

SUSTAINABLE SEGREGATION? ASSESSING THE ENVIRONMENTAL IMPACT OF THE WESTCHESTER FAIR HOUSING SETTLEMENT

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Introduction	592
I. Litigation History	594
A. The Suit	594
B. The Judgments.....	596
1. Motion to Dismiss	596
2. Motion for Summary Judgment.....	599
C. The Settlement.....	602
II. Analysis	605
A. Scoping the Inquiry	605
B. Defining “Sustainable Community”	606
C. Measuring Sustainability	608
1. The Furman Center / Urban Institute Indices	609
D. Regional Analysis	611
E. Intracounty Analysis.....	614
1. New Medians.....	615
2. Accounting for Income Effects.....	616
III. Recommendations and Preemptive Rebuttals	620
A. Recommendations for Implementation	620
B. Anticipated Criticisms	620
1. Promoting Success or Merely Recognizing It?	620
2. Is the Sustainable Result a Fair Result?.....	621
3. Affordable for Tenants, Expensive for Government?	623
Conclusion	624

INTRODUCTION

In August 2009, New York's Westchester County agreed to build 750 new units of subsidized housing in thirty-one of its wealthiest and whitest communities.¹ The pledge was the centerpiece of a \$64.5 million settlement between Westchester and the federal government to resolve allegations that the County had shirked its legal duty to "affirmatively further fair housing" under the Housing and Community Development Act ("HCDA").² One commentator hailed the agreement as "the most unequivocal stance against segregation taken by any recent administration."³ Others denounced it as the work of "social engineers."⁴ On one point, both sides agreed: the landmark deal signaled a sea change in the Department of Housing and Urban Development's ("HUD") approach to fair housing enforcement, one with the potential to impact communities far from Mount Kisco and Rye.⁵ Indeed, HUD publicly vowed to "apply this [settlement] to the other 1,200 jurisdictions around the country that receive block grants [under the HCDA]."⁶

A more aggressive stance on fair housing, though, was not the only change afoot at HUD in 2009. The agency's newly appointed Secretary, Shaun Donovan, also placed a strong emphasis on environmental sustainability, announcing an interagency Partnership for Sustainable Communities between HUD, the Department of Transportation ("DOT"), and the Environmental Protection Agency ("EPA");⁷ creating a new Office of Sustainable Housing and Communities within HUD;⁸ and launching a \$100

¹ Stipulation and Order of Settlement and Dismissal at 6, U.S. *ex rel.* Anti-Discrimination Ctr. v. Westchester Cnty. (*Anti-Discrimination Ctr. II*), 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06 Civ. 2860) [hereinafter Settlement].

² *Id.* at 1–2.

³ Dana Goldstein, *Shaking Up Suburbia*, AMERICAN PROSPECT (Aug. 25, 2009), <http://prospect.org/article/shaking-suburbia-0>.

⁴ Editorial, *Color-Coding the Suburbs*, WALL ST. J., August 15, 2009, at A12.

⁵ *Id.*; Goldstein, *supra* note 3.

⁶ Goldstein, *supra* note 3 (quoting HUD Deputy Secretary Ron Sims).

⁷ *Greener Communities, Greater Opportunities: New Ideas for Sustainable Development and Economic Growth, Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. (2009) (statement of Shaun Donovan, Secretary, U.S. Department of Housing and Urban Development), available at <http://portal.hud.gov/hudportal/HUD?src=/press/testimonies/2009/2009-06-16>.

⁸ *Id.*; Press Release, U.S. Dep't of Hous. and Urban Dev., HUD Secretary

million dollar Sustainable Communities Planning Grant Program to encourage regional innovation.⁹

In promoting HUD's partnership with DOT and EPA, Secretary Donovan emphasized the need for the federal government to "speak with one voice on housing, environmental and transportation policy."¹⁰ It is an open question, however, whether HUD's involvement in both the Westchester settlement and the sustainable communities partnership exemplifies this kind of policy coherence. While the desegregation of the suburbs and the encouragement of sustainable communities are both *laudable* goals, they may not be *compatible* goals. If, true to HUD's pledge, the Westchester suit becomes a model for future litigation around the country, does this work for or against the aims of the HUD-EPA-DOT partnership? In other words, is the settlement's brand of fairness sustainable?

HUD says yes: Deputy Secretary Ron Sims cited the Westchester deal as "a model for building strong, inclusive *sustainable* communities in suburban areas across the entire United States."¹¹ This Note seeks to test that assertion. Part I provides a summary of the novel legal claims that prompted the settlement, as well as details of the agreement itself. Part II employs indices developed by New York University's Furman Center for Real Estate and Urban Policy and the Urban Institute to evaluate the relative sustainability of census tracts eligible for housing development under the settlement. These index scores reveal that the settlement, while not *certain* to further both integration and sustainability, has the *potential* to do so if appropriately implemented. Finally, Part III suggests a plan for optimal implementation of the settlement and responds to anticipated criticisms of this strategy.

Donovan Announces New Office of Sustainable Housing and Communities (Feb. 4, 2010), *available at* http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-028.

⁹ Press Release, U.S. Dep't of Hous. and Urban Dev., *supra* note 8.

¹⁰ Donovan, *supra* note 7.

¹¹ Editorial, *supra* note 4 (emphasis added).

I. LITIGATION HISTORY

A. *The Suit*

On April 12, 2006, the Anti-Discrimination Center (“ADC”), a nonprofit organization based in Manhattan, filed suit against Westchester County in the Southern District of New York, alleging violations of the federal False Claims Act (“FCA”).¹² The suit was brought under the “qui tam” provisions of the FCA, which allow a private citizen to litigate in the name of the federal government.¹³ If victorious, a qui tam plaintiff is entitled to between twenty-five and thirty percent of the judgment, plus expenses, with the remainder paid into the U.S. Treasury.¹⁴

While qui tam plaintiffs do not need federal approval to proceed with an FCA suit, the statute does allow the government a first bite at the apple. Before serving notice on the defendant, the plaintiff must file its action under seal, giving the Justice Department sixty days to decide whether to intervene and litigate the case itself.¹⁵ The Bush Administration’s Justice Department declined to exercise this privilege in the Westchester case, freeing the ADC to pursue the action independently.¹⁶

Under Second Circuit precedent, an FCA plaintiff must establish five elements to prevail: “[Defendant] (1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury.”¹⁷ At issue in this case was a series of certifications made by Westchester to HUD in order to secure

¹² U.S. *ex rel.* Anti-Discrimination Ctr. v. Westchester Cnty., 495 F. Supp. 2d 375, 376–77 (S.D.N.Y. 2007); False Claims Act, 31 U.S.C. § 3729–33 (2006).

¹³ 31 U.S.C. § 3730(b)(1).

¹⁴ *Id.* § 3730(d)(2).

¹⁵ *Id.* § 3730(b)(2).

¹⁶ *Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 378.

¹⁷ *Mikes v. Straus*, 274 F.3d 687, 695 (2d Cir. 2001). Some circuits impose one or both of two additional requirements: (6) that the claim was material, and (7) that it caused damages to the United States. Prior to this case, the Second Circuit had not ruled on either issue. *See Anti-Discrimination Ctr. II*, 668 F. Supp. 2d 548, 568 (S.D.N.Y. 2009). In her ruling on summary judgment motions, Judge Cote of the Southern District opted *not* to require damages as an element of an FCA claim. *Id.* Additionally, while she *did* choose to adopt a materiality requirement, she found that the test was easily satisfied in this case. *Id.* at 570.

Community Development Block Grant (“CDBG”) funding under Title I of the HCDA.¹⁸ CDBG funds are primarily available to so-called “entitlement communities”—cities and urban counties that meet specified population thresholds—and can be put to a variety of uses by the recipient governments, including real property acquisition, social service provision, energy conservation, and economic development.¹⁹

As the label “entitlement communities” would suggest, the grants are not discretionary—allocations are made under a statutory formula that takes into account factors such as population size, the prevalence of poverty and overcrowded housing, and the age of local housing stock—and the Secretary is generally unable to withhold any of the calculated award.²⁰ The recipient is, however, required to make certain certifications before receiving the funds, including a pledge that the “grant will be conducted and administered in conformity with the Civil Rights Act of 1964 and the Fair Housing Act, and the grantee will affirmatively further fair housing.”²¹

While the statute itself does not explain what it means to “affirmatively further fair housing” (“AFFH”), subsequent HUD regulations have enumerated three requirements. First, each recipient must “conduct an analysis to identify impediments to fair housing choice within the area.” Second, each recipient must “take appropriate actions to overcome the effects of any impediments identified” through that analysis and, finally, each recipient must “maintain records reflecting the analysis and actions in this regard.”²²

As an urban county with a population of more than 200,000 residents, Westchester qualified for CDBG funding and, between April 2000 and April 2006, accepted more than \$52 million on behalf of the Westchester Urban County Consortium (“WUCC”),

¹⁸ Housing and Community Development Act, 42 U.S.C. § 5301–21 (2006).

