# Hurricanes, Oil Spills, and Discrimination, Oh My: The Story of the Mississippi Cottage

by Jennifer Evans-Cowley and Andrew Canter

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*Editors' Summary*

Immediately following Hurricane Katrina, the Mississippi Governor's Commission for Recovery, Rebuilding, and Renewal collaborated with the Congress for the New Urbanism to generate rebuilding proposals for the Mississippi Gulf Coast. One of the ideas to emerge from this partnership was the Katrina Cottage—a small home that could improve upon the FEMA trailer. The state of Mississippi participated in the resulting Alternative Housing Pilot Program, which was funded by the U.S. Congress. Over five years after Katrina, what are the regulatory barriers local governments have put in place to limit the siting of Mississippi Cottages? Are the strategies that local governments are using a violation of state and federal laws, including the Fair Housing Act? While the Mississippi Cottage program provided citizens with needed housing following Hurricane Katrina, there are significant policy and implementation challenges to providing post-disaster housing.

The Mississippi Gulf Coast has been hit hard over the last five years. Hurricane Katrina brought a massive storm surge that wiped away or severely damaged thousands of homes, and it has taken five years for many families to begin a serious recovery. Residents have faced substantial challenges in rebuilding their lives, especially in finding safe, permanent, and affordable housing.

The immediate response to housing provision was through the Federal Emergency Management Agency (FEMA), which has authority to provide temporary housing for up to 18 months.[1] This Article addresses several of the problems government housing providers and advocates encountered in the transition from FEMA's temporary response into a permanent affordable housing solution after Katrina.

The public generally supports the concept of affordable housing, but when it comes to siting, there is often a collective resistance.[2] In the aftermath of the hurricane, local governments across the Gulf Coast engaged in exclusionary zoning practices, passing ordinances that limited the ability of people to find appropriate housing.[3]

These ordinances, supported by community resistance to affordable housing, have exacerbated the problem of scarce affordable housing over the last five years. While communities acknowledge the need for affordable housing, and in many cases mention it in their community plans,[4] there has been a failure on the part of local governments to enact ordinances that support the siting of affordable housing. One of the most significant affordable housing challenges has related to the Mississippi Cottage program, which at its peak provided free housing to nearly 3,000 families.

This Article will show how, following Hurricane Katrina, local governments enacted discriminatory housing policies that made it difficult for residents to site permanent Mississippi Cottages. In part, discriminatory policies may have been put in place as knee-jerk reactions to what was seen as a temporary housing problem. Local governments may have felt that there would be a brief period after the disaster during which people would have a need for a housing solu-

1. This 18-month deadline can be extended at FEMA's discretion if, "due to extraordinary circumstances an extension would be in the public interest." 44 C.F.R. §206.110(e) (2006). This deadline was extended numerous times after Hurricane Katrina.
2. *See* Stacy E. Seicshnaydre, *The More Things Change, the More They Stay the Same: In Search of a Just Public Housing Policy Post-Katrina*, 81 Tul. L. Rev. 1263-76 (2007).
3. *See* Jennifer S. Evans-Cowley & Joseph Kitchen, *Planning for a Temporary-to-Permanent Housing Solution in Post-Katrina Mississippi: The Story of the Mississippi Cottage*, Int'l J. Mass Emergencies & Hazards (forthcoming 2011); *see, e.g.*, St. Bernard Parish, La., Ordinance No. 670-09-06 (Sept. 19, 2006) (prohibiting rental of single-family residences in St. Bernard Parish to non-family members).
4. *See* Jennifer S. Evans-Cowley & Meghan Z. Gough, *Evaluating New Urbanist Plans in Post-Katrina Mississippi*, 14 J. Urb. Design 37-41 (2009).

tion while they rebuilt their homes, and that this problem would be resolved quickly as rebuilding occurred.

Research, though, has found that it can take 100 times the emergency period and 10 times the restoration period to achieve complete reconstruction.[5] The temporary housing that FEMA provides is simply inadequate to meet the recovery needs of many residents[6]—a dramatic improvement in a city can take two to three times longer than FEMA's 18-month default housing period. Studies have also revealed that post-disaster policies can work to eliminate "less desirable" uses from a city, such as affordable housing, which can result in greater segregation based on social class.[7]

This type of recovery is unacceptable. Five years after Hurricane Katrina, local governments are still working to enact discriminatory ordinances that leave the most socially and economically vulnerable residents without a permanent housing solution.

This is all in the face of the Gulf Coast's latest disaster, the oil spill from the BP Deepwater Horizon well, which lies directly south of Pascagoula, Mississippi. The oil spill has had an immediate impact on the oil services, seafood, and tourism industries. Many residents of Mississippi Cottages have been affected by the oil spill, are facing significant economic challenges, and are struggling to stay in their homes.[8] Where will the most vulnerable residents of the Gulf Coast—estimated at over 4,000 residents by advocates, as of Katrina's fifth anniversary[9]—live if they are not able to keep their Mississippi Cottages?

This Article explores the history of the Mississippi Cottage, with a focus on local government efforts to stop, and then tightly restrict, the temporary and permanent placement of Cottages in their jurisdictions. It critically explores the arguments and beliefs implicit in anti-Cottage officials' and some local residents' negative reactions to Cottages. The Article presents a case study of the city of Gulfport's efforts to stop permanent Cottage placements and segregate Cottages to lower income areas, a goal that was successfully enacted by the City Council in June 2010. Gulfport's efforts are important, because Gulfport is the largest city on the Mississippi Coast and the second-largest in the state, and is therefore looked to for guidance by other Gulf Coast municipalities and municipal lawyers evaluating their own anti-Cottage ordinance options. This Article concludes with a discussion of the legal arguments why Cottage discrimination is very likely contrary to state and federal laws. Although Cottage discrimination appears to be unlawful (in addition to economically divisive), it has been allowed to continue to the present day.

## I. History of the Mississippi Cottage

Following Hurricane Katrina, FEMA deployed travel trailers and manufactured homes to displaced families. This type of temporary housing had proved sufficient in prior, shorter disasters, but the scale of Hurricane Katrina revealed that this housing response was inadequate in addressing the needs of disaster victims.[10]

There was simply an overwhelming demand for temporary housing in Mississippi. More than 50,000 housing units sustained major or severe damage in the three coastal counties of Mississippi.[11] FEMA was unable to respond immediately to the enormous demand, resulting in difficult temporary housing conditions for residents who lived in shelters, tents, hotels, motels, and cruise ships, or doubled up with family or friends. Three months after the storm, FEMA began to distribute travel trailers and manufactured homes. At its peak, FEMA provided more than 49,000 trailers and manufactured homes in Mississippi alone.[12]

In addition to the problem of overwhelming demand, affected households, advocates, and the public became increasingly concerned about the negative public health consequences of living in FEMA-provided temporary housing. From early 2006—almost immediately after the FEMA trailers' deployment—residents started to report health problems, such as frequent nosebleeds, respiratory problems, and mysterious mouth and nasal tumors.[13] At that time, FEMA declined to systematically investigate these claims.[14] Later government studies found that the construction materials used in FEMA trailers emitted high

5. *See* J. Eugene Haas et al., Reconstruction Following Disaster (1977).
6. Seicshnaydre, *supra* note 2.
7. *Id.*
8. Shelia Byrd, *Oil Spill Adds to Housing Woes for Katrina Victims*, Sun Herald (Gulfport-Biloxi), Aug. 22, 2010, *available at* http://www.sunherald.com/2010/08/22/2421479_p2/oil-spill-adds-to-housing-woes.html.
9. Rick Jervis, *Gulf Oil Spill Adds Facet to Katrina Recovery*, USA Today, Aug. 16, 2010, *available at* http://www.usatoday.com/news/nation/2010-08-16-katrina16_ST_N.htm.
10. *See* David Garratt, Deputy Assistant Administrator, Disaster Assistance Directorate for the Federal Emergency Management Agency (FEMA), Address at the National Building Museum, The Alternative Housing Pilot Program: Building a Framework for Future Disaster Recovery (June 19, 2008), *available at* http://www.nbm.org/assets/pdfs/microsoft-word-community_in_the_aftermath_5-19-08.pdf.
11. The Compass Group, LLC & Southern Mississippi Planning and Development District, *Mississippi Housing Recovery Data Project, June 2010 Update*, at 2 n.1 (Aug. 25, 2010) (adopting the FEMA and HUD damage estimates of April 7, 2006); *see* Michael Womack, The Alternative Housing Pilot Program: The Mississippi Cottage Program (Apr. 19, 2009), *available at* http://www.nbm.org/media/video/the-mississippi-Cottage.html.
12. Press Release, FEMA, FEMA and MEMA Search for Rental Properties (Nov. 1, 2006), *available at* http://www.fema.gov/news/newsrelease.fema?id=31199.
13. Spencer S. Hsu, *FEMA Knew of Toxic Gas in Trailers*, Wash. Post, July 20, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/07/19/AR2007071901039.html.
14. *Id.*

levels of formaldehyde, which remained in the unit because the poorly designed trailers had insufficient ventilation.[15]

Formaldehyde can cause symptoms beginning with "irritation of the throat, nose, eyes, skin, and upper respiratory tract," which "can exacerbate symptoms of asthma and other respiratory illnesses."[16] The International Agency for Research on Cancer has concluded that "formaldehyde exposure causes nasopharyngeal cancer," while the National Institutes of Health "classifies formaldehyde as 'reasonably anticipated to be a carcinogen in humans.'"[17] These symptoms led to widespread public health fears and outraged some members of the U.S. Congress.[18]

