

HOUSING DISCRIMINATION COMPLAINT

Metropolitan Milwaukee Fair Housing Council v. Waukesha County, Wisconsin

Submitted: March 15, 2011

CASE NUMBERS:

(Title VIII)
(Title VI)
(Section 109)

1. Complainant

**William R. Tisdale, President and CEO
Metropolitan Milwaukee Fair Housing Council
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Milwaukee, WI 53202
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Representing the Complainant:

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2. Other Aggrieved Parties

Residents of Waukesha County and other areas of Southeastern Wisconsin who have been subjected to discriminatory treatment or segregation by Waukesha County or its subrecipients on the basis of race, color or national origin.

3. The following is alleged to have occurred or is about to occur:

Otherwise deny or make unavailable a dwelling.
Discriminatory terms, conditions, privileges, or services and facilities.
Failure to affirmatively further fair housing and take affirmative steps to overcome discrimination.

4. The alleged violation occurred because of:

Race, color and national origin

5. Address and location of the property in question (or if no property is involved, the County and state where the discrimination occurred):

Waukesha County, Wisconsin

6. Respondents

Waukesha County (Wisconsin)

Serve: Daniel P. Vrakas, County Executive
Waukesha County Administration Center
515 W. Moreland Blvd. Room 320
Waukesha, WI 53188
Phone: (262) 548-7902

7. The following is a statement of the facts regarding the alleged violation:

a. Overview

Pursuant to 42 U.S.C. § 3610 of the Fair Housing Act (“FHA”), Metropolitan Milwaukee Fair Housing Council (“Complainant”) lodges the following complaint, alleging that, in its failure to comply with its own civil rights obligations associated with the use of federal housing and community development funds and in its failure to ensure compliance by its subrecipients, Waukesha County (the “County”) has: (1) made housing unavailable, in violation of 42 U.S.C. § 3604(a); (2) discriminated in the provision of services or facilities in connection therewith, in violation of 42 U.S.C. § 3604(b); (3) violated Title VI of the Civil Rights Act of 1964 and regulations promulgated by the U.S. Department of Housing and Urban Development (“HUD”) pursuant to Title VI; and (4) violated the Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5304. Complainant has diverted its resources to identify and investigate the violations outlined below, and as a result its mission of ensuring equal housing opportunities in the greater Milwaukee metropolitan area has been frustrated.

Furthermore, Waukesha County has failed in its obligation to affirmatively further fair housing (“AFFH”) as required by 42 U.S.C. § 5304(b)(2), 42 U.S.C. § 12705(b)(15) and related federal statutes and regulations.

The County administers approximately \$2.5 million per year in Community Development Block Grant (“CDBG”) and HOME Investment Partnership funds, making grants of these

funds to subrecipients, including 35 municipal subrecipients who are members of the Waukesha Urban County Consortium.¹ Pursuant to federal law, HUD regulations and guidance, the County is required to enter into an agreement with each subrecipient, pursuant to which the County is forbidden to expend funds in, or in support of, a municipality that does not comply with certain civil rights obligations, including compliance with the Fair Housing Act, Title VI of the Civil Rights Act of 1964, and the statutory obligation to “affirmatively further fair housing.”

Complainant has, and summarizes herein, evidence that the County neither complies with its own civil rights certifications nor does it require its subrecipients to comply with their own obligations. Notwithstanding this noncompliance, the County continues to make false certifications of compliance to HUD each year, and continues to fund municipal members of the Consortium even though they maintain policies that are in direct conflict with federal civil rights obligations and certifications.

b. Demographics and Geography

The history of “white flight” from the City of Milwaukee and Milwaukee County is well-documented.² As further outlined below, the hyper-segregated housing patterns that were created through deliberate and intentional zoning, land use, building, investment and infrastructure policies and practices of public and private actors were and are reinforced by suburban zoning and development ordinances which restrict or entirely preclude construction of affordable housing and therefore make it virtually impossible for many low income and minority people to move to the suburbs.

It is also clear that urban sprawl has long been linked to racial disparities. For years, federal housing policies that tended to encourage segregation were

exacerbated by real estate steering, insurance redlining and other housing business practices in metropolitan Milwaukee intended to safeguard property values by preventing racial and ethnic mixing. Together, these practices set the pattern for and reinforced neighborhood segregation....”³

¹ The County has also received funds through HUD’s Neighborhood Stabilization Program and through the American Recovery and Reinvestment Act for housing and community development activities.

² See, e.g., Mark Edward Braun, “Suburban Sprawl in Southeastern Wisconsin: Planning, Politics, and the Lack of Affordable Housing,” in Matthew J. Lindstrom and Hugh Bartling, eds., *Suburban Sprawl: Culture, Theory and Politics* (Lanham, MD: Rowman & Littlefield, 2003).

³ Local Initiatives Support Corporation, *Embracing Diversity: Housing in Southeastern Wisconsin* (February 2002), at p. 5, available at <http://www.publicpolicyforum.org/pdfs/housing.pdf> (last visited Feb. 15, 2011).

Residential relocations caused by freeway construction compounded the problem, while sprawl quite literally paved the way for white flight from the City of Milwaukee.

Recent analyses conducted for the Southeastern Wisconsin Regional Planning Commission (SEWRPC) Water Supply Study indicate that this segregation will continue well into the future. Despite their relatively small numbers, African Americans and Latinos of all income levels are concentrated in a small number of Census tracts in Waukesha County. There is also evidence of relatively recent intentional discrimination by Waukesha County officials.⁴

The U.S. Census Bureau reports that the Milwaukee-Waukesha Primary Metropolitan Statistical Region is, overall, the most racially segregated region in the United States for African Americans. Milwaukee-Waukesha is also in the top third of large metropolitan areas for residential segregation of Latinos.

Most of the job growth in the region has taken place in Waukesha County municipalities, but public policies concerning zoning, land use, building and transportation have limited housing opportunities for African Americans and Latinos near those jobs.

Despite its proximity to the City of Milwaukee (where African Americans account for 38.3% of the population and Latinos comprise 15.7%) and the fact that it is adjacent to Milwaukee County (where African Americans represent 25% of the population and Latinos 9%), Waukesha County and its 37 constituent municipalities (35 of which participate in and are subrecipients of federal housing and community development funds) are overwhelmingly White, and many maintain policies that discourage affordable and multi-family housing and perpetuate racial and ethnic segregation.

According to the 2000 Census, 95.77% of Waukesha's population is White, only 0.73% is African-American and just 2.63% is Latino. These numbers have not changed appreciably in the past decade.

Thirteen (13) Waukesha municipalities have no African-American residents whatsoever. Twenty-eight (28) municipalities have African-American populations of less than 1%, and thirty-two (32) have African-American

⁴ In 2009, the U.S. Equal Employment Opportunities Commission sued Waukesha County itself for racial discrimination in hiring against the entire class of black job applicants, not just the individual whose complaint triggered the investigation. In 2006, for example, a fire chief and a firefighter from a municipality in Waukesha County were convicted of hate crimes after they threatened an African-American man with a gun and dog, using racist language against him.

population of less than 3%. Two (2) have no Latino residents at all, eight (8) have less than 1% Latino population, and twenty-six (26) have less than 3% Latinos. (Source: 2005-2009 American Community Survey 5-Year Estimates).