¹⁹ *Id.* § 5305(a). Note that while CDBG funds can be used to rehabilitate existing housing, and even to acquire land that will host new subsidized housing, they cannot generally be used to directly fund construction of new public housing. See *Community Development Block Grant Entitlement Communities Grants*, HUD, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/entitlement (last visited Aug. 31, 2012) (featuring list of eligible and ineligible activities).

²⁰ 42 U.S.C. § 5306(b).

²¹ *Id.* § 5304(b)(2).

²² 24 C.F.R. § 91.425(a)(1)(i) (2010).

an umbrella organization for forty of the County's forty-five municipalities.²³ In doing so, it repeatedly pledged to AFFH. The first, second, and fifth elements of an FCA claim, then, were never in doubt: Westchester made a claim (the AFFH certification) to the federal government (HUD) seeking payment (the CDBG funds) from the U.S. Treasury.

The heart of the dispute was in the third and fourth elements of the FCA case. ADC alleged that Westchester failed to properly fulfill its AFFH duties (and thus rendered its CDBG certification false, fulfilling element three) when it declined to consider race in its required analysis of impediments to fair housing despite the existence of widespread residential segregation throughout the County.²⁴ ADC further asserted that the County *knew* that the HCDA required it to include such race-based impediments (and thus knew its CDBG certification was false, fulfilling element four).²⁵

B. *The Judgments*

1. *Motion to Dismiss*

ADC's accusations were uncharted territory in fair housing case law and Westchester quickly filed a motion to dismiss the case on both jurisdictional and substantive grounds.²⁶ Its first line of attack was a Federal Rule of Civil Procedure 12(b)(1) challenge to the court's subject matter jurisdiction, predicated on a 1986 jurisdiction-stripping amendment to the FCA. The relevant provision forbids courts to hear *qui tam* actions "based upon public disclosure of allegations or transactions in a . . . congressional, administrative, or Government Accounting Office report."²⁷ Westchester argued that the evidence against it was largely

²³ *Anti-Discrimination Ctr. II*, 668 F. Supp. 2d 548, 550–552 (S.D.N.Y. 2009). The remaining five municipalities—Yonkers, Mount Vernon, New Rochelle, Mount Pleasant, and White Plains—had populations large enough to qualify for CDBG funds independently.

²⁴ Complaint at 13, U.S. *ex rel.* *Anti-Discrimination Ctr. v. Westchester Cnty.*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007) (No 06 Civ. 2860).

²⁵ *Id.* at 13–14.

²⁶ Defendant Westchester County's Memorandum of Law in Support of Its Motion to Dismiss the Complaint, U.S. *ex rel.* *Anti-Discrimination Ctr. v. Westchester Cnty.*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007) (No. 06 Civ. 2860).

²⁷ 31 U.S.C. § 3730(e)(4).

acquired via disclosure requests made to county agencies under New York State's Freedom of Information Law ("FOIL"), and that its responses to these requests should be considered both "public disclosures" and "administrative reports" under the FCA.²⁸ This argument was rejected by District Judge Denise Cote, who agreed that FOIL reports qualified as "public disclosures," but found that the jurisdictional bar only applied to allegations based on administrative reports issued by *federal* agencies.²⁹

Despite its failure to defeat ADC's claim, the jurisdictional bar carries implications for litigation in other jurisdictions. The U.S. Courts of Appeal for the Eight and Ninth Circuits have read the FCA amendment more expansively, concluding that it covers state disclosures as well.³⁰ Private litigants in those jurisdictions will thus be precluded from bringing suits modeled on the ADC claim, insofar as their "smoking gun" documents are acquired via state sunshine law requests. This does not, of course, stop HUD from bringing FCA cases in those jurisdictions. If, however, a future administration reverses course on fair housing, private citizens in at least two large swaths of the country will not be able to force the issue as ADC did in New York.

Westchester also sought a 12(b)(6) dismissal, arguing that neither the HCDA's certification provisions nor HUD's implementing regulations explicitly required grantees to consider racial discrimination and segregation as possible impediments to fair housing.³¹ Judge Cote rejected this claim on multiple fronts. First, she noted that while the HCDA certification does not explicitly mention race, it includes a commitment to uphold the Fair Housing Act ("FHA"),³² which was enacted pursuant to Congress' Thirteenth Amendment power to combat housing discrimination on the basis of "race, color, religion, sex, familial status, or national origin."³³ The FHA explicitly requires that

²⁸ *Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 380.

²⁹ *Id.* at 380–83.

³⁰ See, e.g., *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003); *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 918 (9th Cir. 2006).

³¹ Westchester Motion to Dismiss, *supra* note 26, at 12 ("Had HUD wanted to mandate that grantees identify racial discrimination and segregation as impediments in their analyses, then it could have drafted the certifications to require that.").

³² 42 U.S.C. § 3601–31 (2006).

³³ *U.S. ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 495 F. Supp. 2d 375, 385 (S.D.N.Y. 2007) (citing *United States v. Starrett City Assocs.*, 840

HUD grant programs be administered “in a manner affirmatively to further the policies of [the statute].”³⁴ Additionally, the court noted that the FHA has been interpreted to reach not only intentional discrimination, but also practices that “disproportionately affect minorities” (i.e., neutral practices with a disparate impact).³⁵ As a result, HUD is required not only to ensure that its programs do not facially discriminate, but also “to consider the impact of proposed public housing programs on . . . racial concentration”³⁶ and to leverage its funds to “assist in ending . . . segregation.”³⁷

The HCDA requirement that CDBG recipients pledge to administer their grants in conformity with the Fair Housing Act and to affirmatively further fair housing,³⁸ then, is a method of passing the baton of FHA responsibility from HUD to local governments. Recipients are, in effect, agreeing to play by the same rules as HUD to ensure that CDBG funds are not spent in communities whose policies serve to increase or perpetuate segregation. Given “the clear legislative purpose of the Fair Housing Act . . . to combat racial segregation and discrimination,” Judge Cote found that interpreting the duty to affirmatively further fair housing as exclusive of racial concerns would be an absurd result.³⁹

Judge Cote also pointed out that while HUD *regulations* did not spell out what an analysis of “impediments to fair housing” should entail, the Agency’s 1996 Fair Housing Planning Guide provided a very clear definition of impediments:

[A]ctions, omissions, or decisions . . . which restrict housing choices or the availability of housing choices . . . [or] which have the effect of doing so, based on race, color, religion, sex, disability, familial status, or national origin . . . including policies, practices, or procedures that appear neutral on their

F.2d 1096, 1100 (2d Cir. 1988).

³⁴ 42 U.S.C. § 3608(e)(5).

³⁵ *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1099–1100 (2d Cir. 1988).

³⁶ *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1133–34 (2d Cir. 1973).

³⁷ *NAACP v. Sec. of HUD*, 817 F.2d 149, 155 (1st Cir. 1987).

³⁸ 42 U.S.C. § 5304(b)(2).

³⁹ *U.S. ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 495 F. Supp. 2d 375, 388 (S.D.N.Y. 2007).

face.”⁴⁰

While the Planning Guide is not entitled to *Chevron* deference,⁴¹ Judge Cote deemed the Planning Guide interpretation persuasive, being “firmly rooted in the statutory and regulatory framework and consistent with the case law.”⁴²

2. *Motion for Summary Judgment*

Judge Cote’s ruling on the motion to dismiss simply confirmed that all recipients of CDBG funding are required to consider race as an impediment to fair housing. The decision did *not* amount to a finding that Westchester failed to do so. That defeat came two years later, when Judge Cote awarded a partial summary judgment in favor of ADC, finding “no genuine issue of material fact such that a reasonable jury could find that the County analyzed race in conducting its [analyses of impediments].”⁴³

In addition to claims that its analyses of impediments (“AIs”) indirectly addressed race through mention of issues like “local opposition” to affordable housing and “NIMBY”ism,⁴⁴ Westchester had argued that it used income as a proxy for race.⁴⁵ In other words, racial segregation was so strongly correlated with income segregation that the County could choose to analyze just one. It was appropriate to devote its AIs “entirely to the lack of affordable housing in the County and related obstacles,” Westchester contended, because any affordable housing it constructed would be disproportionately utilized by racial minorities.⁴⁶

The same HUD Planning Guide that the court found persuasive at the motion to dismiss stage, however, expressly warned AI writers against making this assumption:

Clarification of the distinction between AFFH actions and affordable housing activities is often necessary. The two concepts are not equivalent but they are also not entirely separate. When a jurisdiction undertakes to build or rehabilitate

⁴⁰ U.S. DEP’T OF HOUS. AND URBAN DEV., FAIR HOUSING PLANNING GUIDE 2-8 (1996).

