

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

MSP REAL ESTATE INC., et al. )  
)  
Plaintiff, )  
) Civil Action No. 11-cv-281  
v. )  
)  
CITY OF NEW BERLIN, et al. )  
)  
Defendants. )  
\_\_\_\_\_ )

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
) Civil Action No. 11-cv-608  
v. )  
)  
CITY OF NEW BERLIN, )  
)  
Defendant. )  
\_\_\_\_\_ )

**CONSENT DECREE**

1. The United States initiated this action on June 23, 2011, to enforce the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended (“the Fair Housing Act” or “the FHA”), 42 U.S.C. 3601-3631. In its Complaint, the United States alleges that the City of New Berlin (“City” or “New Berlin”) has made unavailable or denied dwellings to persons on the basis of race or color in violation of 42 U.S.C. 3604(a) of the FHA and has interfered with the exercise or enjoyment of rights under the FHA in violation of 42 U.S.C. 3617.
2. In 2010, MSP Real Estate, Inc. (“MSP”) contacted the City with a proposal to construct a 180-unit affordable housing development – with 100 units reserved for seniors and 80

units designated for general or family occupancy (also known as “workforce housing”) on a site it owned in the City Center area of New Berlin zoned for the construction of medium-to-high density residential dwellings. Financing for this development was provided under the federal Low Income Housing Tax Credit Program (“LIHTC”), 42 U.S.C. 26 *et seq.*, and pursuant to LIHTC requirements, occupancy was to be restricted to those households earning 60% or less of the area’s median income, with rents below market-rate. On May 3, 2010, the City’s Plan Commission voted to approve MSP’s application for a zoning permit, with certain conditions, finding that MSP’s proposal satisfied the City’s zoning requirements, including use, site, and architecture requirements.

3. The United States’ Complaint alleges that after the Plan Commission vote on May 3, 2010, the City took several actions in response to community opposition to MSP’s proposed development that were based on race or color, including, but not limited to: (1) reconsidering the Plan Commission vote and later denying zoning approval for MSP’s project on July 12, 2010; (2) denying in January 2011 MSP’s request to use existing City approvals and building permits to construct a previously-approved but un-built 102-unit condominium development on the same site and lease those units as workforce housing, subject to the income restrictions and rent restrictions required by the LIHTC program; and (3) applying its zoning and land use laws, and approving changes to these laws for the City Center area, in a manner that the United States alleges, restricts or prevents the building of affordable housing. The Complaint alleges that New Berlin took these actions with the intent and with the effect of discriminating against prospective African-

American tenants of MSP's proposed development. In so doing, the Complaint alleges that New Berlin has engaged in a pattern or practice of discrimination on the basis of race or color and a denial of rights to a group of persons that raises an issue of general public importance, in violation of the FHA. In its Answer to the Complaint, New Berlin has denied the foregoing allegations and the material allegations of the Complaint, in particular that its actions constitute a violation of the Fair Housing Act, 42 U.S.C. 3601, *et seq.*, or a violation of 42 U.S.C. 1981, 1982 and 1983. The City denies that any of its actions were undertaken with any discriminatory motive, intent or result.

4. On March 21, 2011, MSP filed its own lawsuit alleging that the City's actions described above violated the FHA. On July 19, 2011, New Berlin and MSP entered into a Memorandum of Understanding ("MOU") containing the terms of settlement of MSP's claims against the City. Under the terms of the MOU, New Berlin was required to issue a building permit to MSP for construction of the 102-unit development, and New Berlin did so on July 27, 2011. Of the 102 units, 90 units will be income-restricted and rent-restricted as required by the LIHTC program. The remaining twelve units will not be income or rent-restricted. The MOU further provides, *inter alia*, that: (a) the City will not take any actions to delay or obstruct completion of the 102-unit development; (b) the City will work in good faith with MSP in processing its application for the necessary approvals for construction of a 34-unit condominium project reserved for seniors on land adjacent to the 102 unit development, which is also subject to the income restrictions and below-market rate rents of the LIHTC program; and (c) MSP will dismiss its lawsuit with prejudice upon final completion of both components of the proposed development and

the issuance of occupancy permits by the City. The MOU is appended hereto as Appendix A. On July 27, 2011, the City issued building permits to MSP for completion of the 102-unit Workforce Housing Project, and MSP notified the Court that it has resolved its claims with the City. MSP has commenced construction of the 102-unit workforce housing project.

