ; Fed. R. Civ. P. 72(b)(3). That said, this Court should review the Monitor's analysis with deference; as the docket sheet demonstrates, the Monitor has been intimately involved with the implementation of the Settlement and filed extensive submissions with the Court. *See, e.g.*, Reports dated February 10, 2010 (dkt. nos. 327–28); July 7, 2010 (dkt. nos. 329–30); October 25, 2010 (dkt. no. 334); April 25, 2011 (dkt. no. 336); and October 26, 2011 (dkt. no. 382).

The Settlement "embodies an agreement of the parties" and is also "an agreement 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

---

[6] The Monitor expressly declined to consider whether HUD properly rejected the AI. (Report at 1–2.) The County, nevertheless, has submitted well over one thousand pages of material on this point. The Court should reject the County's arguments. *See infra* Section D.

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). Where, as here, the Monitor has correctly concluded that the County is in breach of its obligations under the Settlement, the Court should order the County to comply. *See, e.g., 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*, 79 Civ. 5831 (RLC), 79 Civ. 5899 (RLC), 2007 WL 222003, at *3 (S.D.N.Y. Jan. 25, 2007) (citing *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985)).

B. The Monitor Correctly Concluded That the County Breached Its Obligation to Promote Source of Income Legislation, and this Court Should Direct the County to Comply with the Consent Decree

1. *The Monitor Correctly Found That the County Has Violated the Consent Decree with Respect to its Obligation to Promote Source of Income Legislation*

The Monitor correctly concluded that the County has not met its obligations under the Settlement to "promote" legislation that would prohibit housing discrimination based on source of income. Paragraph 33 of the Settlement provides as follows:

> As part of its additional obligations to [affirmatively further fair housing], the County also shall: . . .
>
> (g) promote, through the County Executive, legislation currently before the Board of Legislators to ban "source-of-income" discrimination in housing; . . . and
>
> (i) incorporate each undertaking set forth in this paragraph in the County's AI.

Settlement ¶ 33(g),(i). A prohibition on "source of income" discrimination would affirmatively further fair housing, consistent with the grants the County applied for and received from HUD, because the County was required to " 'conduct an analysis of impediments to fair housing choice within the area [and] take appropriate actions to overcome the effects of any impediments identified through that analysis.' " 668 F. Supp. 2d at 551 (quoting 24 C.F.R. § 91.425(a)(1)(i)). The Settlement itself links the promotion of a ban on source-of-income discrimination to those obligations, describing it as an "additional obligation to [affirmatively further fair housing]." Settlement ¶ 33. The requirement that the County "promote" a prohibition on source of income discrimination was thus closely tied to the underlying action, the County's violations of the False Claims Act, and the relief mandated by the Settlement.

At the time the Settlement was entered in 2009, the County Board of Legislators had legislation before it that would prohibit housing discrimination based on source of income. (Report at 2.) The Board approved the Settlement, but the County Executive at the time the Settlement was signed, Andrew J. Spano, then failed to promote the legislation, apart from writing a few letters. (*Id.* at 3.) The Board did not approve the legislation before the end of 2009. Following the re-introduction of the legislation in 2010, the newly elected County Executive, Robert Astorino, has done utterly nothing to promote the legislation. To the contrary, when the Board passed an amended version of the source of income legislation on June 14, 2010, the County Executive vetoed it, on June 25, 2010. (Report at 4.)

No possible definition of "promoting" legislation would include vetoing it. The relevant dictionary definition of "promote" is "[t]o urge the adoption of; advocate." Am. Heritage Dict. of the Eng. Lang. (4th ed.). Under no reasonable reading can the County Executive be said to have "urged the adoption" of legislation whose adoption he prevented, or to "advocate" legislation he vetoed. Thus the Monitor, applying the plain language of the Settlement, concluded that the County is in breach. (Report at 7; citing *United States v. Awan*, 607 F.3d 306, 314 (2d Cir. 2010) (defining "promote" as "to bring or help bring into being").) The Monitor's reading is consistent with the plain language of the Settlement, and should be upheld.