⁴¹ *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

⁴² *Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 387.

⁴³ *Anti-Discrimination Ctr. II*, 668 F. Supp. 2d 548, 562 (S.D.N.Y. 2009).

⁴⁴ *Id.* at 562.

⁴⁵ *Id.* at 564.

⁴⁶ *Id.* at 562, 564.

housing for low- and moderate-income families, for example, this action *is not in and of itself sufficient to affirmatively further fair housing*.⁴⁷

Judge Cote also noted that, even in the absence of the HUD guide, Westchester's reasoning did not withstand logical analysis. The development of affordable housing units might address inequities in the *quality* of housing enjoyed by minority residents, but it would only address patterns of racial segregation if placed in communities that did not already have large minority populations.⁴⁸

Additionally, though the court did not expressly rely on his testimony in its analysis, the ADC's expert witness, Andrew Beveridge,⁴⁹ presented evidence that income alone could not account for the County's high degree of segregation.⁵⁰ The level of segregation between black and white residents, for instance, was found to be 0.64 on the dissimilarity index.⁵¹ When Beveridge instead examined the degree of segregation between households making less than \$100,000 per year and households earning more than \$100,000 per year, that score sunk to 0.38.⁵² Further, when Beveridge looked only at affluent blacks (those in the >\$100,000 income group), their segregation from whites still scored a 0.57 on the dissimilarity index, suggesting that it is not merely a lack of sufficient income that prevents black residents from living in Westchester's predominately white communities.⁵³

Finally, Judge Cote held that even if Westchester's conclusion that income was a proxy for race had been valid, the County needed to show its work.⁵⁴ As mentioned earlier, the third prong

⁴⁷ U.S. DEP'T OF HOUS. AND URBAN DEV., *supra* note 40, at 5-4 (emphasis added).

⁴⁸ *Anti-Discrimination Ctr. II*, 668 F. Supp. 2d 548, 564-65 (S.D.N.Y. 2009).

⁴⁹ Professor of Sociology, Queens College and Graduate Center, City University of New York.

⁵⁰ Initial Expert Report of Andrew Beveridge at 11, *Anti-Discrimination Ctr. II*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06. Civ. 2860).

⁵¹ *Id.* Beveridge described the Dissimilarity Index as showing the percentage of a group that would need to relocate in order to achieve an even geographic distribution of that group over all tracts. *Id.* at 7. A score of .64, then, means that 64% of black households would need to move to achieve an even distribution across Westchester.

⁵² *Id.* at 10.

⁵³ *Id.* at 11-12.

⁵⁴ *Anti-Discrimination Ctr. II*, 668 F. Supp. 2d 548, 565 (S.D.N.Y. 2009)

of HUD's legally binding AFFH regulations requires grant recipients to "maintain records" reflecting their analysis of impediments to fair housing and actions taken to address those impediments.⁵⁵ The Westchester AIs did not mention race, did not explicitly posit a theory of income as proxy for race, and did not describe any demographic data that might reasonably lead the County to hold such a theory. Thus, the judge found it undisputable that Westchester had made a false claim with regard to its AFFH duties.⁵⁶

ADC did not, however, achieve a complete victory on summary judgment. On the fourth element of the FCA claim—Westchester's *knowledge* of its false certification—Judge Cote found that a reasonable juror might side with Westchester.⁵⁷ The County essentially argued a theory of federal acquiescence on this point, claiming that HUD knew all along that the Westchester AIs did not consider race because the County had submitted copies of the analyses in both 2000 and 2004—even though it was not required to do so under federal regulations.⁵⁸ Moreover, HUD had acknowledged the omission of race, advising the County that "[f]uture submissions[] could be improved by including [information on race]," yet never explicitly stated that the failure to do so violated the statute, nor had it threatened to withhold CDBG or any other funds.⁵⁹ This tacit approval, argued Westchester, "reinforced [its] reasonable belief in its own compliance."⁶⁰

The fact that HUD knew of deficiencies in Westchester's AIs could not cure the County's failure to consider race, ruled Judge Cote.⁶¹ The County still failed to affirmatively further fair housing

("[E]ven if the County's analysis led it to conclude that income was an appropriate proxy for race, then it was required to report that analysis and demonstrate how it acted to overcome the effects of that race-based impediment to fair housing.").

⁵⁵ 24 C.F.R. § 91.425(a)(1)(i).

⁵⁶ *Anti-Discrimination Ctr. II*, 668 F. Supp. 2d at 565.

⁵⁷ *Id.* at 567 ("The County has presented sufficient evidence to raise issues of fact as to whether it knowingly submitted false certifications and payment requests to the federal government.").

⁵⁸ Defendant Westchester County's Memorandum of Law in Opposition To Plaintiff/Relators's Motion for Partial Summary Judgment at 28–29, *Anti-Discrimination Ctr. II*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06 Civ. 2860).

⁵⁹ *Anti-Discrimination Ctr. II*, 668 F. Supp. 2d at 570.

⁶⁰ Westchester Summary Judgment Memorandum, *supra* note 58, at 29.

⁶¹ *Anti-Discrimination Ctr. II*, 668 F. Supp. 2d at 567 ("That the relevant [federal] government officials know of the falsity is not in itself a defense.").

and, thus, still made an *objectively* false claim when it certified that it had done so. To make out a successful FCA case, however, ADC had to do more than prove that Westchester's claim was false; it also needed to show Westchester's *subjective* awareness that the certification was false.⁶² On this point, Judge Cote found that the "voluntary submission [of the AIs to HUD] at least permits the inference that the County did not act in knowing and reckless disregard as to the falsity of its certifications."⁶³ In other words, one might not expect a County that *knew* it was violating federal law to be particularly eager to send records of that misbehavior to a federal agency. ADC offered countervailing evidence on this point, such as Westchester's possession of the HUD Fair Planning Guide that explicitly contradicted its interpretation of "impediments."⁶⁴ The uncertainty, however, was sufficient to preclude summary judgment. The dispute would have to be resolved at trial.

C. *The Settlement*

But the trial never came. On August 10, 2009, more than three years after ADC filed its initial complaint, the U.S Attorney for the Southern District filed a Complaint-In-Intervention on behalf of HUD. The new filing echoed the ADC's FCA claim and offered additional accusations of common law fraud, unjust enrichment, and payment under mistake of fact.⁶⁵ The federal government, however, clearly had no plans to litigate its case, for another document was filed with the court that same day: a settlement agreement between HUD and Westchester County.⁶⁶

Most notably, the settlement requires Westchester to spend \$51.6 million to build at least 750 units of affordable housing within seven years. At least 630 (84%) of these units must be located in municipalities with black populations of less than 3% and Hispanic populations of less than 7%.⁶⁷ An additional sixty can be constructed in communities that are less than 7% black and

⁶² See *Mikes v. Straus*, 274 F.3d 687, 695 (2d Cir. 2001) (listing knowledge of falsity as the fourth required element of an FCA case).

⁶³ *Anti-Discrimination Ctr. II*, 668 F. Supp. 2d at 568.

⁶⁴ *Id.* at 567–68.

⁶⁵ Complaint-In-Intervention of the United States at 2, 14–17, *Anti-Discrimination Ctr. II*, 495 F. Supp. 2d 375 (S.D.N.Y. 2009) (No. 06 Civ. 2860).

⁶⁶ Settlement, *supra* note 1, at 1.

⁶⁷ *Id.* ¶ 7(a).