African Americans and Latinos, in Waukesha County and in the region as a whole, are far more likely than white people to reside in rental housing. Within Waukesha County, for example, 50% of Hispanics and 40% of African Americans, but only 17% of non-Hispanic whites, are renters. Moreover, people of color have more difficulty in obtaining mortgages for home purchases in this region. Therefore, the policies of many Waukesha communities that limit or preclude the construction of affordable rental housing have the effect of limiting housing choice on the basis of race, color and national origin.

Border Communities (7 municipalities)

Even those Waukesha municipalities that border Milwaukee County and share its proximity to employment and other opportunities have very small minority populations:

<u>Municipality</u>	<u>% African-American</u>	<u>% Latino</u>
City of Menomonee Falls	3.1	2.1
Village of Butler	0.0	3.8
City of Brookfield	1.2	1.9
Town of Brookfield	4.7	3.9
Village of Elm Grove	1.0	1.6
City of New Berlin	0.7	2.3
City of Muskego	0.5	1.4

(Source: 2005-2009 American Community Survey 5-Year Estimates)

The border communities have large numbers of entry-level retail jobs and a variety of industrial jobs. They should have a large *local* work force, but most of the entry-level workers cannot afford to live near their jobs. There are a variety of impediments to fair housing ranging from land use restrictions to actual hostility against racial integration expressed by public officials. The border communities have received and continue to receive CDBG funding despite their poor track record on racial integration.⁵

⁵ Some examples would be \$34,000 to Menomonee Falls in 2008 for transit and planning; \$77,374 in 2007-2008 to New Berlin for transit and planning; and \$51,301 in 2008 to Muskego for transit and revolving business loans.

City of Waukesha

The City of Waukesha is the County's largest municipality, with a population of 67,625,⁶ and it is somewhat more diverse, but its demographic makeup is still 88.2% White non-Hispanic and only 2.9% African-American and 10.5% Hispanic. Significant impediments include its "housing mix ratio" and various zoning issues. Waukesha receives significant CDBG funding.⁷

Central Waukesha County

All of the municipalities in the central part of the County—even those with a variety of commercial developments and entry-level jobs—have very small minority populations:

<u>Municipality</u>	<u>% African-American</u>	<u>% Latino</u>
Town of Lisbon	0.5	1.0
Village of Sussex	4.1	1.9
Village of Lannon	0.9	2.2
City of Pewaukee	1.1	1.7
Town of Pewaukee	2.0	3.3
Town of Waukesha	0.2	2.0
Village of Big Bend	0.0	1.1
Town of Vernon	0.0	4.7
Town of Merton	0.0	1.5
Village of Merton	0.0	0.5
Village of Chenequa*	0.0	0.0
Village of Hartland	0.6	2.2
Village of Nashotah	0.4	0.7
City of Delafield	0.6	0.9
Town of Delafield	1.8	3.2
Village of Wales	0.3	3.9
Town of Genesee	0.2	2.8
Village of North Prairie	0.0	1.1
Town of Mukwonago	0.3	0.6
Village of Mukwonago	0.0	1.9

* Not a member of Urban County Consortium

⁶ 2005-2009 American Community Survey, 5-year estimates

⁷ \$101,192 in 2007 for park and street improvements and \$143,000 in 2008 for public improvement

(Source: 2005-2009 American Community Survey 5-Year Estimates)

Several of these larger communities like Delafield, Hartland and Mukwonago have a variety of commercial developments with entry-level jobs, but maintain land use policies that discourage affordable and multifamily housing, and thereby limit housing opportunities for African Americans and Latinos.

Western Waukesha County

<u>Municipality</u>	<u>% African-American</u>	<u>% Latino</u>
Town of Oconomowoc	0.0	1.3
Village of Lac La Belle	0.0	0.0
City of Oconomowoc	0.5	2.2
Village of Oconomowoc Lake*	0.0	3.4
Town of Summit	0.7	2.9
Village of Dousman	1.2	3.9
Town of Ottawa	0.4	0.5
Town of Eagle	0.0	3.5
Village of Eagle	0.0	4.5

* Not a member of Urban County Consortium

(Source: 2005-2009 American Community Survey 5-Year Estimates)

Many businesses and a large health care facility have located in Oconomowoc in recent years so it is the logical place to locate hundreds of units of workforce and low income housing. However, Oconomowoc and other communities have impediments to fair housing such as limitations on the percentage of rental housing.

c. Waukesha County Elects to Administer Federal Housing and Community Development Funds

Pursuant to HUD regulations, the County opted to create an Urban County Consortium and to invite participation by municipalities within its boundaries who could not themselves qualify for CDBG funds. On information and belief, the Consortium currently includes as subrecipients 35 Cities, Towns or Villages within the geographic boundaries of Waukesha County. Pursuant to federal requirements, the County is required to enter into a written Cooperation Agreement with each subrecipient. The terms of each such Cooperation Agreement prohibit the County from providing CDBG

funds “for activities in or in support of any Municipality that does not affirmatively further fair housing within its own jurisdiction or that impedes the County’s actions to comply with its fair housing certification.” Additionally, with three surrounding counties, Waukesha County formed a HOME Consortium, and thereby receives an additional allocation of HOME Investment Partnership funds.

For Fiscal Years 2006 through 2010, Waukesha County has received and administered approximately \$12,500,000 in CDBG and HOME funding. In addition, on information and belief, Waukesha County has also received Neighborhood Stabilization Program (“NSP”) funds of at least \$1.3 million since 2008, and has received an unknown additional amount of housing and community development funds which require it to make civil rights certifications. Upon information and belief, no action has ever been taken by Waukesha County to achieve AFFH compliance from its Consortium partners.

d. The County’s Civil Rights Obligations as Administrator of Federal Funds

Before receiving CDBG and related funding, the County must certify that it “will affirmatively further fair housing.” Under federal regulations, this means that the County must truthfully certify that it (1) has or will “conduct an analysis to identify impediments to fair housing choice within the [area]”; (2) “take appropriate actions to overcome the effects of any impediments identified through that analysis”; and (3) “maintain records reflecting the analysis and actions in this regard.” 24 C.F.R. §§ 91.225(a)(1), 570.601(a)(2). These required action steps are clear mandatory obligations of any entitlement jurisdiction once it completes the AFFH certification.

As instructed by HUD, the scope of the Analysis of Impediments (AI) “is broad. It covers the full array of public and private policies, practices, and procedures affecting housing choice.” Office of Fair Housing and Equal Opportunity, United States Department of Housing and Urban Development, *Fair Housing Planning Guide*, 2-8 (1996). The AI should describe: “the degree of segregation and restricted housing by race, ethnicity, disability status, and families with children; how segregation and restricted housing supply occurred; and relate this information by neighborhood and cost of housing.” *Id.* at 2-28.