2. *The Monitor Correctly Rejected the County's Redefinition of "Promote"*

The County's first argument is that it "fully complied with paragraph 33(g) of the Settlement" (Obj. 6) because at the time of the Settlement, the legislation was already pending before the Board; the then-County Executive wrote a few letters in support; and the Settlement implicitly limited the County's obligations to calendar year 2009. The Monitor correctly rejected these assertions.[7] That the County Executive wrote six letters in support is, as the Monitor found, a "very thin reed," inadequate to constitute "promoting" the legislation, and in any event vitiated by a later County Executive's veto of the legislation. (Report at 8.) For the County to undertake to "promote" a ban on source-of-income discrimination, then veto the passed legislation, is inconsistent with both the plain terms of the Settlement as well as the "implied covenant of good

[7] The County selectively quotes the Monitor's Report to create the misimpression that it complied with the Settlement. The County quotes the Monitor's recitation of the limited and inadequate steps that the County took, omits that these steps were merely the County Executive's writing six letters, then omits the crucial sentence that "[t]he parties have identified no other action by Mr. Spano to support the legislation." (*Compare* Obj. 6 (selectively quoting Report at 3), *with* Report at 3.)

faith and fair dealing" inherent in any settlement agreement. *Handschu v. Special Services Division*, No. 71 Civ. 2203, 2007 WL 1711775, at *10 n.10 (S.D.N.Y. June 13, 2007).

Moreover, the County's contention that the descriptive phrase "currently before" somehow transformed itself into a time limitation is baseless. The County's claims that "it is abundantly clear that the duty to 'promote' was inexorably tied to the specific legislation that was pending before the Board" (Obj. 5) ignores the plain language of the Settlement:

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

Settlement ¶ 33(g).[8] There is no temporal limitation upon the County's obligation in this provision. To the contrary, the temporal limitations of the Settlement are detailed elsewhere: paragraphs 58 and 10, respectively, provide that the Court and the Monitor shall retain oversight until the County fully complies with its obligations. Nothing in the Settlement supports the County's theory that it could "promote" the legislation for a few months and then unilaterally stop doing so — nor is there any plausible reason the parties would have negotiated such a provision.[9] To the contrary, the County's obligation to "promote" the legislation was a continuing one. *See 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

---

[8] The County claims that it is "abundantly clear" that a fictional time limitation is "inexorably tied" to its obligation by ignoring elementary principles of grammar. The phrase "currently before the Board" modifies the word "legislation," so that the parties know what the legislation in question provides.

[9] As the County is well aware, the Settlement requires that the County Executive "promote," rather than sign or adopt (Obj. 4) because the Settlement does not require the Board to pass the legislation. But once the Board passes the legislation, the Executive was obliged to "promote" it by signing it.

of compliance"). The only reasonable reading of the duty to "promote" legislation was to promote it until it was enacted.

3. *The County's Legal Arguments Were Properly Rejected by the Monitor, and, to the Extent Never Raised Before the Monitor, Are Meritless*

In its Objection, the County raises an amalgam of meritless rhetorical points dressed up as legal theories, contending that the Monitor's interpretation of the "source of income" provision of the Consent Decree violates the unmistakability doctrine, the reserved powers doctrine, and the Guarantee Clause of the United States Constitution.

As an initial matter, the County's objections have been waived, twice. The Settlement itself contains an admission by the parties that the Court may exercise subject matter jurisdiction over the matter, *see* Settlement ¶ 1, and a representation that the parties are authorized to enter into the Settlement, *see* Settlement ¶ 54. The County has thus waived these arguments. The County also never raised its theories of unmistakability, reserved powers, or the Guarantee Clause before the Monitor, and thus waived these arguments a second time.

a. *Neither the Unmistakability Nor the Reserved Powers Doctrine Applies*

In any event, the County's reliance on the doctrines of unmistakability and reserved powers are baseless. Both the doctrine of unmistakability and of reserved powers prevent states or the federal government from being bound to contracts notwithstanding subsequent changes in the law, unless the government consents to be bound in clear and unmistakable terms. *See, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) ("'[S]overeign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'") (citations omitted); *Doe v. Pataki*, 481 F.3d 69, 79 (2d Cir. 2007) (citing *Winstar*). The unmistakability doctrine and reserved powers doctrine are typically addressed in

the context of federal or state governments or agencies. There is no indication that a county may avail itself of either doctrine, and the County cites no authority permitting a County to do so.