In response to these problems, in 2006, Congress authorized the Alternative Housing Pilot Program, providing $400 million for FEMA to work with states to develop housing that would serve the immediate needs of disaster victims *and* offer new forms of housing to respond to future disasters.[19]

FEMA invited states to submit proposals for Alternative Housing Pilot Program funding. Mississippi was able to respond immediately, because it was already engaged in designing alternative temporary housing. The Congress for the New Urbanism, in partnership with the governor of Mississippi's Commission for Recovery, Renewal, and Rebuilding, had hosted the Mississippi Renewal Forum in October 2005.[20] During the week-long design charrette,[21] they formed an idea for an alternative to the FEMA trailer. The key concept was a temporary-to-permanent alternative housing model, and a shotgun-style house typical of historic housing in the South emerged as a potentially viable alternative.[22]

The concept was simple. The house would be available during the post-disaster period as temporary housing, when every unit would be quickly delivered and placed on blocks in a temporary setting. Then, over time, the house could be converted to permanent use by placement on a foundation, allowing it to be added onto or become a guest Cottage once the original home was rebuilt. The addition of a permanent foundation could also facilitate a legal transformation from the Cottage as personal property (owned by the state and rented to disaster survivors for free) to real property (owned by the survivor with no mortgage and therefore 100% equity). This idea of a temporary-to-permanent housing solution gained a significant amount of press, and architects began to work on market-ready products. For example, Lowe's Home Improvement stores now sell building plans for the Katrina Cottage in a number of different models.[23]

An architecture student at Mississippi State University consulted with the state to take the idea from concept to plan.[24] The goal was to create a unit that felt like a home for approximately $50,000.[25] This resulted in two housing models, a 400-square-foot, one-bedroom model and a 728- or 840-square-foot, two- or three-bedroom model (see Figure 1).[26] Both models were designed to withstand 150-mile-per-hour winds, while including all the standard features of a typical home.[27] Importantly, the units would be dual-certified as manufactured homes (a lower construction standard) *and* modular homes (a higher construction standard).[28] The modular certification in particular would enable Cottages to be transitioned into permanency, since local zoning laws generally allow modular homes in residential areas on terms equal to stick-built, site-built homes.[29] For example, Harrison County, Mississippi, allows modular homes by right in agricultural, estate residential, residential 2, and residential 3 districts. It additionally allows modular homes in the residential 1 district when the home is similar in appearance to other homes in the neighborhood.[30]

15. Maureen Groppe, *CDC Finds Source of FEMA Trailer Health Problems*, USA Today, July 3, 2008, *available at* http://www.usatoday.com/news/health/2008-07-03-toxic-trailers_N.htm.
16. Centers for Disease Control and Prevention, Final Report on Formaldehyde Levels in FEMA-Supplied Travel Trailers, Park Models, and Mobile Homes 4, July 2, 2008, *available at* http://www.cdc.gov/nceh/ehhe/trailerstudy/assessment.htm#final.
17. *Id.*
18. Hsu, *supra* note 13 ("FEMA's primary concerns were legal liability and public relations, not human health and safety," said Rep. Thomas M. Davis III (R-Va.). . . . "I haven't seen this level of government incompetence outside of the nation of China. . . . And they executed an official in China for not having done their job," said Rep. Jim Cooper (D-Tenn.)).
19. Garratt, *supra* note 10, at 3; *see* Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Hurricane Recovery, Pub. L. No. 109-234, 120 Stat. 418 (2006).
20. Mississippi Renewal Forum, Press Release, Mississippi Governor Enlists Congress for the New Urbanism in Historic Coastal Planning Effort, *available at* http://www.mississippirenewal.com/info/day00.html.
21. A charrette is an event bringing together architects, planners, and public officials to collaborate and create a rebuilding or development plan.
22. Personal Communication with Michael Womack, Director, and Jeff Rent, Associate Director, MEMA (Mar. 18, 2008).
23. Lowe's, The Lowe's Katrina Cottage Series, http://www.lowes.com/cd_The+Katrina+Cottage_634317861_.
24. *See supra* note 22.
25. *See* FEMA Fact Sheet Awards: Selected Grant Awards for Alternative Housing Pilot Program, *available at* http://www.fema.gov/media/fact_sheets/ahpp_awards.shtm.
26. *See* Mississippi Alternative Housing, http://www.mscottage.org/park/ and http://www.mscottage.org/cottage/.
27. *Id.* at Cottage Plans, http://www.mscottage.org/plans/ (containing 10 different sets of building plans for Mississippi Cottages that show the units' 150-mph wind certification).
28. *Id.* (showing "Mississippi modular approval" designation and compliance with the 2003 International Residential Code, among other national and international building standards); Letter from Ricky Davis, Chief Deputy State Fire Marshal, State Fire Marshal's Office, to Rosemary Heard (Dec. 31, 2009) (on file with authors) (describing how the State Fire Marshal's Office outfitted each Cottage with a Mississippi Modular Data Plate certifying that it is a modular home suitable for permanent placement) [hereinafter Davis Letter].
29. *See* sources *infra* note 45; *see, e.g.*, New York State, Dep't of State, Div. of Local Gov't Services, *Municipal Regulation of Mobile Homes*, (Jan. 2008), at 4:

> Modular homes, which generally are constructed to New York State Building Code standards, do not carry a HUD seal and are the pinnacle of what can be achieved in manufactured housing production. . . . Because of this close similarity to conventional homes, many municipalities exclude modular homes from their mobile home definition.

30. Harrison County Zoning Ordinance at 44, *available at* http://www.co.harrison.ms.us/downloads/departmental%20downloads/zoning/ordinances/Harrison%20County%20Zoning%20Ordinance%2001-04-2008.pdf.

**Figure 1. This Mississippi Cottage has been elevated to meet flood elevation requirements.**

Note: This image illustrates an elevated Cottage permanently placed in Biloxi, Mississippi. Cottages can also be located at ground level. When elevated, a ramp can be installed to make the Cottage accessible. MEMA provided ramps when it placed the units temporarily, and for permanent installations at low elevations would provide ramps at no charge. For Cottages elevated beyond five foot seven inches (such as the one shown in this Figure), though, the burden of construction and any ramp is on the occupant/purchaser.

The Mississippi Emergency Management Agency (MEMA) submitted the Cottage concept for consideration by the Alternative Housing Pilot Program (MAHP), which planned to distribute the money competitively.[31] The Mississippi proposal scored well and received $281 million—the lion's share of the funding. This was not well-received by other states, and was later justified by a 2007 U.S. Government Accountability Office study.[32]

The state of Mississippi quickly contracted for the units to be constructed and for the design of a distribution program.[33] FEMA identified approximately 14,000 households that were eligible for a Mississippi Cottage.[34] MEMA then ran a lottery and began contacting interested households for screenings to determine their housing needs, including a site assessment to determine if the soil would support the home and whether there would be room for both the Cottage and a permanent home.[35]

At the time, the state did not realize that one of the biggest barriers to siting would be local government resistance, which has been an ongoing challenge throughout the program. As a later evaluation put it, securing local approval even for the temporary portion of the program "turned out to be a more difficult and time-consuming process than MAHP staff initially expected."[36] This response was driven by forces that included "the enormity of the recovery effort, concerns (and misconceptions) about the Cottages themselves and perceptions of the circumstances of households that remained in FEMA units."[37]

After initial placement of the Cottages, some households were to be offered the opportunity to purchase and keep them permanently. In order to qualify, households would have to own the land or get a long-term lease from the owner and meet a variety of other FEMA and MEMA requirements. For example, FEMA's agreement with MEMA required that the units sold to occupants remained owner-occupied through March 2011.[38] The requirements for permanent placement, though, would also be subject to increased scrutiny by local governments.

## II. Local Government Regulation of Mississippi Cottages

### A. *Common Arguments Against Cottages: A Critical Analysis*

MEMA was creating a program to provide much-needed affordable housing to residents of the Mississippi Gulf Coast, but it had not anticipated the backlash from local governments. In 2007, a number of local governments along the Coast reacted negatively to the possibility of the Cottages entering their communities, even for temporary use only.[39]

Local officials' reasons for opposing the Cottages varied. A recurring theme was that the Cottages were "trailers." According to one city councilman in Bay St. Louis, "the Mississippi Cottage is a trailer—except that instead of coming in through the side, you come in through the front . . . We don't want the stigma of these homes in our community."[40]

The terms "trailer" and "trailer park" are indeed stigmatized,[41] and correspond to a specific social meaning beyond that of "manufactured homes." Among other things, trailers suggest residents with low and moderate incomes, with less education, who live in more rural[42]