A jurisdiction’s AI is required to include: (1) a comprehensive review of a jurisdiction’s laws, regulations, administrative policies, procedures, and practices; (2) an assessment of how those laws, regulations, and practices affect the location, availability and accessibility of housing; (3) an assessment of conditions, both public and private, affecting fair housing choice for all protected classes, including race and familial status; and (4) an assessment of the availability of affordable, accessible housing in a range of unit sizes. *Id.* at 2-7. Analyzing fair housing impediments and taking appropriate actions mean: (1) eliminating housing discrimination in the jurisdiction; (2) promoting fair

housing choice for all; (3) providing housing opportunities for people of all races and protected classes; and (4) fostering compliance with the nondiscrimination provisions of the Fair Housing Act. *Id.* at 1-3. To comply with its AFFH certification, Waukesha must “become fully aware of the existence, nature, extent, and causes of *all fair housing problems* and the resources available to solve them.” *Id.* at 2-8 (emphasis supplied). Finally, impediments to fair housing choice are not limited to acts of intentional discrimination and indeed, are not limited to actions alone. Rather, impediments to fair housing choice are defined broadly:

- Any actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin which restrict housing choices or the availability of housing choices;
- Any actions, omissions, or decisions which have the effect of restricting housing choices or the availability of housing choices on the basis of race, color, religion, sex, disability, familial status, or national origin.

Id. at 2-8.

A fair housing certification “is not satisfactory to the Secretary” when HUD reviews applicable documents and data and concludes that: (1) there is no AI; (2) the AI is substantially incomplete; (3) no actions were taken to overcome the impediments; (4) actions taken were plainly inappropriate to address impediments; and (5) there are no records reflecting efforts to overcome the impediments identified in the AI. *See* Memorandum from Nelson R. Bregon, General Deputy Assistant Secretary for Community Planning and Development, et al., to all CPD Field Office Directors, et al. (Sept. 2, 2004), *available at* www.hud.gov/offices/fheo/library/finaljointletter.pdf.⁸ An AI must reflect the *current* housing landscape and housing choices within a community, “especially at the beginning of a new Consolidated Plan five-year planning cycle, that it is appropriate to update their AIs to reflect the current fair housing situation in their communities.” *Id.* at 1.

e. Waukesha County Violates its Own Civil Rights Obligations

Through the acts and omissions detailed herein, and those to be discovered during the course of HUD’s investigation, the County has engaged in, and permitted its Consortium partners to engage in, differential treatment of the ultimate beneficiaries of federal housing and community development funds—including those provided to the County

⁸ *See also* 24 C.F.R. §§ 91.425, 570.601 (grantees to take all appropriate actions to overcome impediments to fair housing choice).

under the CDBG, HOME, NSP and other programs—on the basis of race, color and national origin. Furthermore, the County has adopted rules and policies, and permitted its Consortium partners to adopt rules and policies, that have the effect of discriminating on the basis of race, color and national origin, and that have perpetuated segregation on the basis of race, color and national origin.

In addition to the specific examples outlined below, and despite substantial evidence that residents of Waukesha County with very low, low and moderate incomes are experiencing dire needs for housing assistance, the Waukesha County Board and Waukesha County Community Development Division have steered and permitted Consortium partners to steer CDBG, HOME, NSP and other funds away from these housing needs in order to avoid the integrative effect such housing (and its affirmative marketing requirements) would have on majority white communities where it would be perceived to promote integration on the basis of race, color and national origin.

1. The County Has Failed to Identify and Analyze Fair Housing Impediments

The County has also openly disregarded its affirmative obligations to identify and analyze all existing impediments to fair housing choice experienced by the people of Waukesha County, most notably those related to race, color and national origin. The 2008 AI is substantially incomplete because it fails to conduct a thorough identification and analysis of impediments existing in the County; it fails to design, set forth, and carry out specific appropriate actions to overcome the effects of fair housing impediments; and it fails to identify parties responsible for carrying out those actions and timelines for their completion.

The County's AFFH certifications for 2008, 2009 and 2010 were apparently based on an AI that was drafted in early 2008.⁹ Prior to that time, the County had studied impediments to *affordable* housing in or about 1993. On information and belief, the County's AFFH certifications from 1993 to 2007 were based on that 1993 study which, on information and belief, did not constitute an AI as required by federal regulations at 24 C.F.R. §§ 91.225, 570.601.

The 2008 AI is a mere ten pages in length, and is described as a "draft." The AI is so short that it is impossible to know what methodology the County used to determine the "specific impediments" it identifies on pp. 3-8 of the AI, although the effort is

⁹ It is unclear whether public input was a part of the County's AI process. Both the MMFHC and ACLU wrote detailed letters commenting on the inadequacies of the Draft Analysis which included the failure to address local zoning obstacles and transit impediments or to set any targets for the development of affordable housing along with other fair housing issues. However, the comments were not incorporated into the completed Analysis.

notable for its explicit reliance on the “Westchester Urban County Fair Housing Plan,” the document effectively rejected by the U.S. District Court for the Southern District of New York as being part of Westchester County’s false AFFH certifications.

There is no detailed analysis of how these impediments affect housing choice on the basis of race, color, national origin or other protected class, and the AI outlines no appropriate actions to overcome them. Furthermore, as is evidenced by the specific instances of housing discrimination outlined below and by additional evidence that will be discovered during HUD’s investigation, the County substantially failed to carry out the appropriate actions that were necessary to overcome the impediments identified in its 2008 AI.

While the County’s specific failures are numerous, the most significant involve:

AI Fails to Address Racial Segregation: Despite the obligation to “describe the degree of segregation and restricted housing by race, ethnicity [or other protected class and] how segregation and restricted housing supply occurred and [to] relate this information by neighborhood and cost of housing,” *Fair Housing Planning Guide*, at 2-28, the County’s 2008 AI conducts no meaningful scrutiny of these issues.

AI Confuses “Fair Housing” and “Affordable Housing” and Fails to Consider Race-Based Impediments Other than Affordability: The County’s 2008 AI impermissibly conflates AFFH actions with affordable housing activities, and fails to take steps to assure that all affordable housing developed is “fully available to all residents of the community, regardless of race [or other protected class].” *Fair Housing Planning Guide*, at 5-4.

AI Imposes Artificial Limitations on the Resources Available to the County to Combat Fair Housing Impediments: The 2008 AI implicitly assumes that the County’s obligation to take appropriate actions is limited to the extent of resources or assets available through federal programs. In fact, though, the

AFFH obligation is not restricted to the design and operation of HUD-funded programs at the State or local level. The AFFH obligation extends to all housing and housing-related activities in the grantee’s jurisdictional area whether publicly or privately funded.”

Fair Housing Planning Guide, at 1-3.

As relevant herein, Waukesha County's 2008 AI identifies the following impediments to fair housing choice:

1. Municipal zoning, land use and building codes, policies and practices
2. Availability and cost of land
3. "Economic discrimination" by unnamed parties
4. Lack of an enforcement provision in the County's Smart Growth Plan
5. Wisconsin's Low Income Housing Tax Credit policy permitting local veto of affordable housing proposals

Although the 2008 AI identifies these enumerated items as fair housing impediments, it fails entirely to identify the specific municipalities that employ zoning, land use and building codes, policies and practices that act as impediments to fair housing choice. Because it does not identify the municipalities, it fails in its obligations under federal law, regulation, HUD guidance and the terms of the Cooperation Agreements, to ensure that its subrecipients are complying with their own individual AFFH obligations. Without oversight of municipal AFFH compliance, it is very likely that the County has continued to provide funding to noncompliant municipalities, or to other subrecipients operating within such noncompliant municipalities.