These doctrines do not, in any event, enable lone county government officials, arrogating to themselves the sovereignty of a State, from refusing to comply with court orders. Both *Winstar* and *Doe* considered the impact of an amendment to a statutory scheme that formed the background to a consent decree; in *Winstar*, the Supreme Court assessed the impact of the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") on preexisting agreements with financial institutions, and ultimately concluded that the unmistakability doctrine did not apply at all. *See Winstar*, 518 U.S. at 871–87. In *Doe*, the Second Circuit considered the impact of a change in sex offender registration laws upon a consent decree between New York and convicted sex offenders, and concluded that the mere recitation of the statutory framework in a consent decree could not be employed to preclude subsequent amendments to that statutory scheme. In this case, by contrast, no legislative body has enacted a change in the statutory scheme in a manner that affects the Settlement; to the contrary, the County Executive has simply decided to ignore a court order. Moreover, the Second Circuit in *Doe* noted that "[t]he limited nature of the litigation strongly indicates that the recitations . . . were not included to secure a prohibition on subsequent state legislation on these topics." *Doe*, 481 F.3d at 77. In this case, by contrast, the County's affirmatively furthering fair housing requirements were not merely background recitations of the Settlement; they were its operative provisions and underlying purpose.

Similarly, the County's reserved powers doctrine argument is meritless. The doctrine holds "that a state government may not contract away 'an essential attribute of its sovereignty.'" *Winstar*, 518 U.S. at 888. There is no indication, and the County provides none, that counties

enjoy the same protections as states. In any event, the Settlement nowhere contracts away any essential attributes of sovereignty. The County appears to suggest that the Settlement strips away the County Executive's veto power and is therefore void (Obj. 8–9.) But the argument is plainly wrong. The ability of a County Executive to veto legislation is not a sovereign power; sovereign powers are, for example, the police power or the power of eminent domain, and possibly the power of taxation. *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23–24 (1977) (rejecting reserved powers claim asserted by State of New Jersey). The County Executive is confusing his powers with the powers of the sovereign as a whole – even assuming that the County constitutes a sovereign within the meaning of the reserved powers caselaw. Nor does the Settlement change the County Executive's general veto power by, for example, prohibiting him from vetoing bills to raise revenue. Instead, the Settlement requires him to "promote" a specific piece of legislation. The County's argument proves too much: if requiring the County Executive to take a specific action can be recharacterized as an invasion upon his veto power, because requiring him to perform an act implicitly requires him not to veto that act, then absent a county-wide referendum the County Executive is free to opt out of any contracts at his whim. But the veto power of one governmental official is not the power of a sovereign, so the situation here does not implicate either the unmistakability doctrine or the reserved powers doctrine.

Even if either the unmistakability doctrine or the reserved powers doctrine applied (and neither does), the Settlement readily meets the doctrinal requirements. The Settlement, in unmistakable terms, concedes subject matter jurisdiction, Settlement ¶ 1; affirms that the parties to the Settlement are authorized to enter into the agreement, Settlement ¶ 54; and requires the County Executive to promote source of income legislation, Settlement ¶ 33(g). Until the County meets all of its obligations under the Settlement, the County agreed that the Court and the

Monitor would retain oversight, Settlement ¶¶ 10, 58. Thus even if either doctrine applied, the County would have no excuse for its breach.

b. *The County's Reliance on the Guarantee Clause Is Frivolous*

The County's reliance on the Guarantee Clause of the U.S. Constitution is frivolous. (Obj. 10–12.) It is an elementary principle of constitutional law that claims under the Guarantee Clause generally present nonjusticiable political questions: "The Supreme Court traditionally has held that claims brought under the Guarantee Clause are nonjusticiable political questions." *Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996) (citing *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (holding that a "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts"); *City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912)). While the Second Circuit has noted that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," *Padavan*, 82 F.3d at 28 (quoting *New York v. United States*, 505 U.S. 144, 185 (1992) (declining Guarantee Clause claim)); *see also Van Allen v. Cuomo*, 621 F.3d 244, 249 n.5 (2d Cir. 2010) (same), it has consistently refused to entertain such claims, *see, e.g.*, *Van Allen*, 621 F.3d at 249 n.5; *Padavan*, 82 F.3d at 28, and this Court should do the same.[10]

Indeed, the County's claim that the Consent Decree constitutes "federal interference with state and local autonomy" in violation of the Guarantee Clause (Obj. 10), is precisely the argument that courts reject as nonjusticiable. *See, e.g.*, *City of New York v. United States*, 971 F.