31. *See* Mississippi Alternative Housing, *supra* note 26.
32. U.S. Gov't Accountability Office, GAO-07-1143R, Disaster Housing: Implementation of FEMA's Alternative Housing Pilot Program Provides Lessons for Improving Future Competitions (2007), *available at* http://www.gao.gov/products/GAO-07-1143R.
33. *See* Abt Associates, Inc. and Amy Jones & Associates, *Developing a More Viable Disaster Housing Unit: A Case Study of the Mississippi Alternative Housing Program*, prepared for FEMA and HUD, Feb. 2, 2009, at 30 ("In order to move quickly, the management contract initially was not competitively bid.") [hereinafter Abt Case Study].
34. Lowe's, *supra* note 23.
35. *Id.*
36. Abt Case Study, *supra* note 33, at 13-14, 30.
37. *Id.*; *see also* Anita Lee. *Cottages Home to Hundreds, but Many Are Still Waiting,* Sun Herald (Gulfport-Biloxi), Sept. 4, 2010, *available at* http://www.sunherald.com/2010/09/04/2452995/cottages-home-to-hundreds-but.html.
38. Final Approved Agreement Articles, Revised 01/09 (governing agreement between FEMA and MEMA); City of Gulfport, Mississippi 2010b, Transcript of Planning and Zoning Commission Hearing, May 27, 2010.
39. Evans-Cowley & Kitchen, *supra* note 3.
40. Jenny Jarvie, *Post-Katrina Cottages Get a Lukewarm Welcome*, L.A. Times, Dec. 16, 2007.
41. Katherine MacTavish et al., *Housing Vulnerability Among Rural Trailer-Park Households*, 13 Geo. J. Poverty L. & Pol'y 95, 106, 108-09 (2006).
42. *Id.* at 95:

> Manufactured housing has emerged as *the* housing for rural Americans of modest means at the dawn of the twenty-first century. . . . Between 1990 and 2000 the number of manufactured homes in nonmetro places grew by 25% to represent 16% of all owner-occupied rural housing stock. "[T]railer parks" . . . now characterize the

areas typically thought to contain lower property values.[43] Manufactured homes are also less well-constructed than other homes[44] and generally not permitted in residential areas of incorporated cities.[45] The use of the term "trailer" to describe what was in fact not a trailer suggests that some local officials thought the Cottages would allow undesirable residents and homes to remain next to "desirable" families in single-family home residential zoning areas.[46]

In addition to the trailer argument, anti-Cottage advocates repeatedly contended that Cottages would lower property values. "I rebuilt a $179,000 home and I've got Katrina Cottages near me," said one Waveland resident. "What does that do to my property values?"[47] This person and others like him feared that allowing Cottages would discourage the rebuilding of new, larger, stick-built homes.[48]

Although it was never fully articulated, the best-case reasoning behind this theory was that families still in FEMA trailers should be denied a Cottage so that their small, unsafe, and unhealthy FEMA trailers would serve as an incentive to rebuild more quickly. This reasoning assumed that these families had the capacity and resources to rebuild and that they would rebuild a conventional home (or other development) worth more than the value of a permanent Cottage. It also assumed that if a FEMA trailer family gave up and moved away, then another purchaser or developer would come in and utilize the lot to its full economic potential. The "lower property values" argument was not deployed with evidence or empirical support for its propositions.

Several of the assumptions of anti-Cottage residents were unfounded. Some Cottage residents who attempted to rebuild were stymied by contractor fraud, which was rampant and underprosecuted by state and local law enforcement.[49] Others could not afford to rebuild.[50] In some cities with countless vacant lots for sale, such as Waveland and Long Beach, the assumption of replacement development was also highly unlikely. At least over the short- to medium-term, one family leaving may have only resulted in another vacant and abandoned slab, not a new family coming in with money to rebuild. As one reporter put it, preserving property values is "an odd case to make in neighborhoods where rebuilding has barely begun and abandoned lots are going to jungle."[51] Finally, the empirical evidence appears to be on the other side of the argument. According to an independent study of the economic value of a Cottage in incorporated areas, in more cases than not, a Cottage turns out to be worth more than the pre-Katrina home it replaced.[52]

It is possible that part of the opposition to Cottages was rooted in ignorance of the unit itself. Even with advocacy from state officials, residents, and nonprofits, some local officials and "not-in-my-backyard" residents would not believe that the Cottages were dual-certified, truly had a modular home data plate from the State Fire Marshal's Office certifying its modular home status, or complied with existing city ordinances incorporating the 2003 International Residential Code (a standard that all of the Cottages satisfied).[53]

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rural landscape. . . . [M]anufactured housing clearly supplies the leading source of unsubsidized, low-cost housing for rural homeowners and renters with few other housing options . . . .

43. *Id.* at 97 ("Rental parks perpetuate the negative stereotype of trailer parks as transient places housing a substantial share of 'hard living,' poor, less well-educated people subject to job and housing instability."); David Ray Papke, *Keeping the Underclass in Its Place: Zoning, the Poor, and Residential Segregation*, 41 Urb. Law. 787, 796 (2009):

> In reality, though, excluding mobile homes from one's suburb relates less to the type of housing than to the type of people thought most likely to occupy that housing. Almost as soon as the mobile home market shifted in the 1950s to a less affluent and less educated population, mobile homes came to be seen by the middle and upper classes as decidedly déclassé. As early as the 1950s residents of mobile home parks came to be seen as "trailer trash," and mobile homes parks concomitantly struck some "as a new kind of slum." . . . When inner-circle Clinton adviser James Carville responded to the allegations by [Paula] Jones, he attempted to discredit Jones by playing on widespread bias against those who live in mobile homes. "Drag $100 bills through trailer parks," Carville said, "and there's no telling what you'll find." Everyone appreciated that the comment was an insult to Jones; some realized it was also offensive to everyone living in mobile home parks.

*See, e.g.*, Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 Law & Contemp. Probs. 37, 41 (2009) ("Everyone 'knows' in the United States, for example, that people who live in mobile homes are likely to be loud, uneducated, and tacky.").

44. Papke, *supra* note 43, at 796 ("Those hostile to mobile homes could also argue that mobile homes deteriorate rapidly and that they are especially vulnerable to tornadoes, hurricanes and other storms. Indeed, mobile homes depreciate in value over time more like cars and trucks than single-family homes.").

45. McQuillin's Law of Municipal Corporations, 8 McQuillin Mun. Corp. §25:156 (3d ed.) ("A mobile home is usually not regarded as a dwelling permissible in a residential zone, even though it is immobile and affixed to the land, because such a use is not in accord with the spirit of the zoning laws, nor in the public interest."); MacTavish et al., *supra* note 41, at 97 ("Urban zoning often excludes trailer parks . . . .").

46. *See generally* Jerry Frug, *The Geography of Community*, 48 Stan. L. Rev. 1047, 1083-84 (1996):

> Home ownership in a "nice" neighborhood . . . is often seen as the top rung in the long climb up the ladder of life. Such an achievement can easily be threatened if neighborhood standards decline, and this decline is likely to be produced, people feel, by neighborhood diversity—in particular, by the presence in the neighborhood either of renters or of homeowners who cannot afford houses like one's own (whatever the price). This lower class of people is associated with multiple character defects, such as instability, disinterest in property maintenance, and propensity toward crime. Thus having such people in the neighborhood threatens not only to lower neighborhood residents' social status but to make them feel uncomfortable in their own home. Race, of course, plays an important role in this portrayal of the kind of neighbor that produces these undesirable effects. But even if America had no racism, zoning would still serve one of its purposes: protecting people from their fear of otherness.

47. J.R. Welsh, *Group Rallies in Support of Cottages*, Sun-Herald (Gulfport-Biloxi), Jan. 27, 2009.

48. Leslie Eaton, *Agency Is Under Pressure to Develop Disaster Housing*, N.Y. Times, Apr. 13, 2008 ("But local governments in Mississippi have resisted the Cottages. They fear people who get Cottages will simply live in them and not rebuild their houses, said Mike Womack, executive director of the Mississippi Emergency Management Agency.").

49. Rick Jervis, *Katrina Cottage Occupants Face New Displacement*, USA Today, Dec. 31, 2008 (example of Mimi Sherrouse).

50. Mary G. Seiley, *Bay Residents Beg Council to Relax Rules on MS Cottages*, Sea Coast Echo, Oct. 13, 2007.

51. Christopher Swope, *Road to Katrinaville*, Governing Mag., Apr. 1, 2009.

52. Elizabeth Newlon, *Assessing the Property Value Impact of Mississippi Cottages* (forthcoming).

53. *See* Davis Letter, *supra* note 28; Abt Case Study, *supra* note 33, at 30.

There were also powerful emotions at work. As post-storm planning commissions and processes so vividly described, Hurricane Katrina allowed everyone to dramatically rethink Gulf Coast communities, starting over from scratch to create a vision of a better Coast.[54] Local officials were given a greater platform and influence with which to impose their vision of the recovered community. For some of these officials, Katrina was perhaps a golden opportunity to remove low- and moderate-income families from city limits, pushing them into trailer parks and unincorporated areas.[55]

As one advocate in New Orleans put it:

> [T]hey've had an agenda for St. Bernard a long time, but as long as people lived here, they couldn't do it. So they used the disaster as a way of cleansing the neighborhood when the neighborhood is weakest. . . . This is a great location for bigger houses and condos. The only problem is you got all these poor black people sitting on it![56]

One example of this "disaster capitalism" in post-Katrina Mississippi occurred in Biloxi. After the storm, the mayor and civic establishment of Biloxi commissioned, funded, and supported[57] a rebuilding proposal[58] calling for expanded casino and tourism development in the city, including additional casinos and a new "central park" in low-lying areas.[59] According to a city summary of the proposal, "[t]he planning framework anticipates East Biloxi building on its pre-Katrina direction, ultimately becoming a tourist, entertainment, and gaming destination of national stature."[60] Gaming is one of the Mississippi Coast's most prominent and powerful industries.[61]

The Vietnamese community, however, found a suspicious overlap between land the city and developers wanted for the casinos and central park, and land that was disproportionately owned by Vietnamese families, who are not well-represented in the Biloxi political and business establishment. According to a Vietnamese advocacy group, roughly 70% of East Biloxi's Vietnamese live in areas that the [proposal] designates for parks and casinos, and a spokesperson "worrie[d] that the Vietnamese are invisible to East Biloxi planners."[62] The only African American on the City Council said the casino proposal was "all about the money,"[63] and announced what amounted to an anti-"disaster capitalism" plan: "seeding" the area with homes "so that it breaks up the idea that you can come in and buy any one big tract of land for cheap."[64] As of summer 2010, a number of casinos had moved onshore and rebuilt in Biloxi; however, the broader plan for additional casinos and the central park had not come to fruition.