Because "[n]on-compliance by the Municipality with any of the provisions [of the Cooperation Agreement] may constitute non-compliance by the County which may provide cause for funding sanctions or other remedial actions by HUD," the County's failure to oversee and enforce AFFH compliance by municipalities means that the County's express and implied certifications to HUD concerning AFFH compliance are, at best, suspect. At worst, all of the County's AFFH certifications to HUD have been false because it has no process by which to enforce the AFFH obligations on subrecipients.

2. The County Has Failed to Take Appropriate Actions to Overcome Impediments

The County has failed altogether to design and carry out "appropriate actions" to overcome the impediments it has purportedly identified. As relevant herein, the County proposes only the following actions to overcome identified impediments:

1. Coordinate a seminar on affordable housing to develop "specific recommendations for the development of affordable housing throughout the county...."
2. Continue to operate housing assistance programs supported by federal funds
3. Advocate change at the federal and state level concerning identified programs
4. Identify and overcome housing production impediments

These actions are neither appropriate nor sufficient to overcome what the County itself

describes as “[t]he most devastating effect of zoning, land use and building codes....” (AI, at p. 4). In its cursory and deficient analysis of the effect of local zoning and land use policies on the availability of housing for people of color, the 2008 AI is evidence of the County’s systemic failure to consider the effect on fair housing choice of “[p]ublic policies, practices, and procedures involving housing and housing-related activities” and “[z]oning and land use policies....” *Fair Housing Planning Guide*, at 2-9.

Furthermore, the County has failed, with respect to its insufficient proposed actions to overcome fair housing impediments, to “organize these actions into a prioritized list of specific actions [w]ith milestones, timetables, and measurable results [t]o be undertaken by the jurisdiction in each of the 4 years following completion/update of the AI.” *Fair Housing Planning Guide*, at 2-6.

Limitations imposed on the Waukesha County Housing Authority

One of the specific actions to overcome the impediments listed above is that the County will continue to operate its housing assistance programs. However, the existence of the Waukesha County Housing Authority has actually been an impediment rather than a means of furthering fair housing throughout the County. When the Housing Authority was created in 1987, its bylaws prohibited it from developing affordable housing anywhere outside the geographic limits of the City of Waukesha. The Authority has been able to assist individuals with Section 8 vouchers outside of the City, but it could not develop housing anywhere else in the County. Over the many years that this limitation has been in effect, the County has intentionally avoided the single most effective means of developing affordable housing in municipalities that have few or no minority residents.

County’s failure to take actions itself in areas where it has zoning authority

Waukesha County has repeatedly asserted that it is unable to directly provide affordable housing because it has no control over zoning, even though its zoning power extends to townships. *See* Wis. Stat. § 59.69; Waukesha County Ordinances Ch. 14. As but one illustration, the County has zoning authority over the town of Waukesha, which received CDBG funds for Smart Growth planning,¹⁰ and which is 96% White non-Hispanic and less than of 1% African-American. The County claims that “townships which often have strict rules on home construction due to their more rural nature, Department of Natural Resources (DNR) development restrictions and

¹⁰ In October 2003, the town of Waukesha was approved to receive \$4382 in CDBG funds for Smart Growth planning. The plan was adopted in 2009; it is unclear if the town received additional CDBG funds after 2003.

lack of sewer and water.”¹¹ However, there is no evidence that the County attempted to investigate whether there is any available land to develop affordable housing and/or whether any of the town land does have sewers,¹² and failed to take steps to develop mechanisms to facilitate the provision of affordable family housing in the townships or to otherwise exercise its authority in the townships to facilitate the development of affordable housing.

County’s actions regarding Smart Growth planning

For years Waukesha County told HUD that it would use Smart Growth planning to meet its AFFH obligations. For example, in January 2003, Waukesha County told HUD that, to promote and enforce fair housing and to address fair housing barriers in the county AI, “some of the local communities will participate with the county in the development of Smart Growth Plan”

It is, however, clear that the planning failed to comply with this commitment. For example, Waukesha County’s Smart Growth plan, which was developed jointly with 27 municipalities in the County, barely mentions race at all and entirely fails to address regional racial disparities and the effect of those disparities on housing needs.¹³ It also fails to address or incorporate methods, such as Affirmative Fair Housing Marketing, to increase racial diversity.

In addition, Smart Growth planning was conducted in a manner that had a discriminatory effect. For example, to obtain community opinions regarding support of/opposition to multi-family and affordable housing, Waukesha County planners

¹¹ Waukesha County CAPER, 4th Program Year 2008, at p. 9, available at http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBUQFjAA&url=http%3A%2F%2Fwww.homeconsortium.com%2F2009_docs%2FCAPER4_2009.pdf&rct=j&q=waukesha%20county%20caper&ei=f59_TdjwGofp0gGNtOGFCQ&usq=AFQjCNEh49t-KgRe90U8HWYR1xR4FOx7tg&sig2=y3YyejGhCEIBHsrcoO04jQ&cad=rja.

¹² For example, the Town of Brookfield has a sanitary district which it describes as “the water and sewer utility in the Town of Brookfield.” <http://www.townofbrookfield.com/SD4.html>. It also appears that the Town of Summit, and possibly parts of other towns, have or plan to have sewers. http://www.waukeshacounty.gov/uploadedFiles/Media/PDF/Parks_and_Land_Use/Land_Information/Maps/County_Comprehensive_Plan_Maps/Existing%20and%20Planned%20Sewer.pdf.

¹³ Of dozens of pages of demographic information in the Smart Growth plan, there appears to be only a single paragraph addressing race, which confirms that “[a]lmost 96 percent of residents in Waukesha County were White in 2000.” The profile goes on to claim that “the population of Waukesha County continues to grow more diverse. Between 1990 and 2000 the Hispanic population in the county nearly doubled from 5,448 to 9,503.” The profile, however, neglects to mention that the number of white non-hispanic people increased more than 11 times as much as the number of Hispanic people increased, thus calling into question even this purported limited increase in “diversity.” In 1990, Waukesha County’s white non-Hispanic population was 294, 855. In 2000, that had increased to 339,905. Thus there was an increase of 45,050 white non-Hispanic residents but only 4055 Hispanic residents. 1990 Census (Data Set 1, Table P10); 2000 Census (Data Set 1, Table P4) (data for Waukesha County).

surveyed only homeowners within the county, not renters – who are disproportionately people of color. There is also no indication that the County or participating jurisdictions made any effort to include or incorporate the needs of people with limited English proficiency. There is no indication that the County or any participating jurisdiction addressed the permanent housing needs of homeless people within the County, who are disproportionately people of color.

Despite the mandates of state law that the housing element of each community's Smart Growth plan

identify specific policies and programs that . . . provide a range of housing choices that meet the needs of people of all income levels and of all age groups and people with special needs, [and] policies and programs that promote the availability of land for the development or redevelopment of low-income and moderate-income housing,¹⁴

the plan offers little more than vague assertions that they will provide a variety of housing. Although the Smart Growth plan made it clear that there is a vital need for affordable housing in Waukesha County, the recommendation portion of the plan falls far short of identifying specific policies and programs that will meaningfully address affordable housing need.¹⁵ To the contrary, even though the Plan states that the “County and municipalities should examine regulatory codes to identify the extent to which they permit or exclude relatively lower cost housing, and make appropriate changes to facilitate the provision of such housing,” the County fails to even undertake such an examination of its own codes, much less make appropriate changes to facilitate affordable housing production.¹⁶

¹⁴ Wis. Stat. § 66.1001(2)(b).