10% Hispanic, and a final sixty can be placed in municipalities with black populations of less than 14% and Hispanic populations of less than 16%.⁶⁸

At least half of the housing must be rental units, 20% of which must be affordable to households with income at or below 50% of the Area Median Income (“AMI”),⁶⁹ and the rest must be affordable to households with income at or below 65% of the AMI.⁷⁰ The remaining units can be tenant-owned, and must be affordable to households at 80% of AMI.⁷¹ Finally, a maximum of 25% of units can be subject to age restrictions (e.g., designated as housing for senior citizens).⁷² The County must market these affordable units in “geographic areas with large non-white populations,” but the settlement contains no specific racial quotas for the unit occupants.⁷³

In addition to building new units, the settlement requires Westchester to adopt several broad-based changes to its general housing policy. First, it must end a practice of allowing municipalities a “first right of refusal” when the County seeks to acquire land in their jurisdiction for affordable housing purposes.⁷⁴ Second, it must condition the disbursement of any CBDG or similar funds on an agreement by the recipient municipality to eliminate practices such as local residency requirements for affordable units (which serve to perpetuate segregation in communities with few minority residents).⁷⁵ Third, it must develop a “model ordinance” that municipalities can use to encourage fair housing through devices such as inclusionary zoning, though there is no requirement that municipalities actually

⁶⁸ *Id.* ¶ 7(b)–(c).

⁶⁹ The 2009 Westchester AMI was \$105,300. See HUD DATASETS, http://www.huduser.org/portal/datasets/il/il2009/2009summary.odn?inputname=METRO48325M48325*Westchester+County%2C+NY+Statutory+Exception+Area&selection_type=hmfa&year=2009 (last visited Aug. 31, 2012).

⁷⁰ Settlement, *supra* note 1, ¶ 7(d). Affordable here means that rent shall consume no more than 30% of a family’s adjusted income. *Id.* (citing 24 C.F.R. § 92.252(a)&(b)).

⁷¹ *Id.* ¶ 7(e). Affordable here means that principle, interest, taxes, insurance, and condo fees shall consume no more than 33% of a family’s adjusted income, given a maximum 40-year mortgage with a 5% down payment. *Id.*

⁷² *Id.* ¶ 7(f).

⁷³ *Id.* ¶ 33(e).

⁷⁴ *Id.* ¶ 25(c).

⁷⁵ *Id.* ¶ 25(d).

adopt such an ordinance.⁷⁶ Finally, if none of these mechanisms suffice to overcome municipal resistance to the housing plans, Westchester agrees to use all other appropriate means to further AFFH, including suing its own local governments.⁷⁷

One of the most important elements of the settlement is not a pledge of action at all but, rather, a simple acknowledgement by Westchester of its extant power to disregard municipal zoning rules in order to “benefit the health and welfare” of the County as a whole.⁷⁸ The County had previously disclaimed possession of any such authority, a refusal that allowed municipalities to effectively exclude affordable housing via land use restrictions such as the requirement of extremely large lots for one-family homes.⁷⁹

As of January 2011, few of the settlement’s requirements have been carried to fruition. The County has submitted three successive drafts of its required Implementation Plan, none of which have garnered the approval of its court-appointed monitor.⁸⁰ Additionally, HUD rejected Westchester’s revised analysis of impediments to fair housing in December 2010, finding that it “failed to set forth specific strategies . . . to combat exclusionary zoning practices.”⁸¹ As a result, both the ultimate location and timing of settlement-housing construction remains unclear.

⁷⁶ *Id.* ¶ 25(a).

⁷⁷ *Id.* ¶ 7(j).

⁷⁸ *Id.* at 2 (“Whereas the United States and the County agree and acknowledge that . . . pursuant to New York State law, municipal land use policies and actions shall take into consideration the housing needs of the surrounding region and may not impede the County in its performance of duties . . .”).

⁷⁹ The County backpedaled on this acknowledgement in its first draft of the Settlement’s required Implementation Plan. The court-appointed monitor criticized the drafters for “emphasiz[ing] the County’s lack of authority with respect to zoning and land use controls.” Amended Monitor’s Report Regarding Implementation of the Stipulation and Order of Settlement and Dismissal for the Period of August 10, 2009 Through February 10, 2010 at 8, *Anti-Discrimination Ctr. II*, (S.D.N.Y. 2009) (No. 06 Civ. 2860), available at <http://www.antibiaslaw.com/westchester-false-claims-case>.

⁸⁰ *ADC Status Report, November 1, 2010*, ANTI-DISCRIMINATION CENTER, <http://www.antibiaslaw.com/westchester-false-claims-case/adc-status-report-november-1-2010>.

⁸¹ Letter from HUD to Kevin Plunkett, Deputy Cnty. Exec., Westchester Cnty. (Dec. 21, 2010), available at <http://www.remappingdebate.org/sites/all/files/HUD%20Letter%20December%202010.pdf>.

II. ANALYSIS

A. *Scoping the Inquiry*

How sustainable is the settlement? The answer to this question depends a great deal on how one defines “sustainable,” which is in turn dependent on the scope of one’s inquiry. While in the abstract, “sustainable” simply means capable of enduring,⁸² in practice it carries very different implications at different levels of geographic specificity. One could assess, for instance, the sustainability of the housing units themselves, examining indicators such as energy efficiency, indoor air quality, or other characteristics emphasized in “green construction.”⁸³ Taking a slightly broader view, one could consider the sustainability of the housing’s placement within its community. Is it urban infill or greenfield development at the municipal fringe? Is it within walking distance of amenities such as schools and basic retail?⁸⁴ Finally, one could step back even further and examine the overall sustainability of the community in which the housing will be located. In evaluating the settlement, this last inquiry seems most applicable and instructive.

To see why this last inquiry is preferable, note that prior to the ADC litigation, the problem was not a failure by Westchester to build *any* affordable housing. On the contrary, between 1990 and 1999, more than 2,300 subsidized units were built.⁸⁵ The vast majority of these, however, were sited in just six of the County’s forty-five municipalities.⁸⁶ The major impact of the settlement, then, is not to ensure that Westchester generates a significantly higher volume of affordable housing, but rather to redirect the construction of such housing from one set of communities (those

⁸² See WEBSTER’S COLLEGE DICTIONARY (Random House 2d rev. ed. 2001) (defining “sustain” as “to endure without giving way or yielding”).

⁸³ This is the model utilized, for instance, by the U.S. Green Building Council’s Leadership in Energy and Environmental Design (LEED) certification system. See *FAQ: LEED Green Building Certification System*, U.S. GREEN BUILDING COUNCIL, https://www.usgbc.org/FAQConsolidation/FAQ_Detail.aspx?id=C02n40000000wagAAA (last visited Sept. 1, 2012).

⁸⁴ The settlement does include one provision aimed at such intracommunity concerns. When selecting development locations, “priority will be given to sites . . . that are located in close proximity to public transportation.” Settlement, *supra* note 1, ¶ 7(g).

⁸⁵ Beveridge Initial Expert Report, *supra* note 50, at 13–14.

⁸⁶ *Id.*

with significant minority populations) to another (those without). Such a shift has little impact on a developer's opportunity to engage in green construction techniques.⁸⁷ Given identical materials, an energy efficient home can be constructed in any community. Intracommunity siting guidelines, too, are easily transferable from one jurisdiction to another. Assuming that every community features at least some educational facilities and retail space, proximity to schools and stores can be universally mandated. The quality of those amenities, however, will vary widely between municipalities. If a policymaker wants to ensure access to *high-performing* schools, say, or to a *walkable* retail corridor, she must rely on existing social and physical infrastructure. New housing itself—at least in the relatively modest quantities mandated by the settlement—is unlikely to drive significant change in those amenities.

In other words, a conception of sustainability that is rooted in construction techniques or intracity siting decisions can be brought to a community. A conception of sustainability that is dependent on the value of a broad set of community amenities is not so easily imported. Instead of the housing increasing the sustainability of the community, the community increases the sustainability of the housing. In evaluating the Westchester settlement, the question becomes whether the eligible communities will provide a more sustainable setting for new affordable housing than the ineligible communities would have otherwise provided. If an Energy Star-certified apartment that would have been built near transit in Ossining is now an Energy Star-certified apartment built near transit in Scarsdale, have we achieved a more or less sustainable result?

B. *Defining "Sustainable Community"*

Having narrowed the inquiry to the relative sustainability of different communities, one must first ask: what does it mean for a *community* to be sustainable? Which of its characteristics must be "capable of enduring:" its natural resources, size, wealth,

⁸⁷ This is particularly true in Westchester, as the county already requires any housing built with HOPE VI or LIHTC support to achieve Energy Star efficiency certification. See WESTCHESTER COUNTY FAIR AND AFFORDABLE HOUSING IMPLEMENTATION PLAN, APPENDIX E-2(iii): SUMMARY AND OUTLINE OF GREEN TECHNOLOGY 4 (August 9, 2010), available at <http://homes.westchestergov.com/images/stories/settlementpdfs/AppendixE-2-iii.pdf>.

demographics, architectural character, climate?