The broader point of this example is that communities inevitably reenvision themselves after a disaster, but not necessarily with the buy-in or inclusion of their lower income and minority communities. It is likely that populations who may not have been incorporated into the decisionmaking process before a disaster would be at serious risk of an identical problem after a disaster, when processes have broken down and people are recovering from disaster-caused trauma.

Thus, the Cottages collided with local officials and NIMBY residents' visions of their new cities. To Cottage residents and housing advocates, anti-Cottage neighbors and civic leaders wanted communities that would be more exclusive than they were before the storm, populated only by desirable homes and desirable people who could afford to rebuild expensive site-built homes.

On-the-ground advocates encountered a wide variety of specious reasoning and judgments from local officials about homes that they themselves would never need to live in. Said one official: "The Cottage doesn't solve the housing problem . . . they might be more comfortable than a trailer, but . . . they're not as comfortable as a real home."[65] Obviously, many Cottage residents disagreed. The bigger question, however, is why local officials would ever have the authority to determine that a Cottage was not a "real home" when the Cottage was built to existing ordinances and construction standards that define permanent housing.

Anti-Cottage positions may have also reflected the speaker's perception of persons receiving government assistance: "People say we've got obligations for affordable housing, but this is a community that has to get moving . . . What's happening is that people who have not paid rent or utilities for 2 1/2 years just want to keep on hav-

54. Evans-Cowley & Gough, *supra* note 4.
55. In Bay St. Louis, "the City Council has been trying to prevent the Cottages from taking root in what had been its most valuable neighborhoods." Jarvie, *supra* note 40. The city attempted to keep Cottages only in mobile home parks. *Id.* The urge to restrict Cottages to poorer areas only was also found in Gulfport's January 2009 and June 2010 ordinances, discussed below, as well as Waveland's 2008 attempt to keep Cottages in mobile home parks only. *See* Meaghan Chapman, *Homeless for the Holidays*, Sea Coast Echo, Dec. 5, 2008.
56. Naomi Klein, The Shock Doctrine 524 (2007).
57. American RadioWorks, *Rebuilding Biloxi One Year After Katrina*, *available at* http://americanradioworks.publicradio.org/features/biloxi/m6a.html ("Biloxi's mayor hired Living Cities to develop a recovery plan for East Biloxi."); City of Biloxi, Living Cities, Knight Foundation offer plan for East Biloxi, *available at* http://biloxi.ms.us/pdf/sotcpages1213.pdf (report "commissioned" by Mayor A.J. Holloway); Remarks of Mayor A.J. Holloway to luncheon gathering organized by Living Cities, Mar. 14, 2007, *available at* http://www.biloxi.ms.us/mayor/speeches/speechdetail.asp?log=70 ("Many of you in this room and others unable to be here helped provide funding for Living Cities to undertake this project.").
58. The proposal was developed by Living Cities, "an innovative philanthropic collaborative of 22 of the world's largest foundations and financial institutions." Living Cities, About Us, http://www.livingcities.org/about/.
59. American RadioWorks, *supra* note 57, at 2.
60. City of Biloxi, *supra* note 57.
61. *See generally* Tim Shorrock, *Gambling With Biloxi*, The Progressive, Aug. 2007, *available at* http://www.progressive.org/mag_shorrock0807:
> Less than eight weeks after Katrina, [the Mississippi Legislature] passed a new law that allowed casinos to be built on land as long as they were within 800 feet of the coast. The gambling industry had long sought this legislation. Instantly, every piece of land within a mile of Mississippi's coast became a hot commodity. Developers and promoters . . . promised new investments of $20 billion to $30 billion in the area compared to the $3 billion to $6 billion planned before Katrina.

62. American RadioWorks, *supra* note 57, at 2.
63. Shorrock, *supra* note 61.
64. American RadioWorks, *supra* note 57, at 2.
65. Jarvie, *supra* note 40.

ing a free ride."[66] Such opinions were especially ironic for local government officials to vocalize, since the basic needs of their city governments—rent for offices, road repaving funds, fire station construction monies, and a propping up of the reduced tax base—have been on the equivalent of federal life support ever since Hurricane Katrina struck. Many officials were willing to accept federal funds for their personal rebuilding and for the long-term operation of their local governments, but would not extend the same lifeline to individuals in the greatest need.

### *B. The Anti-Cottage Ordinances*

MEMA was ultimately able to convince every local government on the Coast to accept Cottages on a temporary basis. In exchange, MEMA promised to remove the units at the end of March 2009.[67] The cities also imposed a variety of conditions upon the residents, such as the following:

- The city of Moss Point permitted units only on private residential lots (no group sites or commercial lots) and initially restricted occupancy to one year.
- The city of Pascagoula gave blanket approval to place Park Model units (1 bedroom) wherever a travel trailer existed, but individual approval was required for placement of the larger Cottages. The agreement also defined MEMA's responsibility for the cost of installation maintenance, demobilization, and reasonable site restoration.
- Several jurisdictions (Gulfport, Bay St. Louis, Pascagoula, and Gautier) required applicants to provide specific evidence that they were rebuilding a permanent unit in order to obtain a permit for placement of the Cottages.
- Harrison County and Pass Christian authorized the placement of Cottages only where local zoning allowed modular and manufactured homes, and required applicants to follow the normal process for obtaining a zoning variance if they wished to place a unit elsewhere in the jurisdiction. Pass Christian's agreement further specified that "no person will be allowed to purchase the units from the state of Mississippi" at the end of their occupancy and reminded the State that "time is of the essence" in the removal of units.[68]
- Waveland forced prospective Cottage residents to sign a waiver certifying that they would not, and could not, seek permanency in the Cottage. In 2009, Cottage residents sued Waveland over the city's restrictions, and the waiver became a minor issue in the litigation.[69]

The federally funded evaluation of the early Cottage program, again in its typical understatement, concluded that this "process proved to be time-consuming, confusing and sometimes frustrating for all concerned."[70] Ultimately, however, every jurisdiction on the Coast allowed some form of *temporary* Cottage use.

The biggest concerns revolved around the potential for permanent siting. Based on policies set in early 2008, only nine of the 15 jurisdictions on the Mississippi Gulf Coast considered permanent siting of Cottages, and there were again specific restrictions.[71] For example, most restricted the siting to replacement of a previously manufactured home or in agricultural areas.[72] The local governments seemed largely resistant to the idea of these homes becoming permanent in traditional residential communities.

Resistance started to wane in fall 2008 through a confluence of factors. The state of Mississippi was falling short of the housing unit production numbers it had pledged to congressional officials and federal agencies, especially for production of affordable units.[73] The state also knew that those federal officials were scrutinizing Mississippi's decision to divert nearly $600 million to enhance its port at Gulfport by using federal funds intended for low- and moderate-income housing.[74] The state had to have been aware that letting these valuable Cottages go unused would be a major embarrassment in both Jackson and Washington that could potentially threaten Mississippi's plans for the port and other projects.[75]

Also in 2008, the governor acceded to local governmental leaders and appointed a high-level "Gulf Coast Hous-

66. *Id.*
67. To MEMA and housing advocates, the agreement to limit Cottages to March 2009 was a foot in the door that could possibly be used to expand to permanent placement later. Such an early deadline was also impossible to achieve logistically. To local officials, it was a sacrifice to local demand, state pressure, and, later, a major source of hurt feelings, since MEMA in fact eventually did seek permanent placement for the Cottages.
68. Abt Case Study, *supra* note 33, at 36.
69. *See* Defendants' Answer and Motions to Dismiss, filed Jan. 29, 2009, Gambrell et al. v. City of Waveland et al., Cause No. C2301-09-45(1), Chancery Court of Hancock County. The waiver is on file with the authors.
70. Abt Case Study, *supra* note 33, at 36.
71. Evans-Cowley & Kitchen, *supra* note 3.
72. *Id.*
73. *See, e.g.*, STEPS Coalition, *Mississippi CDBG Recovery Fund: Report Card and Recommendations*, at 6-7 (Jan. 2008), http://www.stepscoalition.org/downloads/news/reports/2008ReportCard.1.pdf; STEPS Coalition, *Is Mississippi Building Back Better Than Before?*, at 9, 11-12 (Aug. 29, 2008), http://www.mscenterforjustice.org/glomer/upload_repo/docs/Steps3rdAnnivReport.pdf.
74. *See* Mike Stuckey, *Feds OK Mississippi's Katrina Grant Diversion*, MSNBC, Jan. 25, 2008, http://www.msnbc.msn.com/id/22805282/ns/us_news-life/; Press Release, U.S. Congresswoman Maxine Waters, Congresswoman Waters Applauds Settlement for Mississippi Gulf Homeowners, Renters Impacted by Hurricane Katrina, Nov. 15, 2010:

> Like many housing advocates I was shocked that the State of Mississippi not only failed to address the housing needs of low-income homeowners and renters after Hurricane Katrina, but also proposed to use unspent housing dollars on the expansion of the Port of Gulfport. I held a hearing on this issue, wrote to HUD and Governor Barbour in opposition, and implored our appropriators to withhold funding for the Port until the State met the housing needs of low-income homeowners and renters.