¹⁵ Using the plan's population projections for 2035, the established housing demand is 38,900 additional housing units by 2035. More than 37% of that will be extremely low, very low and low income households, with an additional 9% as moderate income households, requiring the construction of approximately 18,000 affordable units to be built by 2035. The Smart Growth plan's actual recommendations do not come remotely close to even beginning to address that need.

¹⁶ Further, in the 2008 CAPER Waukesha County asserted that as an effort to overcome an identified impediment, “County staff participated in the development of a countywide Smart Growth Plan and has continued its participation with the Waukesha Housing Action Coalition and the Housing Trust development.” http://www.homeconsortium.com/2009_docs/CAPER4_2009.pdf. While the Smart Growth planning process was given as an action by the county to affirmatively further fair housing, the staff conducting the Smart Growth planning process did not ever mention fair housing or racial segregation. When the issue was broached, it was only by MMFHC staff on the advisory committee. The County also did not mention that the Metropolitan Milwaukee Fair Housing Council staff voted against the Plan because of inadequate fair and affordable housing efforts.

The 2008 AI's "recommendations" for dealing with fair housing impediments do not indicate how such activities address specific fair housing impediments or when any such actions will be taken.¹⁷ Having a plan of action to combat impediments, with specific goals and time frames, is an essential component of fair housing planning. An AI without definitive goals, strategies, time frames and actions, coupled with definitive dates by which to accomplish tasks designed to address, reduce or eliminate fair housing impediments, is not an AI because it does not comply with the statutory and regulatory requirements to AFFH. Without such an analysis and planning effort, HUD cannot hold the County (or its Consortium partners) accountable for its AFFH certifications. Nor is there any concrete evidence in Annual Action Plans or Consolidated Annual Performance and Evaluation Reports since 2008 that the County has undertaken any of the relevant actions it outlined therein to overcome the impediments discussed above.

3. The County Fails to Monitor Civil Rights Compliance by its Consortium Partners

Pursuant to federal regulations, the County "is responsible for ensuring that CDBG funds are used in accordance with all program requirements," 24 C.F.R. § 570.501(b). To the extent the County chooses to commingle and share its CDBG funds with other entitlement jurisdictions, it is required to enter into written agreements with those municipalities to ensure that they comply with all program requirements. 24 C.F.R. § 570.503(a). In particular, any such "agreement shall require the subrecipient to carry out each activity in compliance with all Federal laws and regulations described in Subpart K of these regulations." 24 C.F.R. § 570.503(b)(5). Subpart K refers, among other things, to the obligations to comply with Title VI of the Civil Rights Act of

Before adopting the Smart Growth Plan, the County's Land Use Commission held a public hearing on the draft Plan. Seventeen people, County residents as well as housing and disability advocates, testified against the adoption of the Plan's housing chapter. The Commission had minimal discussion and approved the Plan.

Nor did the County note, after a two-year advocacy and education campaign to educate County Supervisors, the County Executive and County staff about housing trust funds and the need for these additional housing resources in the County, that Waukesha County has not approved any Housing Trust fund. Supervisors were not even in agreement about the *need* for affordable housing, therefore a housing trust fund resolution was never even introduced, much less funded.

¹⁷ Waukesha County's AI draft does have a recommendation to "Pass a Countywide Fair Housing Ordinance." The Waukesha staff person writing the AI informed MMFHC staff that Waukesha's County Executive and corporation counsel reprimanded him verbally for incorporating that recommendation into the AI.

1964, the Fair Housing Act, the AFFH obligation and Section 109 of the Housing and Community Development Act of 1974.

Notwithstanding the existence of the Cooperation Agreement with its municipal partners, the County has failed altogether to monitor their compliance with their AFFH obligations and the other civil rights obligations contained in Subpart K. In fact, the County conducts no independent analysis of the impediments that exist in the municipalities with which it shares federal housing and community development funds. Rather, it relies on those very grantees to determine whether fair housing impediments exist in their jurisdictions. This is contrary to the letter and spirit of federal law, which prohibits the expenditure of federal housing and community development funds unless a recipient complies with its AFFH and civil rights obligations. 42 U.S.C. § 5304(b)(2).¹⁸

HUD has previously warned the County of these obligations, and of its shortcomings with respect to subrecipients.¹⁹

¹⁸ Further evidence that the County has violated its AFFH responsibilities can be found in the minimal guidance it has provided to its Consortium partners about the meaning of AFFH certifications and the AI. Even though HUD has articulated important policy guidance, such as *Managing CDBG: A Guidebook for Grantees on Subrecipient Oversight* (Mar. 2005) and *Playing by the Rules: A Handbook for CDBG Subrecipients on Administrative Systems* (Mar. 2005), the County has chosen to do little or nothing to inform its Consortium partners about their actual obligations pursuant to the Consortium Agreement.

In *Managing CDBG*, HUD underlines the importance of providing such guidance and having detailed written agreements with recipients, going so far as to say “[i]f you use subrecipients to conduct CDBG activities without adequate written Agreements, you are courting disaster,” *id.* at Chapter 3-6, and advising recipients to “review the document, line by line, with the subrecipient’s key officials and staff as part of an orientation at the beginning of each program year....” *Id.* at Chapter 3-7. Further emphasizing the County’s obligation to police its partners’ compliance, *Managing CDBG* also says:

It is tempting to view the fine print of the written Agreement as a bureaucratic and legalistic effort to protect you and HUD and to undermine the autonomy of the subrecipient. It is not. Rather, the Agreement should represent a concise, explicit statement of all the rules governing the relationship of the grantee and the subrecipient and the conditions under which funds are provided. There’s no such thing as a “free lunch,” and playing by the rules is one of the conditions for receiving Federal funds.

Id. at Chapter 3-5.

¹⁹ For example, in December 2001, in its review of the CAPER, FHEO “requested that the County obtain from the local communities what they are doing to address these barriers. It does not appear that this office has received any information about what the local communities are doing to address these barriers. All participating communities are to take appropriate actions to overcome barriers to fair housing choice and to keep records of those actions.” In April 2002, HUD again requested submission of “the activities proposed to be undertaken by all local communities participating in the Urban County and/or the HOME consortium to address barriers to housing affordability and fair housing choice. . . All of the participating communities also have a responsibility to take actions to address affordable housing barriers.” In response in May 2002, the county claimed that “While the Waukesha County

As a direct and proximate consequence of the County's failures to enforce the AFFH obligations on municipal subrecipients, many of those municipalities have established and maintained zoning, land use and building regulations that have the purpose or effect of discriminating on the basis of race, color or national origin, and perpetuate segregation on those bases. Without limitation, Complainant alleges that the following laws, policies and conduct of municipal subrecipients have such a purpose or effect.

Specific impediments to fair housing will be discussed in more detail below, but all of the "Border Communities" have zoning obstacles that prevent the development of affordable or multifamily housing that would have an integrative effect, including limitations on percentage of rental housing, or "housing mix ratios" (New Berlin and Brookfield); and zoning that encourages multi-family housing only for elderly residents (Brookfield).