[10] The law review article that the County appears to cite in support of its position concurs: "For more than a hundred years, therefore, the Supreme Court has maintained that the guarantee clause raises only nonjusticiable political questions." Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 70 (1988). The article notes John Adams' confession that he "never understood" what the Guarantee Clause meant and "believe[d] no man ever did or ever will." *Id.* at 23.

Supp. 789, 798–99 (S.D.N.Y. 1997) (rejecting Guarantee Clause claim by City of New York against federal law concerning sharing of information about illegal immigrants), *aff'd*, 179 F.3d 29, 37 (2d Cir. 1999). The County neglects to mention any of this applicable authority.[11]

In support of this deficient legal argument, the County offers nothing more than speculation. The County maintains, for example, the position of the County Executive "may very well be more representative of the County's position as a whole." (Obj. 11.) Not only is this pure speculation, but would allow the County Executive to unilaterally annul agreements to which the County is a party, notwithstanding the consideration that the United States gave in return for such a promise – here, forbearing from pursuing its claims for over $150 million in damages. The County's argument also ignores that the County Executive in 2009 signed the Settlement, and the Board approved it, with the requirement that the County Executive "promote" source of income legislation. In sum, the Court should reject the County's strange assertion that requiring the County Executive to do what the County agreed to do in a Court-ordered Settlement somehow deprives Westchester County of a republican form of government.

c. *The County's "Federalism" Arguments Misstate the Law*

The County next advances a "federalism" argument, accusing the Monitor of ignoring the "admonition" of *Horne v. Flores*, 129 S. Ct. 2579, 2594 (2009). Even apart from the unproven assumption that the County may elevate itself to the level of a State and claim an interest in federalism, the Monitor correctly noted that the County is misrepresenting the context and

---

[11] Instead, the County claims that "[t]he Supreme Court defined the scope of the Guarantee Clause . . . in *Duncan v. McCall*, 139 U.S. 449, 461 (1891)," a habeas corpus petition alleging that the petitioner was not duly tried and sentenced, and then cites *Gordon v. Griffith*, 88 F. Supp. 2d 38, 43 (E.D.N.Y. 2000), a case rejecting a challenge to a state legislator's dismissal of an aide for speaking at a public rally. Both cases mention the Guarantee Clause in dicta, but neither rely on the Guarantee Clause to reach their result, nor do they provide any basis for a claim that the Guarantee Clause offers an escape hatch from a Court-ordered Settlement.

meaning of *Horne*. As the Monitor aptly stated: "*Horne* does not stand for the proposition that a party may unilaterally abrogate its obligations under a court order." (Report at 10.)

To the contrary, *Horne* arose in the context of a motion under Fed. R. Civ. P. 60(b) to modify or amend a consent decree, governing funding for English language learner programs in the school system of Nogales, Arizona. *Horne*, 129 S. Ct. at 2589–90. The County made no such motion here. This context is critical, as the Supreme Court noted that "the passage of time frequently brings about changed circumstances – changes in the nature of the underlying problem, changes in governing law or its interpretation by courts, and new policy insights – that warrant reexamination of the original judgment." *Horne*, 129 S. Ct. at 2593. The County does not explain how circumstances, the law, or policy have changed, and so does not meet *Horne*'s standard. In *Horne*, the Supreme Court explained that the appropriate inquiry in these circumstances is "[i]f a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper." *Horne*, 129 S. Ct. at 2595. The County in this case has not implemented a durable remedy; instead, the County remains both noncompliant and resistant. Finally, the County's suggestion that the Monitor has ignored *Horne*'s "admonition" rests upon its miscitation of that admonition:

> "If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers."