Due to the lack of obvious parameters, the definition of a “sustainable community” often reflects the definer’s point of view. While environmental groups tend to focus on climate change and air and water quality, business and political figures emphasize the need to balance such goals with economic growth. Since the goal of this Note is to evaluate the compatibility of HUD’s sustainability initiatives with HUD’s desegregation efforts, the most pertinent definition of sustainable is likely the one adopted by HUD. According to Secretary Donovan: “[S]ustainability is about tying the quality and location of housing to broader opportunities such as access to good jobs, affordable transportation, quality schools, and safe streets.”⁸⁸

The mission statement for HUD’s new Office of Sustainable Communities similarly focuses on “connecting housing to jobs, fostering local innovation, and helping to build a clean energy economy.”⁸⁹ Although equity considerations are not explicitly mentioned in these definitions, HUD is quick to emphasize that, in its view, sustainability and inclusivity go hand in hand, claiming that “[b]y ensuring that housing is located near job centers and affordable, accessible transportation, we will . . . provide opportunities for people of all ages, incomes, races, and ethnicities to live, work, and learn together.”⁹⁰

This reasoning is, in fact, echoed in the preamble to the Westchester settlement, which asserts that “the broad and equitable distribution of affordable housing promotes sustainable and integrated residential patterns.”⁹¹

HUD’s conception of sustainability is largely in line with earlier federal attempts to foster sustainable development, such as the Clinton era “President’s Council on Sustainable Development,” which sought “bold, new approaches to integrate economic, environmental and equity issues.”⁹² The definition also accords

⁸⁸ Emily Talen & Julia Koschinsky, *Is Subsidized Housing in Sustainable Neighborhoods? Evidence from Chicago*, 21 HOUSING POL’Y DEBATE 1, 2 (quoting HUD Secretary Shaun Donovan).

⁸⁹ *Office of Sustainable Housing and Communities*, HUD, http://portal.hud.gov/portal/page/portal/HUD/program_offices/sustainable_housing_communities (last visited Aug. 31, 2012).

⁹⁰ *Id.*

⁹¹ Settlement, *supra* note 1, at 1.

⁹² See Kristina M. Tridico, *Sustainable America in the Twenty-First Century*:

with self-assessment tools that many American cities developed to track the progress of their own sustainability initiatives in recent years. These municipalities range from major metropolitan areas such as San Francisco to smaller communities such as Nantucket and Canonsburg, PA.⁹³ While the scope of inquiry and the individual indicators employed vary greatly across these locales, the metrics, such as the HUD and Clinton definitions, generally convey three areas of concern: environment, equity, and economy.⁹⁴

C. *Measuring Sustainability*

The Westchester settlement certainly furthers the equity prong of sustainability. By mandating the placement of affordable housing in virtually all-white communities, the settlement seeks to achieve a fairer distribution of subsidized housing throughout the County and, in turn, fairer access for low-income, largely minority residents to the differing packages of goods and services offered by those communities.

One might think the inquiry ends there. After all, if a sustainable community is, by definition, an equitable community, and the settlement promotes equitable communities, does it not follow that the settlement promotes sustainable communities? That syllogism assumes that actions to further equity are at worst neutral with regard to the economic and environmental prongs of sustainability—and it is easy to imagine circumstances in which the assumption fails. For instance, what if, in order to reduce

A Critique of President Clinton's Council on Sustainable Development, 14 J. NAT. RESOURCES & ENVTL. L. 205, 206 (1998) (quoting now defunct Council website).

⁹³ See, e.g., BOROUGH OF CANONSBURG, CANONSBURG SUSTAINABILITY INDICATORS REPORT i (2003), available at <http://www.sustainablepittsburgh.org/pdf/CanonsburgIndicatorsFinal.pdf> (“‘Sustainability’ means the full integration of a healthy environment, economy, social system, and individual well-being over the long term.”); *Sustainability Plan for the City of San Francisco*, SUSTAINABLE CITY, <http://www.sustainable-city.org/Plan/Intro/intro.htm> (last visited Sept. 2, 2012).

⁹⁴ See, e.g., MARTHA'S VINEYARD COMMISSION, MARTHA'S VINEYARD INDICATORS PROJECT: MEASURES OF SUSTAINABILITY 2 (2005) (featuring thirty-seven indicators in four categories: Nature, Economy, Society, and Well-Being); SUSTAINABLE CALGARY, STATE OF OUR CITY REPORT 7 (2011) (featuring indicators meant to track the city's efforts to “[m]aintain or enhance ecological integrity,” “[p]romote social equity,” and “[p]rovide the opportunity for meaningful work and livelihood for all citizens”).

development costs, the settlement mandated that the affordable housing be built in towns with lower land values stemming from a lack of access to quality transit or schools? To ensure that the settlement is not simply one step forward for equity and one step backward for the other prongs of sustainability, one must compare the relative levels of economic and environmental sustainability in the ineligible and eligible communities.

1. *The Furman Center / Urban Institute Indices*

To make this assessment, this Note adopts a pair of indices co-developed by New York University's Furman Center for Real Estate and Urban Policy and the Urban Institute in their report "Building Environmentally Sustainable Communities: A Framework For Inclusivity" ("the Furman/Urban report"), which takes a broad look at possible tensions and synergies between HUD's goals of sustainability and inclusivity.⁹⁵ In the report, the authors develop two assessment tools to measure sustainability using nationally available, predominately census tract-level data: an "Opportunity Index" and a "Walkability/Transit Accessibility Index."⁹⁶

For the Opportunity Index, the Furman Center and Urban Institute focus on the following indicators:⁹⁷

⁹⁵ VICKI BEEN ET AL., FURMAN CENTER FOR REAL ESTATE & URBAN POLICY / URBAN INSTITUTE, BUILDING ENVIRONMENTALLY SUSTAINABLE COMMUNITIES: A FRAMEWORK FOR INCLUSIVITY (2010).

⁹⁶ *Id.* at 18–19. Note that this dataset was compiled prior to the availability of 2010 Census data and 2009 five-year American Community Survey estimates. An analysis incorporating these recently released statistics would provide a more current snapshot of community characteristics.

⁹⁷ *Id.* at 18, 22–23.

Category	Indicator	Source
Education	Percent of elementary school students proficient in state reading and math tests	School Data Direct (2009)
	Percent of elementary students on free and reduced price lunch	
Crime	Number of violent crimes per thousand people	FBI Uniform Crime Report (2008)
	Number of property crimes per thousand people	
Jobs	Absolute number of jobs at "associate's degree" level within 5-mile radius of tract	Census Zip Business Patterns (2006) / BLS Occupational Training Data
	Number of jobs at "associate's degree" level within 5-mile radius divided by number of people at or below 60% AMI within 5-mile radius	
	Growth rate for jobs at "associate's degree" level between 1998 and 2006	Census Zip Business Patterns (2006 & 1998) / BLS Occupational Training Data
Environmental Quality	Sum of common chemical releases (lead, nitric acid, mercury, etc.)	EPA Toxic Release Inventory
	Estimated total respiratory risk from air toxics.	EPA National Air Toxics Assessments (NATA)

The Walkability/Transit Accessibility Index, on the other hand, features these metrics:⁹⁸

Automobile Dependency	Percent of commuters commuting to work by walking or public transit	U.S. Census (2000)
	Daily vehicle mile traveled per capita	FHA National Household Travel Survey (2001)
Density & Walkability	Total population / square mile	U.S. Census (2000)
	Average block size	U.S. Census (2000)

Revisiting HUD's definition of sustainability, one can see that the indicators utilized by the Furman/Urban report directly reflect of the agency's goals: "[S]ustainability is about tying the quality and location of housing to broader opportunities such as access to good jobs, affordable transportation, quality schools, and safe streets."⁹⁹ The quality schools, good jobs, and safe streets components are, of course, clearly represented in the Opportunity Index, while the proximity of these amenities to housing and the availability of affordable transportation (i.e., public transit) to residential development is captured in the Walkability/Transit Accessibility Index.

⁹⁸ *Id.* at 19.

⁹⁹ Talen & Koschinsky, *supra* note 88, at 2.