5. On July 25, 2011, the Court consolidated MSP's action with that of the United States. The United States and the City have determined to avoid the costs and risks of further litigation, and therefore have agreed to the terms of this Consent Decree and to request its entry by the Court. No provision of this Decree is intended to be, nor shall any provision be construed as, an admission by the City that its actions with respect to MSP's proposed affordable housing development have violated the FHA.

**THEREFORE, IT IS HEREBY ORDERED:**

**I. DEFINITIONS**

6. The following terms when used in this Decree, shall have the following meaning:
  - (a) "Affordable housing" means housing, any portion of which is income-restricted and rent-restricted and is designed to serve low-to-moderate income persons. This includes, but need not be limited to, housing financed through the federal Low Income Housing Tax Credit program ("LIHTC"). 26 U.S.C. 42 *et seq.*
  - (b) "Area Median Income" refers to the term that is used in the LIHTC program.

- (c) “The City” and “the City of New Berlin” refer to the City of New Berlin, its elected or appointed officials, including the Common Council, Mayor and Plan Commissioners, its employees, officers, agents, consultants, and any and all persons or entities acting in active concert or participation with the City of New Berlin.
- (d) The “City Center” is the geographic area in New Berlin described in the New Berlin City Center Planned Unit Development (“City Center PUD”), New Berlin Ordinance No. 2122. For purposes of this document, it shall not include those other areas identified as being part of City Center in the City’s comprehensive plan.
- (e) “Comprehensive Plan” refers to the “2020 New Berlin Comprehensive Plan,” adopted by the Plan Commission on November 2, 2009, and developed pursuant to Wisc. State Statute 66.1001.
- (f) “Date of entry of this decree,” or words to that effect, refers to the date the Court enters this Decree.
- (g) “Future land use map” refers to the future land use map in the 2020 New Berlin Comprehensive Plan and shows the intended land use for all parcels of land in New Berlin. The City requires that all development and redevelopment in New Berlin be consistent with its future land use map.
- (h) The “Moratorium” means the City’s suspension of development applications in the City Center area, authorized by Common Council

Resolution No. 2010-19 on June 8, 2010, extended several times since then, and which expired on August 4, 2011.

- (i) “MOU” refers to the Memorandum of Understanding entered into between MSP and the City of New Berlin on July 19, 2011, and attached here as Appendix A.
- (j) “Senior Housing Development” refers to a 34-unit multi-family project that is described in the MOU, all units of which are reserved for seniors who are 55 years-old and older and which are income-restricted and rent-restricted pursuant to the requirements of the LIHTC program.
- (k) “Workforce Housing Development” is a 102-unit multi-family project reserved for general occupancy that is described in the MOU, 90 units of which are income-restricted and rent-restricted pursuant to the requirements of the LIHTC program.

## **II. GENERAL INJUNCTION**

7. During the term of this Consent Decree, the City of New Berlin is hereby enjoined from:
- (a) making unavailable or denying a dwelling to any person because of race or color;<sup>1</sup>
  - (b) interfering with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right protected by the Fair Housing Act;

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<sup>1</sup> “Dwelling” and “person” have the meanings set out in the FHA, 42 U.S.C. 3602(b) and (d).

- (c) interfering with the funding, development, or construction of any affordable housing units because of race or color; and
- (d) discriminating on the basis of race or color in any aspect of the administration of its zoning, land use, or building ordinances, policies, practices, requirements, or processes relating to the use, construction, or occupancy of dwellings.