[hereinafter Waters Press Release].
75. *See* Waters Press Release, *supra* note 74. The media was also useful to Cottage advocates. In 2009, the *Washington Post* ran a front-page story highlighting Mississippi's inability to replace FEMA trailers with the higher-quality Cottages, publishing a picture of hundreds of Cottages sitting vacant in a field only several miles from people living in FEMA trailers. *See* Spencer S. Hsu, *Permanence Eludes Some Katrina Victims*, Wash. Post, June 13, 2009.

ing Director," who was locally known and respected, to address local concerns about the recovery.[76] The governor's selection, former Biloxi Mayor Gerald Blessey, immediately took up the cause of permanent Cottage placement. He visited with officials from every jurisdiction on the Coast, attended planning and City Council meetings, and generally used his public influence to advocate for Cottage permanency.[77] "If they can stay there and live in this Cottage, for many that's the most affordable solution and the main solution," Blessey said. "From a 'humanitarian standpoint,'" Blessey added, allowing the Cottages to stay past the deadline "'is the only practical solution' for residents who might otherwise be homeless."[78]

Mr. Blessey's lobbying was largely successful. By January, most jurisdictions appeared to be on track to allow some form of Cottage permanency with restrictions.[79] Several difficulties remained, however:

- The Gulfport City Council passed a special Cottage ordinance in January 2009.[80] This was a mixed blessing: It showed at least formal approval for *some* Cottages to remain permanently, but the number of restrictions Gulfport put on them meant that dozens if not hundreds were threatened. (At that time, Gulfport had approximately 160 Cottages.)[81] Gulfport's restrictions will be discussed further below.
- Also in January 2009, the city of D'Iberville passed a similar Cottage ordinance that placed over a dozen restrictions on Cottage residents.[82] The ordinance prohibited Cottage residents from keeping their units if they did not have a 2005 homestead exemption, meaning that *only* owner-occupiers from before Katrina could keep a Cottage in D'Iberville after the storm.[83] It also prohibited renting the Cottages, denied landowners' rights to bring Cottages into D'Iberville, dictated the kinds of foundations that could be used for Cottages, prohibited applications for variances from Cottage residents, and placed severe deadlines on the application and receipt of necessary building permits.[84] None of these requirements were applied to non-Cottage modular homes seeking to enter D'Iberville.[85]
- The city of Long Beach refused to pass any Cottage ordinance.[86] In a way, this lack of regulation *could* be interpreted as pro-Cottage—a resident could assume that existing zoning that allowed modular homes would also apply to the Cottages. In practice, though, Long Beach would simply deny permit applications for the permanent placement of Cottages on the grounds that they were mobile homes.[87] Six residents sought legal representation from the Mississippi Center for Justice, which appealed these denials and filed fair housing complaints with the federal government. In response, the city passed a new, independent barrier to discourage Cottage permanency. It imposed a minimum square-footage barrier of 850 square feet, just high enough that no Cottage could possibly qualify.[88] While the permit applications of the original six residents were in before the new barrier passed, and were therefore exempted from this burden, all other Cottage residents were affected. Later, several other Cottage residents went through the variance process, which took months and cost several hundred dollars each. Ultimately, at least three more residents were allowed to remain in their Cottages permanently through the expensive and time-consuming variance process.
- Both incorporated municipalities in Hancock County, Waveland, and Bay St. Louis, voted to restrict Cottages to mobile home parks. This led to a lawsuit in which eight Waveland Cottage residents—seven of whom owned their own land—challenged their city's Cottage prohibition.[89] The residents argued that the Cottages were modular homes, which were already allowed in residential areas of Waveland. They also argued that Waveland could not pass its own definition of modular home without coming into conflict with state law.[90] After public interest and pro bono lawyers sued Waveland

76. In part, Coast residents felt a disconnect between the reality of their needs and a decisionmaking process centered in the state capital, Jackson, nearly three hours away.
77. *See, e.g.*, Anita Lee, *A Case for Permanence*, Sun Herald (Gulfport-Biloxi), Nov. 15, 2008; Chapman, *supra* note 55; J.R. Welsh, *Blessey Faces MEMA Cottage Opponents*, Sun Herald (Gulfport-Biloxi), Nov. 18, 2008.
78. Lee, *supra* note 77.
79. *Compare* Evans-Cowley & Kitchen, *supra* note 3 (discussing how in early 2008, only nine of the 15 jurisdictions considered permanent siting of Cottages) *with* MEMA Jurisdictional Matrix, April 2009 (on file with authors) (a MEMA document showing a permanent placement option in all but one jurisdiction, Long Beach, which ultimately allowed some permanent Cottages after legal advocacy). There is also another, city-specific way to show this process: *compare* Toni Miles, *Permanent MEMA Cottages Still to Be Decided in Biloxi*, WLOX, July 23, 2008 ("The Biloxi City Council is going to take a closer look before voting on whether to allow MEMA cottages to be permanent fixtures in some parts of Biloxi. . . . Mary Rose Leahy . . . hopes she can make her MEMA cottage her permanent home.") *with* Anita Lee, *Cottages Home to Hundreds, but Many Are Still Waiting*, Sun Herald (Gulfport-Biloxi), Sept. 4, 2010 ("Five years and three days after Hurricane Katrina, Mary Rose Leahy is home. . . . 'To be on it and finally have this cottage as mine, I can do whatever I want. That's a great sense of relief.'").
80. *See* Ordinance, *infra* note 104.
81. *See* Letter, *infra* note 188.
82. *See* City of D'Iberville Ordinance No. 121.
83. *Id.*
84. *Id.*
85. *See* City of D'Iberville, Building Division, Minimum Residential & Commercial Permit Requirements, http://diberville.ms.us/building-division/permit-instructions/ (listing requirements).
86. MEMA Jurisdictional Matrix, *supra* note 79.
87. *See* various Letters from City of Long Beach Building/Code Official Earl Levens to Cottage Residents Seeking Building Permits, throughout Spring and Summer 2009 (on file with authors).
88. *See* City of Long Beach Ordinance No. 568; Loftus, G. 2010. Personal Communication, Long Beach Planning Commission member, May 22, 2010.
89. *See* documents filed in Cause No. C2301-09-45(1), *supra* note 69.
90. *See* discussion *infra* at Part IV.A.; *see also* Letter from John Rice, Attorney for MEMA, to Ronald J. Artigues Jr., Attorney for Hancock County Board of Supervisors, Jan. 7, 2009 (on file with authors) [hereinafter Rice Letter].

three times over the Cottages, the city settled in early June 2009.[91] A new ordinance allowed the plaintiffs to remain and removed some of the worst restrictions from Waveland's ordinance. However, the new ordinance was still a far cry from treatment equal to that given to other modular homes.[92]

- In March 2009, two months after the Waveland litigation commenced, the city of Bay St. Louis passed its own Cottage ordinance.[93] The city may have felt that it could minimize its risk of being a litigation target if it passed an ordinance more similar to those in Gulfport and D'Iberville, rather than Waveland's restrictions, which had thus far led to three lawsuits. While Bay St. Louis' Planning and Zoning Commission drafted one of the fairer Cottage ordinances, the City Council went back and reinserted more severe restrictions. The end result was an ordinance similar to those in D'Iberville and Gulfport.[94]

According to MEMA's "Jurisdictional Matrix,"[95] by April 2009, Long Beach was the lone holdout on Cottage permanency, and it later allowed a handful of Cottages as described above. After extensive lobbying and litigation efforts, every municipality theoretically allowed some pathway to permanent Cottage placement—all with substantial restrictions.

The desire for local control should not have been surprising; local governments have had the power to segregate land uses for over seven decades.[96] Zoning is exclusionary by nature, and improper use of local zoning power can amount to an illegal practice of excluding low-income and minority residents.[97] Exclusionary zoning practices can be observed across the nation and are often supported by communities that argue that they are protecting their property values.[98]

The U.S. Supreme Court has historically upheld broad rights of local governments to develop zoning ordinances that best serve their communities. Local decisions of City Councils and Boards of Aldermen are afforded deference on similar terms as legislative bodies. As the Supreme Court has stated, "[w]e do not sit to determine whether a particular housing project is or is not desirable. . . . In the present case, the [legislature] and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them."[99] This deference has permitted local governments to develop zoning regulations that ignore the needs of socially vulnerable populations. Exclusionary zoning contributes to the unequal development within a region and limits access to affordable housing.[100] The result can be segregated communities that are divided based on race and class.[101]

The restrictions on Mississippi Cottages varied, but in many cases, they were exclusionary in fact and in law. While each community took a different approach, one of the most outspoken communities has been the city of Gulfport. Gulfport is the second largest city in Mississippi, the largest city in the region, and has had one of the most clearly discriminatory Mississippi Cottage policies.[102] The city of Gulfport has been selected for a case study examining the evolution of their Cottage land use policy and the reactions and results of their land use decisions. This is of particular importance because of the current and ongoing nature of the Mississippi Cottage program.