City of New Berlin

Although it borders Milwaukee County (which has significant African-American and Latino populations), the City of New Berlin is 96% White, and has a high rate of homeownership and a high median family income. Despite accepting substantial CDBG funds over the past decade, New Berlin has

Consolidated Plan does indicate that zoning and land use are impediments to affordability, none of the four county local governmental units discriminates in its zoning or land use decisions. It would be impossible, as your letter suggests, to contact each local governmental unit (over 100) to survey their effort to address barriers. We are hopeful that as opportunities for affordability are identified, we can work with the local government decision-makers to influence their positive actions." It is unclear whether the county ever in fact attempted to assert that influence.

The County's failure to monitor its municipal subrecipients continued into 2007, when HUD noted that:

Page 3, item 3 appears to be a summary of only one area of impediment, the gap between housing costs and income related to affordable housing needs and local land use provisions and realities. Other impediments that exist, and should have been identified, are not mentioned. Item 4 is a description of activities to address impediments identified in 3, it appears, but the narrative statements are so general it is not possible to evaluate adequate. Even briefly, how did the County work with (what) municipalities to encourage them in affordable housing development to modify some of their impediments? (Which impediments were identified?) What was the "encouragement" given by the Housing Action Committee, tech advisory groups or HOME Board and what results if any were achieved? What Smart Growth actions have actually been made, if any, to provide affordable housing, equal housing opportunity, or addressing any other impediments? The narrative does not say.

In the fall of 2009, the ACLU filed an open records request with Waukesha County; seeking all records evidencing consideration of AFFH issues in distribution of 2010 CDBG funds. In response, the director of community development left a lengthy voice mail message stating that no such documents existed.

neither identified nor addressed fair housing impediments experienced by people of color. In fact, its policies and statements by elected leaders indicate a strong antipathy to the kind of housing units that would promote housing choice for people of color.

New Berlin's "housing mix" policy limits the availability of multifamily housing. The Vision statement in the 2001 *New Berlin Growth and Development Master Plan Update* emphasizes the City's resistance to the integrative effect of multifamily housing:

The Urban Neighborhoods will be a series of well-maintained, quality *single-family neighborhoods* that will continue to exist indefinitely into the future. They will be served by neighborhood amenities such as parks, pedestrian connections to adjacent neighborhoods and nearby shopping areas.... New development and redevelopment will complement the residential character of the area.

Id. at 12 (Emphasis supplied).

The *Master Plan Update* also includes a development policy that recommends that New Berlin "preserve the same basic mix of uses, in order to maintain a City-wide ratio of single-family dwelling units to multifamily dwelling units of no more than 80:20." *Id.* Since the implementation of this policy, the supply of rental housing in New Berlin has been stagnant and rents have increased well beyond the level available to people with Housing Choice Vouchers.²⁰

On information and belief, New Berlin has employed zoning and land use laws and policies to artificially limit multifamily housing because of a concern that such housing would have an integrative effect.²¹ What little affordable rental housing may be available in New Berlin appears to be limited to seniors.

²⁰ According to a report from the Waukesha County Housing Authority, in March 2003 104 vouchers were being used in New Berlin. By March 2010, the number of vouchers used in New Berlin had decreased 37% to 66. On information and belief, the impact of the reduction in affordability was felt disproportionately by people of color.

²¹ According to the 2020 New Berlin Comprehensive Plan, only 58 acres in the New Berlin are available and identified appropriate for multi-family housing, as compared to 6,226 acres for single family housing. Without policies to ensure affordability, even the modest number of rental apartments that could be built will likely be priced as to preclude any integrative effect.

Elected officials have not been shy in their public and vocal opposition to affordable rental housing that would likely have an integrative effect. In January 2010, in response to a developer's application for approval of an 80 unit workforce housing project along with a 172 unit elderly project in New Berlin by MSP Development, Mayor Jack Chiovatero said:

[T]he concern I have is I thought this was going to be an ownership type area. You use the word "work force" housing. I know that is a term that is being used now for more affordable type housing. My concern for this area would be to make sure that these apartments and the income ranges of those who can afford being in these apartments can actually contribute to the community...

*I don't want to see something come across the creek into the middle of our County Center that is going to be worrisome for people in the area as well as for the demographics and retail in the area. Apartment dwellers probably have more disposable income because they don't have the bills that a homeowner has, but at the same time I have seen lesser income people try to live in an area they can't live in. That concerns me.*²²

Id. at pp. 7, 10.

Lee Sisson, a Plan Commission member, also objected:

[Y]ou don't need a crystal ball to read how this Plan Commission feels about this project. I think generally the expression on the elderly is fine. As I told you in the Architectural Review Meeting, you need to minimize some of that surface parking. There is too much asphalt. I think the most significant thing that you ought to hear tonight is that from our past work on the Comprehensive Plan, from the research we did, we learned then and we know now that an affordable housing project in New Berlin is not a priority. It definitely, in my opinion, is not a priority for County Center. You might find some other locations

²² New Berlin Plan Comm'n (Minutes of Jan. 4, 2010), p. 7, 10 (emphasis supplied). According to the developer, "Our target market is anyone who can qualify with the income restrictions and has acceptable credit can live there. This is targeted at a couple that makes less than \$34,000.00 a year. We are talking about restaurant workers, retail workers, teachers, fire fighters, policemen, healthcare workers, etc. When you talk about the retail, I would strongly argue that someone who is in that income bracket is spending a lot higher percentage of their income at retail and what you are looking for rather than having 300 units of elderly there." *Id.* at 9.

in the County, but not in County Center. Having said that and recognizing that the greatest source of frustration often times is unfulfilled expectations, which is exactly what we are looking at here. Our expectations for this particular parcel is considerably different. You don't need a crystal ball to see that.

Id. at p. 11.

Despite these comments, New Berlin's Planning Department determined the MSP development was a good project and recommended that the developer be given the variance required. The Mayor also supported the project. Citizens of New Berlin organized a strong opposition to the project. Residents based opposition on their belief that "upscale" and "luxury" housing and retail would be better suited to the area. Considerable pressure from these opponents prompted Mayor Jack F. Chiovatero to write to a constituent and friend, saying:

I am a prisoner in my own home. I have spent several hours a day last week listening and replying to concerned citizens. I spent all weekend doing the same.... I was stopped by several people and it took an hour and a half to leave the store. I was asked NOT to attend two functions this weekend for fear it would distract and cause havoc by my presence. ***Our City is filled with prejudice and bigoted people who with very few facts are making this project into something evil and degrading.***

There are two appeals so far, and reconsideration I have before the Plan Commission to remove the parking waiver.... In politics, perception is reality and with that I will not continue my support myself. The developer sits in Minnesota, looking at this project and how it will effect [sic] his assets, and my family is being verbally abused and harassed. ***New Berlin is not ready, nor may never be, for a project like this. Unfortunately, I will be doing whatever in my power to end this project, it will result in lawsuits and making New Berlin a community of bigots.***

(Emphasis supplied).

After a recall petition of the Mayor was started, he requested to rescind his approval of the project. In July, the New Berlin Plan Commission voted to rescind the variance, essentially killing the MSP development.

None of these problems is identified as a fair housing impediment in the City, and no action is proposed to overcome any such impediment. Still, New Berlin continues to receive CDBG funding from the County.

City of Brookfield

The City of Brookfield also borders Milwaukee County, is 94% White and has an even higher homeownership rate and median family income than New Berlin. Brookfield receives CDBG funds even though its land use and zoning policies are substantial impediments to integration and housing choice for people of color.