**III. THE WORKFORCE HOUSING DEVELOPMENT AND  
THE SENIOR HOUSING DEVELOPMENT**

8. The City has agreed to permit the construction of the Workforce Housing Development and Senior Housing Development and has issued building and zoning permits for these projects. The City shall not obstruct or delay any aspect of construction or completion of the Workforce Housing Development or the Senior Housing Development, including with respect to the timing, level, and issuance, as applicable, of inspections, approvals, occupancy permits, and other similar matters. If permits or approvals are required from Waukesha County, the State of Wisconsin, or other entity for the construction or completion of the Workforce Housing Development or Senior Housing Development, the City shall work with MSP and these entities to obtain as promptly as possible, in the normal and ordinary course of business, the necessary permits and approvals. If modifications, changes, or clarifications to the plans for, or construction of, the Workforce Housing Development or Senior Housing Development become necessary during the pendency of its construction, the City shall work cooperatively and in good faith with MSP to handle these matters reasonably and in the ordinary course of permitting and construction. Nothing in this paragraph shall be construed to prevent the City from applying its zoning requirements in a non-discriminatory manner and from

ensuring that the Workforce Housing Development and Senior Housing Development comply with valid requirements of applicable law.

#### **IV. FAIR HOUSING POLICY**

9. Within thirty (30) days of entry of the Decree, the City shall adopt a “Fair Housing Policy,” the text of which would be in the form of Appendix B. The Fair Housing Policy shall list the name and contact information for the City’s Fair Housing Compliance officer (Section VII *infra*). The City shall include the Fair Housing Policy in all literature and information or application packets to residential developers, including developers of multi-family housing projects. The City shall include the Fair Housing Policy as a readily accessible link on its website.
10. Within thirty (30) days of entry of the Decree, the City shall place the phrase “Equal Housing Opportunity” or the fair housing logo on its website. The City shall place the same in all future published notices and advertisements related to housing or residential development and submit copies of all such notices and advertisement to the United States within six (6) months of publishing, as required by Section VIII. Compliance with this paragraph may be achieved by forwarding to the Department of Justice links to the downloadable documents which evidence compliance with this paragraph.  
  
 (“Compliance, Record-Keeping and Reporting”).

#### **V. FURTHER RELIEF TO REMEDY AND PREVENT LAND USE PRACTICES THAT VIOLATE THE FAIR HOUSING ACT**

11. Wisconsin State Statutes Section 66.1001(2)(b) (*Housing Element*) requires communities to “provide a range of housing choices that meet the needs of persons of all income levels” and to “promote the availability of land for the development or redevelopment of



low-income and moderate-income housing. . . .” In Chapter 7 of the 2020 Comprehensive Plan, the City acknowledged its obligation to “provide an adequate supply of affordable housing for individuals of all income levels” as part of its planning process. Comp. Plan at 7:1. The City recognizes that “lack of affordable housing or ‘workforce’ housing is considered by many to have negative effects on a community’s overall health.” Comp. Plan 7:23. The City has committed itself to “continu[ing] to support ‘affordable’ or ‘workforce’ housing options to accommodate young families, the elderly, and other low and moderate income residents” and to “allow[ing] a diverse array of housing options. . . .” Comp. Plan 7:25. As part of the resolution of this case, and consistent with the statutory obligations and the commitments in its planning documents to support the future development of affordable housing, the City has agreed to undertake the actions set forth below.

12. Moratorium. The City agrees that the Moratorium on development applications in the City Center expired on August 4, 2011, has not been extended by the City Council, and is legally terminated.
13. Housing Trust Fund. During the term of this Consent Decree, the City will create and operate a Housing Trust Fund, which will be established by an ordinance with the language contained in Appendix C. The purpose of the Housing Trust Fund will be to provide resources for the support of developers and governmental entities in the acquisition, construction, rehabilitation, and modification of affordable housing for low income and moderate income households and to finance support services that assist low income households in obtaining and maintaining affordable housing. In addition, a sum

of at least \$50,000, and not less than half of any additional amounts placed in the Housing Trust Fund, shall be used for projects or programs designed to promote integration and equal housing opportunity for all, regardless of race, within the City of New Berlin. The City will use all reasonable efforts to encourage applications for projects that serve this purpose. Acceptable examples of such projects include a housing mobility program or a program designed to educate and encourage the participation of private landlords in the Housing Choice Voucher program.