As of August 30, 2010, a total of 2,741 Mississippi Cottages had been provided in either temporary or permanent form across lower Mississippi.[103] A total of 666 were permanently placed. However, at that time, there were 651 Cottages still occupied with approximately 300 awaiting permanent placement. Others have been transferred to nonprofit groups and auctioned and may seek permanent placement.

## III. The Story of Gulfport

While a number of communities implemented regulatory strategies to limit the siting of Mississippi Cottages, the city of Gulfport's defiance is more unusual than its neighbors, because it has been reaffirmed over time through multiple ordinances. Over the past five years, the city has adopted a series of exclusionary zoning ordinances related to the Mississippi Cottage. This section discusses these ordinances.

### A. *Mississippi Cottage Ordinance, 2009*

In January 2009, the city adopted an ordinance specifically regarding the permanent placement of Mississippi Cottages.[104] It considered MEMA Cottages to be nonconforming structures that must be owner-occupied and located on property owned by the resident of the Cottage. They were

91. *See* documents filed in Cause No. C2301-09-45(1), *supra* note 69.
92. *See* City of Waveland Ordinance No. 338 (June 2, 2009).
93. *See* City of Bay St. Louis Ordinance No. 517 (Mar. 3, 2009).
94. *Id.*
95. MEMA Jurisdictional Matrix, *supra* note 79.
96. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
97. *See* Joseph Schilling & Leslie Linton, *The Public Health Roots of Zoning*, 28 Am. J. Prev. Med. 96 (2005); Wendy Collins Perdue et al., *The Built Environment and Its Relationship to the Public's Health: The Legal Framework*, 93 Am. J. Pub. Health 1390 (2003); Julie Sze, Noxious New York (2006).
98. Sacoby Wilson et al., *How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health, and Environmental Justice*, Envtl. Just. 1(4): 211-16 (2008).
99. Berman v. Parker, 348 U.S. 26, 33 (1954).
100. *See, e.g.,* Southern Burlington County N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151, 182 (1975) ("Concededly, low and moderate income housing has been intentionally excluded.").
101. Laura Pulido, *Rethinking Environmental Racism: White Privilege and Urban Development in Southern California*, 90 Annals Assoc. Am. Geographers 12-40 (March 2000); Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, *in* Zoning and the American Dream: Promises Still to Keep 101-21 (Charles M. Haar & Jerold S. Kayden eds., 1999); Gerald E. Frug, City Making (1999); Juliana Maantay, *Zoning, Equity, and Public Health*, 91 Am. J. Pub. Health 1033 (2001); Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass (1993).
102. Along with clearly discriminatory ordinances in Bay St. Louis, Waveland, Long Beach, and D'Iberville. It cannot be said that anti-Cottage discrimination has been subtle.
103. *Mississippi Cottages by the Numbers*. Sun Herald (Gulfport-Biloxi), Sept. 4, 2010, *available at* http://www.sunherald.com/2010/09/04/2452993/mississippi-cottages-by-the-numbers.html.
104. City of Gulfport Ordinance No. 2617 (Jan. 15, 2009).

required to be for single-family use, could not be rented, and could not be added onto or modified. All of these are prohibitions and requirements not placed on other homes in Gulfport.

The most discriminatory element of the ordinance allowed neighbors within 160 feet of the proposed Cottage placement to veto the unit's permanent placement. According to the ordinance, a permanent Cottage:

> May not be located where pre-storm homes share or shared similar architectural standards or historical consistency except where all (i.e., 100% of) property owners within a 160' radius of the subject property have consented, in writing, to the placement. The request for consent will be forwarded to the neighboring property owners by the Department of Urban Development and the request for consent shall be advertised in a newspaper of general circulation in the City. Failure of a neighboring property owner to respond to the letter or advertisement within fifteen (15) days of posting or advertisement, respectively, whichever is later, shall be deemed to be written consent to the placement.[105]

As to the requirement of "architectural standards or historical consistency," the city's criteria for determining such neighborhoods were vague and never released. The Mississippi Center for Justice filed a public records request seeking clarification of this "standard," but the city did not produce any documents about it. This phrase may have been intended to arbitrarily keep Cottages out of higher priced areas, such as along Second Street and the beachfront; however, this could not be confirmed.

As to the veto provision, this clause is completely inconsistent with public input procedures for other types of zoning matters. Property owners seeking to place a normal modular home in Gulfport are not subject to any neighbor input, much less a veto. Also, the language of the veto itself is one-sided: property owners were not invited to submit their comments in favor of the siting; rather, they could respond only in opposition.

We conducted a public records review of all letters in opposition to the siting of a Mississippi Cottage. The city declined to release the records in contravention of the Mississippi Public Access to Public Records Act.[106] The Mississippi Center for Justice had to file a lawsuit to get the records, and several weeks later obtained 61 letters of objection regarding 19 Cottages.[107] More Cottages may have been objected to; these 61 letters were the only ones released by the city of Gulfport. Even Cottages that did not receive objections had problems getting permitted by the city of Gulfport, as we will discuss later.

In enacting the 2009 ordinance, Gulfport first sent a letter to neighboring property owners within 160 feet of each Cottage notifying them of their right to object. One resident had a problem with the way the letter was worded and wrote: "In writing this letter, I reserve all my rights for future objections. The notification letter from the City stated that failure to respond would 'deemed to be written consent to the placement.' I object to any such position of the City and without my express consent no consent is to be inferred."

In all cases, 50% or less of the contacted property owners submitted letters of opposition, meaning that, based on the wording of the city's letter, the majority of property owners gave consent to the placement of the Cottages. On average, only 18% of contacted property owners responded with opposition to the siting of a Cottage, but the ordinance did not allow for majority rule. Based on the ordinance, any Cottage receiving a letter of opposition was ineligible for permanent siting.

The reasons for opposing the siting of the Cottages varied from property to property. Much of the language in the letters of opposition contained terms that could be commonly associated with exclusionary zoning. The most common concern was property values, with 69% of the letters containing a reference to the effect of the siting on property values. The opinions offered around property values were mixed and, in some cases, contradictory. For example, one person said, "our neighborhood should not be devalued just so someone can have a weekend get away."[108] This statement was itself made by an out-of-state property owner that had not rebuilt.

Another reported a belief that the siting of the Cottages was an unconstitutional taking, referring to the perceived loss in property value. This argument is legally meritless: without actual physical invasion, a local government's regulatory action does not amount to an unconstitutional taking unless it "denies all economically beneficial or productive use of land."[109] In the Cottage situation, the ostensibly affected neighbors were not deprived of all economically beneficial or productive uses; their property could still be put to the same uses as before Cottages.[110]

Along this same theme, some neighbors reported that they were concerned that the placement of the Cottages would slow rebuilding because people would have a disincentive to invest in rebuilding a site-built home. However, this logic is not completely sound: for example, one person wrote that they were the only permanent home within two blocks of the proposed Cottage address because no one else had returned after four years. It is hard to under-

105. *Id.* §2, pt. 4(i).
106. Miss. Code §§25-61-1 et seq.
107. *See* Mississippi Center for Justice v. City of Gulfport, Cause No. C2401-10-425(1), Chancery Court of Harrison County, First Judicial District.
108. Some Cottage opponents were responding to feelings that Cottage residents were taking advantage of the situation. *See* Abt Case Study, *supra* note 33, at 35. However, many of these feelings were grounded in rumor rather than fact. "[W]when MAHP staff requested specific information about cases of abuse the response was often that someone 'had heard' about a case." *Id.*
109. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 22 ELR 21104 (1992).
110. As the Supreme Court has noted: "Government hardly could go on" if it had to compensate property owners for every mere diminution of value every time it changed the law. *Lucas*, 505 U.S. at 1018 (citation omitted). In short, diminution of value is acceptable; deprivation of all value or use is unconstitutional.

stand how one Cottage would further slow almost nonexistent rebuilding.[111]

The second most common concern was the fit with the neighborhood. Forty-six percent of objectors raised this as a concern. For example: "This neighborhood is being rebuilt and a MEMA Cottage is not representative of what was there before, or of what is being built. We have spent more than $180,000 repairing our 1901 home and do not want a small manufactured Cottage in our neighborhood." Another stated: "Hopefully the area is going to be rebuilt with traditional family homes. We feel that a MEMA Cottage does not fit in this neighborhood."

Very few of the letters raised concerns relevant to the land use siting decision. For example, fewer than 10% raised a reasonable zoning concern. Where zoning issues were raised, they appeared to be valid concerns relating to required setbacks, lot sizes, etc. However, these requirements applied to Cottages as well, and presumably would have been discovered during the formal permitting process. On a related note, 21% of objectors raised code enforcement concerns based on the existing property conditions, such as commercial car repair operations being conducted onsite.

A number of the concerns point to possible discrimination. For example, approximately 10% made reference to the type of people living in the Cottage. One person stated, "this neighborhood is not a trailer park," and another said, "we are not trailer park people." Approximately 10% reported concerns about the appearance of the Cottages. There were also the clearly angry views about a perceived lack of quality of the structures (8%). This comment captures some of the concern: the Cottage is "nothing more than a proposed missile aimed at our neighborhood." There was clearly a disconnect between the fact that this was a house that was brought in by truck and the storm resistance inherent in the design, which was certified to withstand 150-mile-per-hour winds.