As the report's authors are quick to point out, their framework "admittedly draws lines about which reasonable people can disagree."¹⁰⁰ They frame the Opportunity Index broadly "by reference to chances to improve one's education, employment, and neighborhood quality of life."¹⁰¹ The Walkability/Transit Accessibility Index, on the other hand, is a much more tightly defined measure, focusing on a set of concerns that are "widely considered to be key elements [though not the only element] of the definition of environmental sustainability."¹⁰²

Additionally, for most of the indicators above, there is no clear threshold of sustainability. Planners can, for instance, identify the minimum population density necessary to support a bus system, but selecting a "sustainable" number of daily vehicle miles traveled per capita is a fraught empirical exercise. Similarly, is it possible to single out a percentage of students proficient in math and reading that marks the dividing line between low and high opportunity communities? Given these difficulties, the indicator scores mean little in a vacuum. Instead, they are most useful in relative terms (i.e., is this community more or less sustainable than a relevant set of peers?). The question becomes one of selecting a comparator. This Note look first at how the eligible tracts score in relation to the New York metropolitan region as a whole, and then at how they fare in comparison only to their counterparts within Westchester County.

D. *Regional Analysis*

The Furman/Urban report selected two large metropolitan areas to use as case studies for the deployment of its indices: New York and Seattle. In both regions, it found that "areas of high opportunity and high walkability/transit accessibility largely do not overlap."¹⁰³ On average, a tract's performance on one index tended to be inversely correlated with its scores on the other.¹⁰⁴ Additionally, the report found that African-Americans, Latinos, and Asian-Americans tend to be disproportionately represented in walkable neighborhoods with low opportunity while whites are

¹⁰⁰ BEEN ET AL., *supra* note 95, at 17.

¹⁰¹ *Id.*

¹⁰² *Id.* at 18.

¹⁰³ BEEN ET AL., *supra* note 95, at 16.

¹⁰⁴ *Id.* at 22.

concentrated in opportunity-rich but auto-dependent neighborhoods.¹⁰⁵ Finally, the report found that federally subsidized housing was more likely to be sited in high walkability/transit accessibility, low opportunity neighborhoods.¹⁰⁶

Westchester is made up of 221 census tracts.¹⁰⁷ Thirty-one towns and villages, representing 83 of those tracts, are eligible to receive a portion of the housing mandated by the settlement.¹⁰⁸ Based on the Furman/Urban findings, one might expect eligible tracts—located in majority white communities with little to no existing subsidized housing—to perform poorly on measures of walkability and transit accessibility but well on measures of opportunity, while ineligible tracts would exhibit the reverse characteristics. The Furman/Urban data affirms the first half of this assumption.

	Above NYC Regional Median for Opportunity	Above NYC Regional Median for Walkability/Transit Accessibility	Above NYC Regional Median for Both
Eligible Tracts	100%	0%	0%
Ineligible Tracts	70%	13%	1.5%
All Westchester	82%	8%	1%

The eligible tracts perform almost exactly as expected. One hundred percent offer above-median levels of opportunity, while not a single eligible tract scores above median for walkability/transit accessibility. Obviously, the 0% performance on the walkability index also means that no eligible tracts are

¹⁰⁵ *Id.* at ii.

¹⁰⁶ *Id.*

¹⁰⁷ See Westchester County Census Tracts 2000, WESTCHESTER COUNTY DEPARTMENT OF PLANNING (September, 2003), <http://www.westchestergov.com/planning/research/Census2000/Oct03updates/research/censusmaps.htm>. Four of these tracts, including Sing Sing Prison and the Westchester Airport, contain no private housing and have been excluded from the ensuing analysis.

¹⁰⁸ WESTCHESTER COUNTY FAIR AND AFFORDABLE HOUSING IMPLEMENTATION PLAN, Appendix H-1(ii) (Jan. 29, 2010 Draft). Only 65 of these tracts fulfill the requirements of ¶ 7(a) of the Settlement (which governs 630 units of the required units). An additional 15 satisfy the less restrictive ¶ 7(b), which governs 60 units, and 3 more only pass muster with ¶ 7(c), which governs the final 60. Additionally, the majority of these tracts may contain some individual census blocks whose concentration of minority residents disqualify them from eligibility.

above median for *both* indices.

The ineligible tracts, however, do not offer a mirror image of this performance. Over half (70%) are also above median for opportunity, while only 13% are above median for walkability/transit accessibility. Additionally, only two tracts exhibit above-average performance in both indices.¹⁰⁹

In comparison to its regional brethren, then, Westchester is a land of opportunity. Indeed, it boasts one of the highest percentages of above-median tracts in the region, topped only by Suffolk and Nassau counties.¹¹⁰ That bountiful opportunity, however, is not easily accessed on foot or via public transit. On the one hand, this seems a predictable result for a New York suburban county. In the *Greenness of Cities*, Edward Glaeser and Matthew Kahn found that New York had the nation's greatest suburb-city gap with regard to per capita GHG emissions, due to the increased car use and the decreased density of development that accompanied a journey outward from the city center.¹¹¹ In fact, Westchester is actually one of the higher performing suburban counties on this measure. Nassau, Suffolk, Rockland, and Bergen all feature not a single above-median tract for walkability.¹¹² Conversely, many central city tracts perform very well on walkability and transit accessibility measures but very poorly on opportunity. For instance, while 81% of tracts in the Bronx are above median for walkability, only 1% are above the opportunity median.¹¹³

Yet the Furman/Urban report did not reveal an entirely binary choice between suburban opportunity and urban walkability. Instead, it found that a significant percentage of tracts in the

¹⁰⁹ Both of these tracts are located in Mount Vernon. It is worth noting here that eligibility for Settlement housing is determined at the city rather than tract level. Although some of Mount Vernon's individual census tracts would fit the appropriate demographic profiles, Mount Vernon as a whole is excluded from eligibility because its total population is almost 60% black. See American Factfinder, *Mount Vernon Profile of General Population and Housing Characteristics*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov> (search "Mount Vernon, NY").

¹¹⁰ BEEN ET AL., *supra* note 95, at 27.

¹¹¹ See EDWARD L. GLAESER & MATTHEW KAHN, RAPPAPORT INSTITUTE FOR GREATER BOSTON / TAUBMAN CENTER FOR STATE AND LOCAL GOVERNMENT, *THE GREENNESS OF CITIES* 8 (March 2008).

¹¹² BEEN ET AL., *supra* note 95, at 27.

¹¹³ *Id.*

region—11%—are above median for *both* indices.¹¹⁴ Moreover, some counties considerably outperform this average. Almost half (46%) of the tracts in Hudson County, New Jersey, for instance, are above both medians, while over a third (38%) of Manhattan's tracts claim the honor.¹¹⁵ From a regional perspective, then, the HUD ideal of neighborhoods that feature both high opportunity and high walkability/transit accessibility is achievable in the New York metropolitan area. It simply is not achievable in Westchester County.

E. *Intracounty Analysis*

This Note, however, seeks to assess the sustainability of the Westchester Fair Housing Settlement. For that purpose, a conclusion that Westchester is a generally unsustainable place to build housing is somewhat irrelevant because the counterfactual to the settlement does not involve the construction of housing elsewhere in the region. As mentioned earlier, Westchester constructed more than 2000 units of housing between 1990 and 2003 as part of an overall plan to build 5000 such units.¹¹⁶ It is thus fair to assume that even in the absence of a settlement, the County would have built an additional 750 units within the next seven years. It simply would have tended to build them in the 134 ineligible tracts, rather than the 83 eligible ones.

The Furman/Urban report acknowledges the limitations of using regional medians as sustainability benchmarks for a county-specific program:

[I]t may not always make sense in the context of HUD programs that operate on a county wide scale, for example, to compare a suburban county with more urban counties, which could obscure differences between suburban neighborhoods that, while more similar to each other than to urban neighborhoods, still have significant differences in opportunity and walkability/transit accessibility.¹¹⁷

In other words, if a policymaker is choosing between *counties*, it is safe to characterize virtually all of Westchester as a high opportunity/low walkability zone, but if one is choosing

¹¹⁴ *Id.* at 21.

¹¹⁵ *Id.*

¹¹⁶ See Beveridge Initial Expert Report, *supra* note 50, at 14.

¹¹⁷ BEEN ET AL., *supra* note 95, at 36.

between individual communities *within* Westchester, there are meaningful differences that the regional medians do not expose. As such, instead of scoring each of the eligible and ineligible tracts in relation to the 3,459 tracts that make up the New York metropolitan area, this Note recalculates the indices to create an exclusively intracounty comparison, creating a new set of county medians to serve as benchmarks for sustainability.