Brookfield has a significant regional retail corridor. Businesses along this corridor employ primarily low-wage retail and service workers. Yet, almost no housing affordable to these employees exists in the City of Brookfield. Since 1992, Brookfield has had one of the largest minimum lot size requirements in Waukesha County, a restriction that discouraged affordable housing construction; home prices were far higher than could be afforded by Brookfield's low paying retail and service sector employees.²³

In the late 1990s, a survey of residents showed objections to all kinds of multifamily housing, but especially to multifamily housing that was not for seniors or condominiums.²⁴ Brookfield apparently changed its zoning to facilitate multifamily senior housing.²⁵

The Wisconsin Housing and Economic Development Association (WHEDA) identifies only two affordable housing complexes in Brookfield. Both are elderly-only. Many municipalities in Waukesha County, including Brookfield have created a zoning distinction between "senior multi-family" and "non-senior multi-family." Under zoning districts that allow multi-family housing ONLY senior housing is a *permitted use*. "Non-senior multi-family" is a

²³ Laurel Walker, "Report finds many barriers to home ownership - Communities are urged to cut costly zoning and building regulations" and "Finley to outline plan for affordable housing," *Milwaukee Journal* (6/4/92).

²⁴ Paul Gores, "Residents favor limiting retail on Capitol Drive, poll says -Survey also finds people unsure about allowing multifamily housing," *Milwaukee Journal Sentinel* (1/26/99).

²⁵ Paul Gores, "More affordable senior housing proposed," *Milwaukee Journal Sentinel* (8/19/99)

("In the past, County zoning limiting the number of housing units per acre has discouraged developers from putting up anything but luxury apartments and condominiums. But a recent change makes it easier for County officials to increase the multifamily density on individual projects and tailor buildings to fulfill needs in the community, such as senior housing.")

conditional use, requiring additional approvals from the municipality, lessening the project's likelihood of approval. Brookfield's planner indicated to one of the Complainant's employees that the reason *senior* affordable multi-family housing may get approved but *family* affordable multi-family housing does not, was due to racist attitudes.

One of Brookfield's senior Low Income Housing Tax Credit (LIHTC) developments is perpetually deed-restricted for that use because of the intervention of the local alderman. There is other evidence of negative racial attitudes. For example, in early 2009, the Brookfield City Clerk told one of the Complainant's employees that residents were not opposed to an affordable LIHTC development because it was "affordable" but rather because the developer was Indian.

Its Smart Growth Plan, adopted in late 2009, explicitly states that Brookfield intends to "[r]etain our character as a predominately single family, owner occupied community."²⁶ Brookfield's "2035 Vision has a continued focus on owner occupied housing, with an increased focus on senior housing options as the County continues to age." Brookfield's housing stock is currently 87% single family, 12% multi-family, and only 10% rental. Opposition to multifamily housing was evident during the planning process; for example, a memo dated 7/11/2005 from Alderman James Heinrich raised concerns about multi-family housing²⁷ and in the Housing Focus Group for Brookfield's Comprehensive Plan (6/18/08) one woman stated that subsidized housing was a problem because demand might be regional and bring people from outside the community.

None of these problems is identified as a fair housing impediment in the City, and no action is proposed to overcome any such impediment. There is no indication that Brookfield has taken any steps to further fair housing for families.²⁸ Still, Brookfield continues to receive CDBG funding from the County. In 2003, it received money for accessibility of County buildings, and

²⁶ County of Brookfield 2035 Comprehensive Plan (adopted Dec. 2009), at p. 47.

²⁷ "I brought this request to have you review this issue because I am not sure the supply and demand for this type of housing still exists in the City of Brookfield. Is it a crime to live in an area that college and high school graduates cannot afford? . . . I personally see no need to provide 'affordable housing'. . . My constituents moved to Brookfield because of its open spaces and single family homes. Brookfield was a place where they would not be living on top of their neighbors or being hit with the barrage of noise, lights, and overall congestion found in cities like Milwaukee or Waukesha."

²⁸ In the early 1990s, Brookfield apparently agreed to accept 10 scattered site homes from the Waukesha County Housing Authority, but there is no indication that those were ever constructed.

in 2009, it received more than \$40,000 for additional accessibility and accessible play equipment.²⁹

Specific impediments to fair housing will be discussed in more detail below, but all of the border communities have zoning obstacles that prevent the development of low income, integrated housing. Some examples are: limitations on percentage of rental housing, or “housing mix ratios” (New Berlin and Brookfield); and zoning that encourages multi-family housing only for elderly residents (Brookfield).

Village of Menomonee Falls

The Village of Menomonee Falls is in close proximity to Milwaukee County. It is 97% White and has a high homeownership rate and a high median family income. The County continues to give it CDBG funding even though Menomonee Falls maintains severe restrictions on multifamily housing that might have an integrative effect. For example, while the Village nominally provides for multifamily zoning districts, but it makes virtually all parcels subject to conditional use approval by the Village Board before anything can be built.³⁰

Furthermore, when the Village adopted its Smart Growth Plan in December 2008, a survey revealed little support from residents of the Village for affordable housing, mass transit, and the use of tax increment financing for affordable housing.

None of these problems is identified as a fair housing impediment in the

²⁹ Waukesha County Enrolled Ordinance 164-49

³⁰ Sec. 122-239 (emphases added):

RM-2 multifamily residential district (a) Intent. This RM-2 district is intended to provide for development similar in character to the RM-1 district, but with higher density. RM-2 districts are intended to be located within an approved sanitary sewer service area. RM-2 multifamily residential districts are likely to have more direct impact on neighborhood property values, neighborhood health, safety and traffic than RM-1 districts because of the closer location of the multifamily use to neighboring non multifamily uses.

(b) Principle Uses. Principle uses in the RM-2 district are dwelling existing on February 5, 1973, including multifamily and single family structures whether attached or detached; .

(e) Conditional Uses. The following uses may be permitted with a conditional use permit in the RM-2 district. Requests for conditional use permits are considered by the village board of trustees after receiving a recommendation from the plan commission. The issuance of a conditional use permit is entirely at the village board’s discretion and is, therefore, subject to denial.

Village, and no action is proposed to overcome any such impediment. Still, Menomonee Falls continues to receive CDBG funding from the County. In 2007, the Village received \$20,000 in CDBG funds for a Village Center Master plan, and in 2009 it also received \$36,000 for Village Center planning.³¹

City of Waukesha

The City of Waukesha has a larger Latino population, and a slightly larger African American population, than Waukesha County as a whole. However, in 2009, the City began to take steps to reduce the proportion of multifamily housing, thereby diminishing housing opportunities for people of color.

The application of this policy has already led to the rejection of an apartment complex proposed by Bielinski, as well as the Plan Commission's disapproval of a proposed 60-unit affordable housing complex with 2, 3 and 4 bedroom units, known as Meadow Lane Townhomes, despite the fact that the land use plan indicated this area would be for higher-density housing. In rejecting the Meadow Lane proposal, neighbors repeatedly objected to non-owner-occupied housing, subsidized housing, the number of children, traffic, and other issues. On information and belief, these were pretexts for discrimination based on race, color or national origin, and City officials made their decisions based on those discriminatory views.