The Planning Commission and City Council intended to use the objection letters to prevent the siting of the Cottages in a number of cases. Site visits to the properties that received letters of objection revealed that a Cottage was not able to be sited in 11 of the 19 cases; while 8 more remained, some were temporarily placed and may not have been retained permanently. In none of these cases did more than one-half of the property owners within 160 feet write in to oppose the siting of a Cottage, and only 10% of respondents raised a zoning concern for three of the 19 cases (16%). This suggests that the City Council or City Building Department put weight on the opposition letters that were received, regardless of whether the comments pertained substantively to the zoning request or not.

Site visits confirmed where the Cottages were located. If a property owner was home, he or she was interviewed to find out more about his or her Cottage situation. One respondent indicated that getting the Cottage sited was just too difficult. In one instance, a property owner reported that their MEMA Cottage was moved to a manufactured home park, and in another, MEMA took the home back. One property owner specifically cited the city ordinances as a barrier to housing. Another cited their neighbors as the barrier.

### *B. Mississippi Cottage Ordinance, 2010*

There was significant political turmoil throughout 2009 and 2010, in part related to Mississippi Cottages. In the May 2010 election, there was turnover in the City Council. The new City Council adopted a new Cottage ordinance to replace the previous Cottage ordinance.

The change in policy was party attributed to the pending sale of Mississippi Cottages to residents. In late 2009 and early 2010, MEMA began entering into contracts for residents to purchase their homes. Part of the sale process was making sure that each property owner had zoning clearance to permanently site a Cottage. At one point, MEMA representatives assisted Cottage owners in applying for permanent siting approval, submitting approximately 30 permits at once.[112]

Another reason for the proposed tightening of the ordinance was a pending auction of Cottages. On June 4, 2010, approximately 175 Cottages were auctioned off to the general public several miles north of Gulfport.[113] The city did not want new Cottages to enter in waves and turn Gulfport into a Cottage city.[114] Advocates heard this concern repeatedly from city officials and their attorneys across the Coast. Allegedly, "no one" had a problem with letting their current Cottage residents stay, but if they let down their restrictive ordinance, then Cottages from the auctions and other jurisdictions could flood into their city. To advocates, this was a red herring, since the cities in fact did place significant roadblocks on their own residents keeping their Cottages. To city officials, however, it was a collective action problem.

Additionally, from a legal perspective, it would be safer for cities to apply a new across-the-board definition of modular home, or even a minimum-square-footage ordinance, than to adopt an ordinance singling out MEMA Cottages by name, which is what most Coast communities had done in the past. Singling out Cottages by name could bolster Cottage residents' argument that the municipalities were "intentionally" treating *Cottages* unlike non-Cottage modular homes as prohibited by the Equal Protection Clause of the U.S. Constitution.[115] Across-the-board ordinances, however, could be more easily justified as merely impact-

111. This was also a recurring issue in the cities of Waveland and Long Beach, where the population is still thousands of residents down since Katrina, and a Cottage is occasionally the only home back on the entire block.

112. *See* Transcript, *supra* note 38, at 44.

113. *Mississippi Cottages Used Following Hurricane Katrina to Be Auctioned*, Gulf Coast News, May 20, 2010, http://www.gulfcoastnews.com/GCNews-KatrinaCottageAuction052010.htm.

114. As of August 30, 2010, a total of 350 Cottages had been auctioned. *Mississippi Cottages by the Numbers*, *supra* note 103.

115. This legal theory is discussed in more detail below, *infra* Part IV.E.

ing Cottages, rather than targeting them for removal from the city.

On June 22, 2010, the city adopted three amendments to the Zoning Ordinance related to Cottages. First, the city struck its previous MEMA Cottage ordinance from January 2009. This took all language specifically referring to MEMA Cottages off the books.

Second, the city expanded the definition of manufactured home as follows: "any structure plated or certified as a manufactured home/mobile home, no matter what other plate or certification it holds or building code it meets, shall, for the purposes of this ordinance, be considered to be a manufactured home/mobile home and no other structure type."[116] Because Cottages are dual-plated to both the lower manufactured home standard and the higher modular home standard, this meant that the city was declaring that Cottages were manufactured homes, and thus restricted only to mobile home parks. This effectively overrode the State Fire Marshal's certification of the Cottages as modular homes.[117] This change seemed arbitrary: one would think that if a home was dual-plated, a city could just as easily treat it as the higher quality modular home.

Third, the city adopted a new definition of "modular home." A modular home "shall consist of two (2) or more components that can be separated when transported but designed to be joined into one integral unit." This means that in order to be considered a modular home, a house must come in two or more parts. This directly excludes the one-part Mississippi Cottage, specifically designed to be easily transported. The effect was to declare that all Mississippi Cottages are manufactured homes, rather than modular, thus restricting them only to the districts that allow manufactured homes, primarily manufactured home parks. This ordinance meant that Mississippi Cottages would be permanently segregated and concentrated into manufactured home parks, rather than be allowed to stay on the sites of the residents' pre-storm homes.

In their June 22, 2010, meeting, the City Council and municipal officials also declared that they had gone through a private discussion with MEMA about which Cottages could remain and which had to go. It is not clear what criteria were used to make these determinations. The net result, however, was an announcement at the City Council meeting that 22 of the Cottages currently in Gulfport were on a special list of exceptions and would be able to remain and be permanently placed as nonconforming structures. The new ordinances would not apply to them. This effectively ensured that Gulfport was limiting its "exposure" to new Cottages coming up for auction.

### *C. Gulfport Resident Reaction*

The city had held a public hearing in May 2010 for the consideration of the adoption of the new ordinance. The authors reviewed the transcript of the public hearing to determine the opinions of residents. There was significant opposition to the proposed ordinance from Mississippi Cottage residents.

Several people were confused and frustrated by the city changing its decision on Mississippi Cottages. They reported that they were in the process of purchasing their Cottages from MEMA, only to be told that because the city of Gulfport was trying to amend the ordinance, the city may prevent them from permanently siting the homes on their properties. These people admitted that the Cottages were all they could afford and that they couldn't afford to rebuild their homes. One resident requested grandfathering for those that had already started the process of purchasing their Cottages.

A number of the people offered testimony about the challenges of the most socially vulnerable. One person described their personal struggles, between the loss of their home in Katrina, a contractor stealing $35,000 intended to be used for repairing the home, and now the possibility of losing their Cottage. Speaking about Cottage residents, one person said: "I guess the greater percentage of the people living in these homes right now are disabled. I can tell you right now, they're disabled, and they're low-income families. And we don't know what's going on in the Gulf with the oil. . . ." These residents understood that the socially vulnerable did not have any other alternatives than the Mississippi Cottage.

Others expressed their support of the ordinance and opposition to the MEMA Cottages. One resident responded that they didn't mind the existing modular homes, but they didn't want more MEMA Cottages coming into the neighborhoods. This points to a general misunderstanding that the Mississippi Cottage is a type of manufactured housing, which is reinforced by the city's proposed ordinance. One resident did rebut this argument, stating: "So the lumping a modular home—well, first of all, the MEMA Cottage is a modular home. And saying that the fact that it's in one piece and not in two pieces is really, if you ask me, a very frivolous criteria for whether it is or is not a modular home. It's a modular home based on its building specifications and its strength."

A specific concern was raised about the impact of the Cottages on property values. However, another resident challenged this in favor of the Cottages, stating: "Hell, property value been overrated for the last three years. Everybody knows homes is out of whack. And that's not the issue. The issue is that people want a place to stay."

One common concern was the use of the Cottages for secondary residences. "There's a Cottage across the street from me that he didn't live there when the storm happened. He now has that Cottage there because in the summer, it's his summer home that's there. If he had lost his home like

116. City of Gulfport, Mississippi. 2010a. *Zoning Ordinance Amendment Manufactured Home*.

117. *See* Cottage Building Plans, *supra* note 27 (showing Mississippi modular approval); Davis Letter, *supra* note 28.

the rest of us, you wouldn't hear me saying a word about it." The zoning ordinance, however, makes no distinction between first and second homes for any type of housing. In addition, MEMA's terms prohibited the sale of a Cottage for secondary residences, so a duplicative city ordinance on this issue only serves to heighten neighbors' fears of a destabilized community. The distinction of who will live in the home as a primary residence is further discussed by another resident:

> . . . the existing ordinance definitely called out specifically MEMA Cottages and puts it in parentheses. And it goes further to talk about these are the ones that the Mississippi Emergency Management Agency provided to certain qualified and eligible individuals to serve as temporary housing following Hurricane Katrina . . . I see nothing in here that would preclude someone who purchased the Cottage today from selling it to another individual and selling the property that it's sitting on such that was intended to serve as a temporary housing following Hurricane Katrina in perpetual would remain as a permanent structure . . . it seems to be a fair argument that the intent of this was developed before ownership was a possibility and that it does not have language in it that precludes the permanent placement and the passing along as long as it's a single family, as long as it's owner occupied, and as long as it's not rented . . . we would want to make sure of every tool available to identify individuals that are abusing—I use that word in my personal opinion—the right to have temporary housing following a major disaster in this area. I would think that it would totally preclude situations where people may purchase one of these, except to place it in a location that the text amendments would clearly allow, such as a trailer park or an A-1 district where such a use would be permitted.

The testimony clearly pointed to the need for socially vulnerable residents to keep the housing on a permanent basis. The concerns raised by many of the non-Cottage residents, such as whether the Cottages would be rented in the future, whether they would be occupied by the pre-Katrina permanent residents, and their impact on property values all point to discriminatory concerns.

In spite of this, the Planning Commission recommended approval of the ordinance amendments, which went on to pass the City Council on June 22, 2010.