(Obj. 12 (purporting to quote *Horne*, 129 S. Ct. at 2595) (miscited as 2593).) This is actually a quotation from *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441 (2004), as partially quoted in *Horne*, but the Court in *Horne* places it in the context of returning authority to the State only when a change in circumstances warrants, and the County has not even attempted such a showing. The passage in *Horne* begins with precisely the admonition that the Monitor suggested

this Court follow: "It goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief." *Horne*, 129 S. Ct. at 2594. And in *Frew*, the Supreme Court rejected Texas' argument that the Eleventh Amendment barred a motion to enforce a consent decree, permitting such a motion under *Ex Parte Young*, 209 U.S. 123 (1908). The Court explained: "'In exercising their prospective powers . . . federal courts are not reduced to issuing injunctions against state officers and hoping for compliance.'" *Frew*, 540 U.S. at 440 (quoting *Hutto v. Finney*, 437 U.S. 678, 690–91 (1978)).

In any event, the Settlement here was plainly reasonable and necessary. The Settlement in this case was entered to resolve the County's near-decade of fraud in obtaining federal funds. *See* 668 F. Supp. 2d at 561–65. The Settlement required the County to meet a variety of injunctive obligations that were a condition of receiving those funds. The County has never argued that the Settlement must be modified due to circumstances that have somehow changed since 2009, or that it is overbroad or outdated. And while the importance of the democratic process and the duties of elected officials is unquestioned, the fact is that the County has committed—through its elected officials—to a course of action, ordered by a federal court, that it now refuses to follow.

d. *The Court Should Order the County to Cure Its Breach of the Settlement*

The Monitor recommended that the County Executive be enjoined to request that the legislature reintroduce the prior legislation, provide information to assist in analyzing its impact, and to sign it. (Report at 10.) This relief is wholly proper. "A defendant who has obtained the benefits of a consent decree – not the least of which is the termination of the litigation – cannot then be permitted to ignore such affirmative obligations as were imposed by the decree." *Berger*, 771 F.2d at 1568. The Government respectfully requests that the Court sustain the Monitor's Report, reject the County's objections, and order the relief requested.

C. The Monitor Correctly Concluded That the County Breached Its Obligation to Address Local Zoning Ordinances, and this Court Should Direct the County to Comply with the Consent Decree

The second dispute concerns the County's lack of a strategy for addressing actions, or lack of action, by municipalities with respect to exclusionary zoning practices.

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

Certain zoning practices of municipalities within the County may hinder the development of Affordable AFFH Units, or more generally hinder efforts to affirmatively further fair housing. Courts have repeatedly identified zoning as an obstacle to fair housing. *E.g.*, *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir. 1995) (zoning restrictions may constitute discriminatory housing practice); *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 936–38 (2d Cir.) (zoning that restricted multi-family housing to certain geographical areas adversely affected

minorities and perpetuated segregation), *aff'd*, 488 U.S. 15 (1988) (per curiam). Addressing local zoning practices, therefore, is a plainly appropriate object of the Settlement.

The specific issues before the Monitor concerned timing, strategy, and enforcement. As to timing, the County has agreed to comply with the Monitor's recommendation. (Obj. 15.)

1. *The Monitor's Recommendations Concerning Strategy Are Appropriate*

The Monitor appropriately recommended that the County: (i) develop a process for notifying municipalities of zoning issues that hinder the County's obligations under the Settlement and changes that must be made, and if not made, the consequences of municipalities' failure to make them; (ii) develop a process to involve municipal decision-makers in consultation regarding changes in zoning and land use restrictions; and (iii) provide a description of how these requirements will be included in future contracts or other written agreements between the County and municipalities. (Report 15–16.) The County has yet to conduct this analysis.

The County's primary objection is that the Settlement does not specifically require the steps that HUD, and the Monitor, have directed it to take, and that these modest steps "far exceed" what the Settlement requires. (Obj. 16.) Yet the Settlement expressly obliges the County to "use *all available means*," including "financial and other incentives" to municipalities, to achieve the objective of developing Affordable AFFH Units and to encourage municipalities as well to promote that objective. Settlement ¶ 7(i), (j) (emphasis added). The County's Objection is further inconsistent with the Settlement's provision that "*all possible actions*" will be taken by the County "to meet its obligations . . . includ[e] . . . promoting inclusionary *and other appropriate zoning* by municipalities." *Id.* ¶ 15 (emphasis added). Evaluating zoning issues, both in terms of promoting inclusionary zoning and addressing exclusionary zoning, are certainly actions the County is capable of, as it routinely makes recommendations and observations

regarding proposed zoning actions or land-use regulations within the County. More broadly, the County's agreement that it will use "all available means" and take "all possible actions" precludes its present Objection that the specific remedial measures recommended by the Monitor do not appear in the Settlement.