Notably, on the same evening, the Plan Commission did not even mention the Housing Mix study when it approved a mixed use commercial and rental apartment development – with more than 100 apartments – adjacent to Carroll College, a campus that has a population somewhat less diverse than in the County of Waukesha as a whole.³² Thus it appears the Housing Mix goals are being utilized in a manner that has a discriminatory effect. In addition, even though the Housing Mix policy was used as the justification for denying Meadow Lane Townhomes, plan commissioners suggested that senior multi-family housing would be acceptable.

None of these problems is identified as a fair housing impediment in the City, and no action is proposed to overcome any such impediment. Still, the City of Waukesha continues to receive CDBG funding from the County.

³¹ Waukesha County Enrolled Ordinance 164-49.

³² County of Waukesha Plan Commission Minutes (2/24/10).

The City's failure to address fair housing impediments is largely the result of its efforts to limit low income housing and multi-family housing in general with a "housing mix ratio" or rental percentage limitation. Waukesha also makes extensive use of "temporary (T-1) zoning" which is a significant obstacle to the development of low income housing.

In addition to the Housing Mix policy, the City of Waukesha appears to be using "temporary" zoning in a manner that also restricts affordable housing. More than four years ago the City of Waukesha annexed land from another community and left that land zoned T-1, or temporary zoning. The land for the proposed Meadow Lane Townhomes was zoned T-1, but the City's Master Land Use Plan indicated the land use was appropriate for multifamily housing even more dense than the Meadow Lane proposal. But because of the nature of the "temporary" zoning, the developer could not proceed with the plan without the City's approval.

Other Violations

The County repeatedly claimed it would use the Smart Growth planning process to AFFH. For example, in December 2003 HUD stated that:

Waukesha County still needs to develop a plan to obtain fair housing actions from the participating communities starting with the communities within Waukesha County. The communities themselves must take actions pursuant to the Smart Growth plans or the CHRB study.

It is unclear that Waukesha County ever told the local communities that this was required, much less sought to enforce the requirement - even though the County gave a number of communities CDBG money for Smart Growth planning.³³

The one effort the County appeared to take to attempt to get housing in participating jurisdictions was in May 2004, when the county set aside program dollars to write down land costs to make both multifamily and single family housing affordable. The set aside dollars have included communities outside the City of Waukesha, but were never deployed there. For instance, the set aside dollars for affordable housing in Mukwonago had to be given

³³ Local governments that received actual CDBG funds for Smart Growth planning include (at least) New Berlin, Towns of Mukwonago and Waukesha, and Villages of Wales and Hartland.

back to HUD partly because of a land use action taken by the community that made the proposed housing no longer feasible.

f. HUD's Authority and Obligation to Enforce Compliance

HUD not only has the authority, but the obligation, to enforce compliance with the FHA and related authorities. 42 U.S.C. § 3608(e)(5); Exec. Order No. 12,892, § 2-202, 59 Fed. Reg. 2939 (Jan. 17, 1999); Exec. Order No. 11,063, § 102, 27 Fed. Reg. 11, 527 (Nov. 20, 1962). Under the Housing and Community Development Act of 1974 (HCDA), 42 U.S.C. § 5301 *et seq.*, and its implementing regulations, the Secretary has the authority to make grants “only if” grantees make certain submissions and certifications. 42 U.S.C. § 5304(b)(2); 24 C.F.R. §§ 91.325(a)(1), 570.601(a)(2).

CDBG and related grant funds are expressly conditioned on a jurisdiction's certification that it will affirmatively further fair housing.

The AFFH certification [is] not a mere boilerplate formality, but rather a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring the [jurisdiction] to conduct an AI, take appropriate actions in response, and to document its analysis and actions.”

United States of America ex rel. Anti-Discrimination Ctr. of Metro New York, Inc., v. Westchester County, 668 F. Supp. 2d 548, 569 (S.D.N.Y. 2009).³⁴ The Secretary cannot obligate funds when a grantee has failed to make a certification that is material to its eligibility to receive these funds.

g. Continuing Violation

While some of the specific instances cited herein may have occurred more than one year prior to the filing of this Complaint, Complainant alleges that they are all part of the County's continuous pattern and practice of disregard for its civil rights obligations and civil rights certifications, that there is at least one violation that has occurred during the past year, and that HUD has jurisdiction to consider all of these instances (and others which are discovered during the course of HUD's investigation) under the “continuing

³⁴ “[A]n individual government employee's decision to approve or continue such funding, even with full access to all relevant information or knowledge of the falsity of the applicants certification does not demonstrate that the falsity was not material . . . the assertion that certain HUD bureaucrats reviewed the County's submission and continued to grant the County funding cannot somehow make the false AFFH certifications immaterial, where the funding was explicitly conditioned on the certifications.” *Westchester*, 668 F. Supp. 2d at 570.

violation” theory first articulated in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

As outlined above, the County has engaged in one or more acts of discrimination on the basis of race, color and national origin in the one year preceding the filing of this complaint. In addition, the County’s actions and failures to act, since 2000, as outlined herein, constitute a continuing violation of the Fair Housing Act and related civil rights statutes mentioned above. As a consequence, HUD has the authority under those statutes to investigate the County’s actions and inactions during the past ten years, and to take necessary and appropriate action to enforce the County’s civil rights obligations and to provide appropriate relief to the Complainants.

h. Conclusion

Because of its failure to conduct a compliant AI (and to enforce obligations on its Consortium partners) and take seriously the Actions outlined in its 2008 AI, Waukesha County cannot currently make an AFFH certification that can be “satisfactory to the Secretary.” The County’s failure to follow through on its AI commitments and ensure compliant Consortium partners is particularly troubling considering the long history of race-based housing discrimination in these jurisdictions. In addition to demonstrating the insufficiency of the County’s procedures and requirements, these facts—the history of racial discrimination and fair housing violations in grantee jurisdictions, the County’s failure to conduct a meaningful AI to reflect the current fair housing situation, and ongoing race-based resistance to multifamily affordable housing—constitute “evidence, not directly involving the grantee’s past performance under this program, that tends to challenge in a substantial manner the grantee’s certification of future performance” sufficient to support a determination that Waukesha County has not made a certification that it will affirmatively further fair housing satisfactory to the Secretary. 24 C.F.R. § 570.304(a).

Under all applicable laws and regulations, the Secretary has not only the authority, but the obligation and responsibility to review the Waukesha County’s submissions and certifications in application for funds and to enforce compliance with CDBG program requirements and the intent of Congress.

For the reasons set out above, we ask you to deem Waukesha County’s certifications insufficient to support obligation of CDBG funds at this time, and require revision of the AI and certifications in accordance with applicable federal laws and regulations. Complainant also seeks all other relief that may be available pursuant to the Fair Housing Act, including reasonable attorneys’ fees and costs.

8. The most recent date on which the alleged discrimination occurred:

Ongoing as of the date this Complaint was submitted.

9. Types of Federal Funds identified:

Community Development Block Grant.
HOME Investment Partnership.
Neighborhood Stabilization Program.

10. The acts alleged in this complaint, if proven, may constitute a violation of the following:

Sections 804a and 804b of Title VIII of the Civil Rights Act of 1968 as amended by the Fair Housing Act of 1988.

Title VI of the Civil Rights Act of 1964.

Section 109 of Title I of the Housing and Community Development Act of 1974.

Dated: March 15, 2011

Respectfully submitted,

/s/ Michael Allen

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