1. *New Medians*

	Above County Median for Opportunity	Above County Median for Walkability/ Transit Accessibility	Above County Median for Both Indices
Eligible Tracts	86%	23%	18%
Ineligible Tracts	28%	67%	13%

Even with a new, higher opportunity median, the bulk of the eligible tracts (86%) continue to qualify as high opportunity.¹¹⁸ In fact, well over half (57%) of the eligible tracts are in the top *quartile* with regard to opportunity. Despite the lower bar for walkability/transit accessibility, however, the eligible tracts continue to perform comparatively poorly. Only 23% are above median, and 55% are in the bottom quartile for the County.

The ineligible tracts see even greater change in performance as a result of the new county-specific benchmarks. Whereas in the regional analysis, both the ineligible and eligible tracts performed more strongly on the Opportunity Index than the Walkability Index, the ineligible tracts results are now a near mirror image of the eligible tracts. Only 28% are above median for the Opportunity Index, with 38% in the bottom quartile. Sixty-seven percent are now above median for walkability/transit accessibility, with 37% in the top quartile. For those who prioritize economic vitality, then, the settlement would seem to lead to a preferable

¹¹⁸ For the purposes of the intracounty analysis, I exclude crime statistics (both violent and property) from the Opportunity Index, because the data is only available at the county level. In other words, every tract in Westchester scores identically.

result by shifting development from the ineligible to eligible tracts. Policymakers concerned primarily with mitigating climate change, on the other hand, would prefer the status quo.

Yet when one looks for HUD's priority—tracts that excel in both indices—the performance gap between the two groups narrows considerably. The eligible group has a slight edge with 18% of tracts above median for both opportunity and walkability/transit accessibility, but the ineligible pack is not far behind at 13% of tracts above both medians. Thus, for the purposes of the broad definition of sustainability advocated by HUD, post-settlement development appears slightly more likely to be located in a sustainable community than pre-settlement development. The eligible tracts scoring above median for both indices are listed below.

"SUSTAINABLE" TRACTS ELIGIBLE FOR SETTLEMENT HOUSING	
Community	Tract Number(s)
Bronxville	46 & 47
Cortlandt**	146.03
Dobb's Ferry*	104
Eastchester	49 & 51
Harrison	84.04
Larchmont	71
Mamaroneck (Town)	69 & 70
Pelham Village*	54
Rye	75 & 77
Scarsdale	100
Tuckahoe**	48

* Eligible only for the 120 units of housing authorized by paragraphs 7(b) and 7(c) of the settlement.

** Eligible only for the 60 units of housing authorized by paragraph 7(c) of the settlement.

2. *Accounting for Income Effects*

The sustainable tracts identified above share characteristics that are not captured by the index scores. For instance, virtually all of the tracts, both eligible and ineligible, are located in southern Westchester, within close proximity to the northern border of the Bronx.¹¹⁹ The one outlier is eligible tract 146.03 in Cortlandt, a community at Westchester's northern border. The Cortlandt tract,

¹¹⁹ See Westchester Census, *2000 Municipal Profiles*, WESTCHESTER COUNTY, <http://planning.westchestergov.com> (select "Census and Research Data," then select "Municipal Profiles").

does, however, share the sustainable tracts' other major commonality: it, like every one of its high-scoring peers, is located within one mile of a Metro North railway station and within one mile of a local bus route.¹²⁰

While all above-median tracts are proximate to transit, that characteristic does not guarantee a high overall index score. Take the example of Census Tract 55 in Pelham Manor. It, too, is within a mile of a commuter rail station and bus line. Furthermore, it scores well above median—the seventy-first percentile—for average block size, and not far below median—the fortieth percentile—for population density. Yet it is in the twenty-seventh percentile for daily vehicle miles traveled per capita (VMTs). What explains the discrepancy? One might guess that there are physical impediments to transit access that an as-the-crow-flies measure of proximity does not capture. A basic proximity measure also fails to capture differences in transportation quality—the number and frequency of stops and the reliability of service.

Perhaps, though, the difference is a question of preference rather than infrastructure. Perhaps residents of Pelham Manor use their cars more than others in Westchester not because they *have* to do so but because they can *afford* to do so. As the Furman/Urban report points out, “[H]igher-income households tend to drive more and use transit less than lower-income households, [meaning that] high-income . . . tracts will score lower than lower-income tracts with the identical access to transit and similar development patterns.”¹²¹ Why? Because public transit is a classic example of what economists call an inferior good; as income increases, people tend to opt for more expensive modes of transport—usually personal vehicles.¹²² Thus, Pelham Manor’s \$112,553 median household income—177% of the county median of \$63,582—might go a long way in explaining its puzzlingly low performance on per capita VMT.¹²³

¹²⁰ See WESTCHESTER COUNTY FAIR AND AFFORDABLE HOUSING IMPLEMENTATION PLAN, APPENDIX E-3(iv): SUMMARY AND OUTLINE OF GREEN TECHNOLOGY 4 (March 12, 2010), available at <http://homes.westchestergov.com/images/stories/settlementpdfs/AppendixE-3-iv.pdf>.

¹²¹ BEEN ET AL., *supra* note 95, at 35.

¹²² Samuel Staley, *Why Transit Is an Inferior Good*, PLANETIZEN (June 25, 2008, 10:43 AM), <http://www.planetizen.com/node/33371>.

¹²³ American Factfinder, *Pelham Manor Selected Economic Characteristics*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov> (search for “Pelham Manor, New York” and “Westchester County, New York”).

If higher income leads to higher reliance on automobiles, however, how does one explain the fact that Pelham Manor performs quite well on modal share, with more than 30% of residents travelling to work by foot or public transportation (putting the town in the top quartile for that indicator)? Census transportation statistics are not disaggregated by type of transit, but given that (1) over 60% of the tract's employed population works in "management, professional, and related occupations" and (2) residents' mean travel time to work is 35.3 minutes, one might infer that most Pelham Manor workers travel to white-collar jobs in New York City via commuter rail, a mode of transport that higher-income residents are less likely to eschew than, say, local bus service.¹²⁴ This use of rail to travel to the city, while ensuring a high modal share score, would not necessarily preclude a high VMT score for the tract, as those same workers, as well as their spouses and driving-age children, likely rely exclusively on cars when traveling for non-work purposes.

3. *Income-Adjusted Results*

Tenants of any subsidized housing built in Pelham Manor would have lower incomes than its current residents and one can assume that, all else being equal, they would drive less than current residents. To the extent, then, that statistics on current modal share and VMTs reflect residents' transportation preferences independent of transportation accessibility, they are not useful in deciding where to allocate settlement housing. The following chart shows how the distribution of high-scoring tracts shifts when the Walkability/Transit Accessibility Index scores are recalculated using income-adjusted measures of auto dependency.¹²⁵

¹²⁴ See American FactFinder, *Pelham Manor Selected Economic Characteristics*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov> (search for "Pelham Manor, New York") (listing average commuting time and percentage of population working in "management, professional, and related occupation"). In 2005, Metro North estimated its average Westchester rider's income at \$150,000. Jennifer Medina, *Taking the 'Reverse' Out of Commuting*, N.Y. TIMES, March 6, 2005, at 14WC.

¹²⁵ To create income-adjusted measures, this Note again borrows a methodology from the Furman/Urban report, regressing VMTs per capita and modal share percentages against median household income for all Westchester tracts and then using the resulting residuals to create new z-scores. See BEEN ET AL., *supra* note 95, at 35 n.16.

	Above County Median for Opportunity	Above County Median for Walkability/Transit Accessibility	Above County Median for Both Indices
Eligible Tracts	86%	34%	29%
Ineligible Tracts	28%	60%	12%

The result is a marked increase in the number of tracts that score above median for both opportunity and walkability/transit accessibility. The number of “sustainable” eligible tracts rises from fifteen to twenty-four, and post-settlement housing now appears *substantially* more likely to be built in a sustainable neighborhood than was pre-settlement housing.

And what of Pelham Manor? With income taken into account, its VMT score rises from the twenty-seventh percentile to the eighty-fourth, while its modal share percentage ascends more modestly from the seventy-first percentile to the eighty-eighth. Census Tract 55 now joins the ranks of “sustainable” eligible communities.

“SUSTAINABLE” TRACTS ELIGIBLE FOR SETTLEMENT HOUSING: INCOME-ADJUSTED RESULTS	
Community	Tracts Number(s)
Bronxville	46, 47
Dobb’s Ferry*	104
Eastchester	49 & 51
Harrison	84.01, 84.04, 85 & 86.02
Larchmont	71
Mamaroneck (Town)	69 & 70
New Castle	131.04
North Castle	123.04
Pelham Village*	54
Pelham Manor	55
Rye	75, 76 & 77
Scarsdale	98, 99, 100 & 101
Tuckahoe**	48

* Eligible only for the 120 units of housing authorized by paragraphs 7(b) and 7(c) of the settlement.