The County's argument that it has already agreed to do much of what the Monitor recommends, albeit in a less precise form (Obj. 16–17), undercuts the force of its Objection. The problem is that the County largely plans to analyze these local zoning practices while the Settlement requires it to seek to change exclusionary practices, and specify a strategy to overcome exclusionary zoning practices. The Monitor's recommendations appropriately implement the required analysis and should be sustained.

2. *The Monitor's Recommendations for Enforcement Are Appropriate*

The Monitor also correctly concluded that the County failed to meet its obligations to address exclusionary zoning practices, including through litigation. The Monitor noted that the County has taken the position that it will not engage in any legal action unless a particular project is blocked by a local zoning ordinance, which improperly shifts to developers the burden of challenging such an ordinance when the Settlement places that burden upon the County. (Report at 16–17.) The Monitor further noted that the current County Executive has expressly disclaimed any legal action, giving political speeches stating, among other things, "They want us to sue our municipalities to rip up local zoning. We are not going to stand for that." (Report at 18.)

The County Executive's publicly announced refusals to engage in litigation, combined with the County's failure to specify appropriate circumstances for legal action, gravely undermine paragraph 7(j) of the Settlement, which expressly requires that the County "shall use all available means as appropriate," including "legal action," to address a municipality's failure

to promote the objectives of the Settlement. No one can expect that the County will ever use legal action to obtain compliance – as it is required to do – if the County Executive is hostile to complying, and the County is evasive in complying, with a court-ordered Settlement. In its Objection, the County maintains that suit is appropriate only "if municipalities hinder or impede the County," which the County interprets to mean that, once the County challenges exclusionary zoning, a municipality resists. (Obj. 18.) The County further notes that no party has pointed to any municipality that has thus far hindered the County. (*Id.*) These objections overlook the fact that the County's passive approach to challenging exclusionary zoning ordinances has resulted in a failure to overcome these obstacles, such that projects may not be going forward due to exclusionary zoning. Thus, the Monitor's appropriate recommendation that the County identify the specific zoning practices that would lead it to file suit (Report at 18), should be sustained.

The County's Objection, in any event, distorts the Government's position. The Government has argued that the County must now "identify the 'types of situations that would lead to litigation.'" (Report at 16 (quoting Government submission at 3).) The County complains that this would require assessment of a "purely hypothetical litigation strategy" (Obj. 18), but it is a common task for attorneys to identify situations where potential litigation could arise. For example, if Town X in Westchester County has a local zoning ordinance that limits multifamily housing, particularly in a predominantly white neighborhood, then Town X is vulnerable to litigation. *See, e.g.*, *Huntington*, 844 F.2d at 935–37 (neutral zoning rule may result in "adverse impact on a particular minority group" or "harm to the community generally by the perpetuation of segregation"). The Settlement obliges the County to identify these potential vulnerabilities in local zoning ordinances as part of the County's obligation to affirmatively further fair housing. Notifying a municipality that a provision of its zoning code has exclusionary effects provides, as

the Monitor notes, "[f]air notice" (Report at 18) that litigation could arise if that provision is subsequently used to block the actual construction or development of housing units.[12]

Neither the Government nor the Monitor have thus far demanded that the County commence abstract litigation based solely upon a provision in a local zoning code, and this issue is not before the Court. Hence the County's standing arguments are irrelevant.[13] Instead, both the Government and the Monitor have requested the County to analyze local zoning codes, identify those provisions in local zoning codes that are exclusionary, in purpose or effect, and so advise the municipalities – so that in the event that a particular housing project is planned for that municipality, that town or village has been put on notice. Identifying these legal vulnerabilities in local ordinances, moreover, could lead to the municipality changing its code on its own initiative – which would also serve the purposes of the Settlement and avoid litigation.