14. The City will initially fund the Housing Trust Fund by contributing the sum of Seventy-Five Thousand Dollars (\$75,000.00). The City will use all reasonable efforts to look for other sources of private and public funding for the Housing Trust Fund for the duration of the Decree. The City will review all Tax Increment Financing (“TIF”) projects that may be approved within the City of New Berlin and initiated within the term of this agreement as a potential source of funding, and, if financially feasible, will extend the duration of the TIF as permitted pursuant to Wisconsin Statute Section 66.1005, with the proceeds derived therefrom to be placed in the Housing Trust Fund. The creation of the housing trust fund shall occur not less than three months from the date of execution of this Consent Decree.
15. Future Multi-Family Development in the City Center PUD. The parties acknowledge that in 2011 the City made amendments to the City Center PUD, as well as to the 2020 Comprehensive Plan, which the United States challenged in its Complaint. The parties further acknowledge that there are three (3) areas in the City Center PUD that are vacant and available for the construction of multi-family units and that have a future land use

designation that supports multi-family units. These are: (1) the park out lot at approximately 3575 S. 147<sup>th</sup> Street, which comprises 5.37 acres and is owned by the City; (2) the “Anchor Bank” parcel, along National Avenue, with a specific address of 14901-5055 W. National Avenue, which comprises 8.13 acres; and (3) the “Decade” parcel, which comprises approximately 9.89 acres of developable land. Each of these parcels is shown on the City's future land use map as having a mixed use designation of “Suburban Commercial,” “Mixed-Use Residential” and “Commercial Center” and therefore may be developed consistent with any of these uses, including multi-family.

16. As part of the amendments to the City Center PUD, the City limited the number of dwelling units that could be constructed within the City Center PUD to a maximum of the total number of units already built, or approved to be built, at the time of the PUD amendments, which the City calculates to be a total of 235 units. The City agrees to increase this limit by 75, for a total of 310 residential units.
17. The City also agrees to allow the construction of multi-family units on these three parcels to occur at or up to the same density and building height applicable to the MSP Workforce Housing Development under construction, which is 18.89 units/acre and 42 feet, respectively. The parties acknowledge that each of these parcels may be developed for uses other than residential because of their future land use designation. Although the City makes no commitment as to how these parcels will be developed, it acknowledges that if a multi-family residential application is made for these parcels, the parcels would support such use, subject to the applicable City codes and other requirements set forth in this Decree. The City agrees not to modify the City Center PUD to limit or restrict those

areas where multi-family housing could be constructed within the City Center PUD for the duration of the Decree.

18. Future Changes to Zoning for Multi-Family Developments. The City represents that the only other land currently available for the development of multi-family units in the City of New Berlin (other than the parcels identified in paragraph 15 above in the City Center PUD) is a 30-acre parcel located at approximately 1500-1800 South Moorland Road, owned by Highland Memorial Park and zoned I-1. During the pendency of this Decree, the City shall not adopt or approve any changes to its future land use map that would limit or restrict construction of multi-family units on this parcel or on any other area where multi-family units would otherwise be possible, consistent with its future land use map, for the duration of this Decree.
19. Fair Housing Outreach. Within ninety (90) days of entry of the Decree, the City shall submit a Fair Housing Outreach Plan for approval by the United States. The objective of this outreach plan shall be to counter negative public perception following the City's actions on MSP's affordable housing development and perception that the City of New Berlin does not welcome residents regardless of race or color to live in New Berlin or that it does not welcome the development of affordable housing because of the race or color of the prospective residents. The parties agree that the City shall not be required to retain a consultant in order to implement this plan and that the requirements set forth in that plan may be performed by current City staff members. The Fair Housing Outreach Plan should include at a minimum: (1) a description of the specific outreach activities the City will undertake, entities the City will contact, and materials that the City will use to

encourage multi-family housing developers to propose and construct affordable housing in New Berlin; (2) a description of the specific outreach activities the City will undertake, entities the City will contact, and materials that the City will use to advertise affordable housing opportunities available in New Berlin to all households, regardless of race; and (3) an estimated timetable for implementing the Fair Housing Outreach Plan. The Fair Housing Outreach plan shall not be funded by money from the Housing Trust Fund.