** Eligible only for the 60 units of housing authorized by paragraph 7(c) of the settlement.

IV. RECOMMENDATIONS AND PREEMPTIVE REBUTTALS

A. *Recommendations for Implementation*

This Note set out to answer one question: is the Westchester Fair Housing Settlement sustainable? These findings suggest answer: *it can* be, if implemented correctly. While the agreement itself contains no language that guarantees it will be the “model for building strong, inclusive *sustainable* communities” that HUD proclaimed it to be¹²⁶—even with the income-adjusted index scores, the majority of eligible census tracts (71%, to be precise) do not qualify as sustainable—it also contains no provisions that prevent such a result. There is no mandate, after all, that the 750 subsidized units be spread across *every* eligible community. Instead, the settlement dictates where those units *cannot* be built. As such the County is free to prioritize the development of subsidized housing in those thirty census tracts that score above median for both indices. In fact, the settlement already provides some justification for such a strategy via its requirement that the County site housing in proximity to transit where possible. As mentioned earlier, each of the twenty-four sustainable tracts is located with a one-mile radius of a commuter rail station.

Additionally, if the County decides, for any reason, that 750 units is too much housing to develop in just thirty tracts, or that some of these tracts are inappropriate for other reasons, it can simply adjust the sustainability benchmarks to broaden the available pool. For instance, leaving the opportunity cut-off at the fiftieth percentile while reducing the walkability/transit accessibility threshold to the forty-fifth percentile adds two additional tracts to the list of possible development sites. Such incremental adjustment would provide greater flexibility without necessitating total abandonment of the index framework.

B. *Anticipated Criticisms*

1. *Promoting Success or Merely Recognizing It?*

One could argue that the siting strategies advocated by this Note are not so much an example of HUD *promoting* sustainable communities as identifying ones that already exist. Instead of

¹²⁶ Editorial, *supra* note 4.

simply picking winners, might it not be possible for HUD to seek to improve walkability and transit accessibility in eligible communities that already have high opportunity scores? In the long term, the Furman/Urban report suggests just this brand of proactive behavior.¹²⁷

Such a strategy, however, would require the leveraging of funds and policy instruments far outside the scope of the Westchester settlement. The settlement-mandated units alone, no matter how thoughtfully placed, will likely have little impact on the overall walkability of their surrounding communities. Seven hundred and fifty homes, after all, is hardly a momentous amount of development. To put this in perspective, Westchester County contained 349,445 housing units in 2000.¹²⁸ Additionally, it issued permits for new residential buildings at a clip of 2,000 per year between 1998 and 2004.¹²⁹ The settlement, then, will spur less than half of the development that occurred in a single year during the real estate boom, and its impact will be spread out over almost a decade.

To improve the walkability/transit accessibility of a community that currently scores poorly on such measures would require large investments in improved transit, overhauls of local zoning regulations, and an influx of higher-density, mixed-use developments. These are, no doubt, precisely the sorts of changes in development patterns that HUD seeks to encourage via its partnership with DOT and EPA. If the Agency wants to encourage a sustainable settlement result *in the short term*, however, it should direct the units toward communities that already exhibit sustainable characteristics rather than those with potential for future improvement.

2. *Is the Sustainable Result a Fair Result?*

One might also be concerned that, by emphasizing sustainability, HUD might undermine the Settlement's commitment to fair housing. If all of the housing is constructed in just thirteen of the eligible communities, are the remaining thirteen

¹²⁷ BEEN ET AL., *supra* note 95, at 42–43.

¹²⁸ WESTCHESTER CNTY. DEP'T OF PLANNING, WESTCHESTER COUNTY DATABOOK: HOUSING (January 2010), *available at* <http://planning.westchestergov.com/images/stories/DataBook/housing.pdf>

¹²⁹ *Id.*

communities receiving tacit permission to remain segregated? In fact, such a plan could be accused of creating perverse incentives for communities intent on resisting integration to abstain from the transit improvements or higher-density development that might improve their walkability/accessibility scores and thus leave them vulnerable to receiving settlement housing.

One might also question the fairness of limiting the ability of low-income tenants to live in unsustainable communities. After all, if the federal government is unwilling to overhaul sprawl-supportive policies such as mortgage tax deductions and highway funding, it might appear hypocritical to tell low-income citizens that they cannot enjoy the same auto-dependent, carbon-intensive communities as their wealthier counterparts. Why should the poor bear a disproportionate responsibility to lead sustainable lives?

First, one must again consider the small volume of housing generated by the settlement. No matter how they are distributed, 750 homes will not be sufficient to integrate all of Westchester County. As a result, while there is still integration to be done in sustainable communities—that is, communities that can offer above-average opportunity at a below-average environmental cost—why not focus energies there first?

Second, while it may have garnered the most media attention, the enforced construction of new subsidized housing is by no means the only component of the settlement. As discussed earlier, the agreement also requires the creation of a model ordinance that furthers fair housing aims, the elimination of local residency requirements that perpetuate segregation, and an end to the right of refusal that the County has traditionally granted to municipalities when acquiring land for subsidized units. These provisions have the potential to subtly reshape the housing policies of all Westchester communities. The fact that a community is not selected to host any of the settlement-mandated units, then, does not necessarily mean it will be able to maintain the segregated status quo.

Finally, with regard to fairness to tenants of the subsidized units, it is important to recall that a poor score on the Walkability/Transit Accessibility Index can, in addition to signaling an unsustainable level of greenhouse gas emissions, also suggest increased transportation costs to local residents, costs that would be a particular burden on low-income tenants. The Housing & Transportation Affordability Index developed by the Center for

Neighborhood Technology, for instance, estimates the average transportation costs for a Bronxville resident at approximately 19% of median household income while those costs climb closer to 25% in the northwestern community of Chappaqua.¹³⁰ For someone making less than 60% of AMI, of course, these percentages would be even higher. Placing low-income tenants in high opportunity but low walkability neighborhoods, then, might simply serve to decrease the effective value of their housing subsidy. It is difficult to describe that as a fair result.

3. *Affordable for Tenants, Expensive for Government?*

The Furman/Urban report indices do not capture the relative cost of development in the census tracts examined. One might assume that land in tracts scoring above median for opportunity or walkability/transit accessibility is costlier than land in low-scoring tracts. Assuming a fixed budget, might an emphasis on siting units in sustainable communities mean a reduction in the number of units available?

Such concerns are arguably minimized in the case of the Westchester settlement, since the County is (1) required to build a minimum of 750 units regardless of cost (though it is, of course, free to build more than that minimum) and (2) already required to build those units in some of Westchester's most exclusive communities (recall that 100% of eligible tracts score above the regional median for opportunity and 86% score above the county median). To the extent that land in tracts scoring above *both* medians trades at a premium to land in tracts scoring only above the opportunity median, however, an emphasis on siting in sustainable communities could lead to higher development costs. This issue certainly merits further examination by HUD. It is important for the Agency to keep in mind, however, that even if development of subsidized housing in sustainable tracts *is* shown to entail higher land prices or construction costs, such siting decisions might also carry significant ancillary benefits, whether they be reduced GHG emissions, reduced asthma hospitalizations, or improved educational outcomes. Thus, the question of whether sustainable development is more costly in absolute terms is quite

¹³⁰ *H & T Affordability Index*, CENTER FOR NEIGHBORHOOD TECHNOLOGY, http://htaindex.cnt.org/mapping_tool.php (Search "Region: New York, New York).

different from the question of whether sustainable development is cost-benefit justified.

CONCLUSION

This Note identifies twenty-four census tracts in thirteen communities as potential sustainable venues for the Westchester settlement housing. These tracts have many characteristics that are not captured by the index scores. Some, for instance, may have little land available for additional development due to wetland or watershed protections. In other words, the tracts may prove to be sustainable communities but not feasible development sites. Additionally, the indices, based on nationally available data, might benefit from the substitution of richer, local datasets—transit accessibility measures that incorporate service frequency, for instance, or crime rates broken out by municipality. Regardless, the assessment techniques pioneered in the Furman/Urban report and further explored in this paper provide, at the very least, a promising departure point for Westchester planners as they prepare to implement the agreement, as well as guidance for HUD in negotiating the terms of future settlements.