In the County's submission to the Monitor, the County averred that the Government demanded that it "detail a hostile campaign against the municipalities" and "threaten premature and frivolous litigation against currently cooperative local municipalities." (Obj. Exh. A, at 11.) It is obviously false, and irresponsible to maintain, that the position of the United States is that any entity "threaten" litigation that was both "premature" and "frivolous" even against

---

[12] The County now claims that it will limit its analysis to ordinances "that clearly violate the Fair Housing Act." (Obj. 21.) A zoning ordinance may be declared exclusionary and unconstitutional, not only if it violates the FHA, but also where it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare[,]" and therefore in violation of the Fifth and Fourteenth Amendments of the Constitution. *Berenson v. New Castle*, 38 N.Y.2d 102, 107 (1975) (citations omitted). *Berenson* holds that zoning ordinances must consider regional needs and requirements, which would include the County's need for affordable housing. This case law is incorporated in the Settlement, in the first paragraph of page 2.

[13] There may be a context in the future, however, in which the County is obliged to pursue legal action against a municipality over an exclusionary zoning ordinance, depending on the analysis of that ordinance and the facts of that case.

"cooperative" municipalities. Thus, in its response to the County's letter, the Government responded that it "has asked for no such thing." (Obj. Exh. D, at 2.) The County has now seized upon that phrase – that the Government "has asked for no such thing" – and misinterprets it to mean that "[i]nterestingly . . . the Government denies that it has required the County to detail litigation." (Obj. 21.) To be clear, the County must detail and "identify the 'types of situations that would lead to litigation'" (Report at 16 (quoting Government submission at 3)) under paragraph 7(j) of the Settlement, which expressly requires that the County "shall use all available means as appropriate," including "legal action," to address a municipality's failure to promote the objectives of the Settlement. The County's refusal to take this initiative – which would pave the way for affordable housing and potentially avoid costly litigation – is inexplicable.

D. The Monitor Appropriately Refused to Address the Issue of the Adequacy of the County's July 11, 2011 Analysis of Impediments

Finally, the County complains that the Monitor improperly refused to address the question of whether HUD should have been satisfied by the County's further revised AI. (Obj. 22–23.) As an initial matter, paragraph 32 of the Settlement provides that the AI must be "deemed acceptable by HUD," thus leaving the issue to HUD's discretion. The County must certify "to satisfaction of the Secretary" that it will affirmatively further fair housing. 42 U.S.C. § 5304(b)(2). Similarly, the County's certification is deemed to be accurate, "unless the Secretary determines otherwise." 42 U.S.C. § 12704(21). Neither these statutes, nor the Settlement, provide any standard by which the Monitor or Court could determine that the County's certification is accurate and satisfactory to HUD.[14] Moreover, the County's Objection incorrectly declares that "the Monitor specifically acknowledged *that he would* "resolve the dispute between HUD and

[14] At best, the County could argue under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, that HUD has acted arbitrarily, capriciously, or contrary to law. The County has not.

the County regarding the County's Analysis of Impediments." (Obj. 22 (citing Exh. I) (emphasis added).) What the Monitor wrote was: "I have received your July 20, 2011 letter *requesting that*, pursuant to paragraph 14(c) of the consent decree, *I resolve* the dispute between HUD and the County regarding the County's Analysis of Impediments." (Obj. Exh. I (emphasis added).) Obviously, acknowledging a request is not the same as agreeing to the request.

In any event, the County has failed to provide any basis for this Court to override HUD's rejection of the AI. In its Objection, the County offers little analysis of its most recent version of the AI; instead, it has simply dumped over one thousand pages of material onto the docket and asked the Court – without providing analysis, guidance, or explanation – to find not merely that these two reams of paper are acceptable, but that they should have been acceptable to HUD. The County cites the AI only three times in its Objection, on all occasions to an undifferentiated mass of paper, without parsing through the 45 separate attachments it has filed. (Obj. 2, 16, 22.) The Court should decline the County's invitation to bless its most recent version of the AI, without any analysis or careful scrutiny by the Monitor, the Government, or even the County.

Conclusion

The Court should reject the County's objections, affirm the Monitor's Report in all respects, and direct the County to comply with its obligations under the Settlement.

Dated: New York, New York
December 21, 2011

Respectfully submitted,
PREET BHARARA
United States Attorney for the
Southern District of New York

By: /s/ David J. Kennedy
DAVID J. KENNEDY
BENJAMIN H. TORRANCE
Assistant United States Attorneys
Telephone: 212.637.2733 (Kennedy)
E-mail: david.kennedy2@usdoj.gov