20. Upon receipt of the Fair Housing Outreach Plan, the United States will have thirty (30) days to approve or recommend changes to the Plan. The United States and the City will work cooperatively, and in good faith, to resolve any differences regarding provisions of the Plan. If the United States and the City cannot agree on provisions of the Plan, the parties will follow the dispute resolution process set forth in paragraph 34 *infra*. New Berlin will implement the Plan within thirty (30) days after all parties have executed this agreement.

## **VI. FAIR HOUSING TRAINING**

21. Within sixty (60) days of the entry of this Decree, the City shall provide in-person training on the requirements of this Decree and of the FHA to all City officials or employees who have duties related to the planning, zoning, permitting, construction, or occupancy of residential housing, including, but not limited to, the Mayor and all members of the Common Council and all staff members or employees of the Plan Commission and Department of Community Development. The training shall be conducted by a qualified, independent third-party person or organization that has been

approved by the United States in advance. The City shall bear all costs associated with this training.

22. The City shall provide a copy of the attendance log evidencing that those persons required to receive such training hereunder have done so. Such log shall be provided with the City's reports. Within thirty (30) days of the date a City official or employee is newly hired for a position or undertakes new duties that would require him or her to attend fair housing training under the terms of this Decree, the City shall distribute to each such person a copy of this Decree and copies of all written materials from the most recent fair housing training session.

## **VII. COMPLIANCE AND RECORD-KEEPING**

23. Within thirty (30) days of the entry of this Decree, the City shall designate a City employee or official as its Fair Housing Compliance Officer ("FHCO"). In addition to any responsibilities set forth above, the FHCO shall be the City official designated to receive complaints of alleged housing discrimination against the City, and participate in fair housing meetings and training. The FHCO shall maintain copies of the Decree, the Fair Housing Policy, the HUD Complaint Form and the HUD pamphlet entitled "Are you a victim of housing discrimination?" (HUD official form 903 and 903.1, respectively) and make these materials freely available to anyone, upon request, including all persons making a fair housing complaint.
24. During the term of the Decree, the FHCO shall provide an initial report within three months of the approval of this Decree and annually thereafter of his or her activities taken in compliance with the Decree. The City shall, in its first Compliance Report as set forth

in paragraph 28, below, notify the United States of the name, address, and title of the FHCO.

25. For the duration of the Decree, the City shall notify counsel for the United States in writing within thirty (30) days of receipt by the Fair Housing Compliance Officer of any complaint, whether written, oral, or in any other form, against the City of New Berlin, or against any of its employees or agents, regarding discrimination based on race or color in housing. If complaints are made verbally, the City shall make a contemporaneous written record of those complaints. The City shall inform counsel for the United States of any efforts the City undertook or plans to undertake to resolve each complaint, and shall promptly inform the United States of the terms of the resolution of the complaint or the failure to resolve the complaint.
26. The City shall preserve all records, including, but not limited to, electronic records and files created in association with complying with this Decree. The City shall be responsible for maintaining and preserving, or supervising the maintenance and preservation of, these records.
27. The City will use all reasonable efforts to notify individual Alderpersons and Plan Commissioners of their obligation to maintain and preserve records related to this case and compliance with the Decree. Under Wisc. Stat. 19.33(1), individual Alderpersons and Plan Commissioners have personal responsibility for the maintenance of records regarding their official duties. The City does not have access to, or control of, the personal e-mail accounts or personal computers of Alderpersons and Plan Commissioners. The City's responsibility to ensure that individual Alderpersons and

Commissioners comply with their record-retention obligations is therefore limited accordingly.

### **VIII. REPORTING**

28. The City shall be responsible for the preparation of annual reports, beginning six months after the entry of this Decree, to be submitted to counsel for the United States identifying all actions taken by the City to comply with the terms of this Decree. These reports will include, at a minimum:
- a. The status of the City's compliance with paragraph 8 above concerning construction and completion of the Workforce Housing Development and Senior Housing Development, including permits, approvals, licenses and inspections that remain to be issued or conducted. The City has issued zoning and building permits for the Workforce Housing Development, and therefore, the City need not include these two items in its report;
  - b. A copy of the Fair Housing Policy distributed by the City of New Berlin pursuant to paragraph 9 and a print-out from the City's website showing a link to this Policy;
  - c. Representative copies of the advertising, notices, and print-out of the website showing the "Equal Housing Opportunity" logo referenced in paragraph 10;
  - d. An update on the activities of the Housing Trust Fund, including the identity of persons selected to serve on Housing Trust Fund Board, or any subcommittee thereof; efforts at fund-raising; and any projects that have applied for, or received funding from, the Trust Fund;



- e. The Fair Housing Outreach Plan, and any updates thereto, referenced in paragraphs 19-20;
  - f. The training log referenced in paragraphs 21-22;
  - g. The name and contact information for the FHCO as set forth in paragraph 23, and any reports prepared by the FHCO for the City, as required by paragraph 24; and
  - h. Any complaints of housing discrimination based on race or color made to the City, as described in paragraph 25.
29. Upon reasonable notice to counsel for the City, the United States shall be permitted to inspect and copy any records associated with compliance with this Decree or, upon request by the United States, the City shall provide copies of such documents.

#### **IX. CIVIL PENALTY**

30. Within thirty (30) days after the entry of this Decree, the City shall pay a total of \$5,000 to the United States as a civil penalty, pursuant to 42 U.S.C. 3614(d)(1)(C). This payment shall be delivered to counsel for the United States, by overnight mail, in the form of a cashier's check payable to the "United States Treasury."

#### **X. SCOPE AND DURATION OF DECREE**

31. The provisions of the Consent Decree shall apply to the City, its officers, agents, employees, consultants, and all persons acting in active concert or participation with them.
32. The Consent Decree shall remain in effect for four (4) years after the date of its entry. The United States and the City agree that in the event City engages in any future violation of the Fair Housing Act, such violation shall constitute a "subsequent violation" pursuant

to 42 U.S.C. 3614(d)(1) (C)(ii). This provision applies to any future violation, whether resolved voluntarily or through judicial proceedings.

33. The Court shall retain jurisdiction of this action for the duration of this Decree to interpret and enforce its terms as necessary, after which time the case shall be dismissed with prejudice. The United States may move the Court to extend the duration of the Decree in the event of noncompliance, whether intentional or not, with any of its terms, or if it believes the interests of justice so require.

#### **XI. REMEDIES FOR NON-COMPLIANCE**

34. The United States and the City shall endeavor in good faith to resolve informally any differences regarding interpretation of and compliance with this Decree. After such good faith efforts, if either party contends that there has been a failure by the other to perform in a timely manner any act required by this Decree, or otherwise to act in conformance with any provision thereof, it may move this Court for relief and for any remedy authorized by law or equity.

#### **XII. TIME FOR PERFORMANCE**


35. Any time limits for performance imposed by this Decree may be extended by mutual written agreement of the parties. The other provisions of this Consent Decree may be modified by written agreement of the parties or by motion to the Court. If the modification is by written agreement of the parties, then such modification will be effective within (30) days of filing the written agreement with the Court, and shall remain in effect for the duration of the Consent Decree, or until such time as the Court indicates

through written order that it has not approved the written agreement to modify the Consent Decree.

### **XIII. COSTS OF LITIGATION**

36. The United States and the City will each bear its own costs and attorneys' fees associated with this litigation.
37. The parties acknowledge that HUD is engaged in an investigation in Waukesha County arising from a Complaint brought by the Metropolitan Milwaukee Fair Housing Council. That Complaint involved the County's management and disbursement of C.D.B.G. funds. As part of that investigation, HUD has sought records from sub-recipients of block grant funding, including the City of New Berlin. The United States acknowledges that the existence of this pending investigation shall not in and of itself be considered a breach of the terms of this Consent Decree in general or the injunction established hereunder in particular.

Dated: April 19th, 2012

  
HONORABLE RUDOLPH T. RANDA  
UNITED STATES DISTRICT JUDGE

The undersigned hereby consent to and apply for entry of this Decree:

**For the United States**

/s/ James L. Santelle  
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/s/ Thomas E. Perez  
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