The story of Gulfport is an extreme example of exclusionary zoning practices that disproportionately segregate low-income and disabled residents into manufactured home parks. The lack of effort to aid Gulfport Cottage residents in their housing need and the drawn-out effort to prevent residents from having a permanent home is disappointing.

What is especially sad about Gulfport's story is that the largest city on the Coast has suffered almost no public consequences for their transparent attempts to zone out Cottages. The city continues to draw millions of Community Development Block Grant (CDBG)-Disaster funding from the Department of Housing and Urban Development (HUD) and the state of Mississippi. It has not been sued over its treatment of Cottages, at least to the authors' knowledge. Also, the last recourses of zoning discrimination, HUD's Fair Housing and Enforcement Office and the U.S. Department of Justice's (DOJ's) Civil Rights Division, have never stepped in to stop it, although HUD and the Barack Obama Administration were made aware of the situation.

The cottage residents of Gulfport have been let down by their elected officials, and arguably they could remedy the situation through local elections. It is the general public, though, that has collectively lost when state and federal enforcement mechanisms turn a blind eye to the low-income residents and fair housing classes that they are charged with protecting.

## IV. Legal Analysis of Anti-Cottage Ordinances

There are at least six legal theories as to why Cottage ordinances are unlawful. They include theories of state preemption, statutory zoning rights, arbitrary and capricious decisionmaking, due process, equal protection, and fair housing—and several more within fair housing. Four of these theories were researched and written by pro bono attorneys at Kirkland & Ellis LLP, who filed these arguments during their representation of Waveland, Mississippi, Cottage residents, in conjunction with local housing advocates from the Mississippi Center for Justice.[118]

### *A. State Preemption*

First, several cities tried to limit Cottage placements by attempting to redefine "modular home."[119] They were aware that their zoning ordinances allowed modular homes and reasoned that redefining what "modular home" meant could allow modular homes, yet keep out Cottages in particular. This action, though, exceeded their legal authority.

Broadly speaking, zoning powers derive from the state's powers and are passed down for local governments to implement in a manner "not inconsistent" with state law.[120] When zoning, "a municipality exercises the state's police power, not its own."[121] Therefore, if the state legislature has defined something—such as what constitutes a "modular home"—then the state's definition preempts the local government's attempt at inconsistent local regulation.[122]

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118. Co-author Canter would like to thank the Kirkland & Ellis team who handled this case with skill and passion, especially Marjorie Press Lindblom, Adam Humann, and Shireen Barday. Their work has been added to in some instances and lightly edited for this Article. Any and all resulting errors are Mr. Canter's alone. Note: five of these sections are taken from *Plaintiffs' Brief in Support of Their Motion for A Preliminary Injunction*, filed Jan. 2009, in Gambrell, *supra* note 69, as well as *Brief of Appellants*, Filed May 12, 2009, in Gambrell et al. v. City of Waveland Board of Aldermen, Cause No. 09-89, Circuit Court of Hancock County.
119. These include, at a minimum, the cities of Gulfport and Waveland.
120. Miss. Code §21-17-5(1).
121. David A. Callies et al., Cases and Materials on Land Use 537 (4th ed. 2004).
122. Miss. Code §21-17-5(1).

This has similarities to the power relationship between the federal and state governments. The Supremacy Clause of the Constitution makes federal law "the supreme Law of the Land."[123] When Congress has passed laws regulating, for example, occupational health and safety, an attempt of one state to itself regulate the same issue is generally prohibited.[124] Oversimplifying somewhat, where the federal government has "occupied the field," a state government may not intrude into the field without permission, pass conflicting laws, or pass laws that otherwise do not further the federal laws.[125]

In the Cottage situation, local governments on the Gulf Coast have stepped in to redefine a term that the state legislature has already defined. Specifically, on June 22, 2010, the city of Gulfport redefined "modular home" as something that comes in two or more pieces.[126] State law, however, defines modular home as follows:

> a structure which is: (i) transportable in *one or more sections*; (ii) designed to be used as a dwelling when connected to the required utilities, and includes plumbing, heating, air conditioning, and electrical systems with the home; (iii) certified by its manufacturers as being constructed in accordance with a nationally recognized building code; and (iv) designed to be permanently installed at its final destination on an approved foundation constructed in compliance with a nationally recognized building code.[127]

This kind of direct contradiction is explicitly forbidden local governments:

> In addition to those powers granted by specific provisions of general law, the governing authorities of municipalities shall have the power to adopt any orders, resolutions or ordinances with respect to such municipal affairs, property and finances *which are not inconsistent* with the Mississippi Constitution of 1890, the Mississippi Code of 1972, or any other statute or law of the State of Mississippi. . . .[128]

Applying this language, the Mississippi Supreme Court has held that an ordinance is "inconsistent" with state law if the two are in direct conflict.[129] In the Cottage situation, the state of Mississippi classified Cottages as modular homes under Mississippi Code Section 75-49-3,[130] while several cities classified Cottages as mobile homes under special Cottage ordinances. Because there is a direct, irreconcilable conflict between these two definitions, the municipal ordinances are inconsistent with state law and therefore invalid.[131]

### *B. Statutory Zoning Rights*

State law prescribes the procedures by which a municipality can adopt a land use restriction.[132] Mississippi law, for example, requires local governments to adopt a comprehensive plan[133]; to create land use zones within a county[134]; to adopt and announce a procedure by which zoning ordinances are determined, established, enforced, amended, supplemented, or changed[135]; and to hold a public hearing, with at least 15 days published notice, before adoption of a zoning ordinance[136]; among other requirements.[137]

If a city wants to modify an aspect of its zoning ordinance, "[t]he statutory methods of amendment must be followed."[138] Ordinances inconsistent with the zoning authorizing statutes are invalid.[139] Cottage residents in Waveland alleged that a variety of these requirements were not followed when its Board of Aldermen adopted its anti-Cottage ordinance.[140]

One of the most important laws in this area for Cottage residents is a statute that requires local governments to treat similar buildings in the same areas similarly. "All regulations shall be uniform for each class or kind of buildings throughout each zone, but regulations in one zone may differ from those in other zones."[141] Within an R-1 residential area, for example, a local government cannot issue a permit to one qualifying landowner and refuse a permit to another qualifying landowner with an identical home. State law prohibits having two contradictory sets of rules applied to the same buildings in the same area.

Yet, Gulf Coast cities have done exactly that to the Cottages. They have granted full property rights to modular homeowners; modular homeowners are not required to place a restrictive covenant on their land, show proof of a 2005 homestead exemption, or be subject to a neighbor veto, among other things, that ordinances have required of the Cottages. The cities admit that modular homes are allowed under their existing zoning ordinances just as other permanent homes. And yet, their special Cottage ordinances create a second set of rules that apply only to Cottages, even though the Cottages are also in identical residential areas.

This practice is contrary to Mississippi Code §17-1-7. A local government cannot establish different tiers of treat-

123. U.S. Const. art. VI, cl. 2.
124. *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Assoc., 505 U.S. 88, 97, 22 ELR 21073 (1992) (plurality opinion).
125. *See id.* at 97, 108.
126. *See* Ordinance, *supra* note 116.
127. Miss. Code §75-49-3 (emphasis added).
128. Miss. Code §21-17-5(1) (emphasis added).
129. *See* Maynard v. City of Tupelo, 691 So. 2d 385, 388 (Miss. 1997) (requiring direct conflict between an ordinance and state law for the ordinance to be inconsistent with state law); *see also* J&B Entm't, Inc. v. City of Jackson, 152 F.3d 362, 379 (5th Cir. 1998) (discussing the validity of an ordinance under Mississippi Code §21-17-5(1): "The Mississippi Supreme Court has explained on several occasions that an ordinance is 'inconsistent' with a state statute only if the two are in direct conflict, as determined by reference to the facts of the case at hand.").
130. *See, e.g.*, Rice Letter, *supra* note 90; Davis Letter, *supra* note 28.
131. *See City of Tupelo*, 691 So. 2d at 388.
132. Miss. Code §§17-1-1 et seq.
133. *Id.* §17-1-9.
134. *Id.* §17-1-7.
135. *Id.* §17-1-15.
136. *Id.* §§17-1-15 and 17-1-17.
137. *See* Board of Supervisors of Harrison County v. Waste Management of Mississippi, Inc., 759 So. 2d 397, 400 (2000).
138. City of Jackson v. Freeman-Howie, Inc., 121 So. 2d 120, 124 (Miss. 1960).
139. *Id.*; *see also Waste Management*, 759 So. 2d at 401.
140. *See Brief of Appellants*, *supra* note 118.
141. Miss. Code §17-1-7.

ment for identical buildings in the same residential zone. If an anti-Cottage ordinance imposes restrictions on Cottages (and only Cottages) over and above those restrictions on modular homes in the city's existing zoning ordinance, the additional restrictions violate Mississippi Code §17-1-7 and should be stricken.

### *C. Arbitrary and Capricious Decisionmaking*

Throughout the MEMA Cottage debate, several cities have decided to treat Cottages as mobile homes without any evidence to support this classification. These decisions are arbitrary and capricious, as well as unsupported by the evidence.

Mississippi courts will set aside municipal zoning decisions when they are "clearly shown to be arbitrary,[142] capricious,[143] discriminatory, illegal or without a substantial evidentiary basis[144]."[145] But where an issue is "fairly debatable," courts will uphold municipal action.[146]

A municipal classification of Cottages as "mobile homes" is not "fairly debatable." There is an overwhelming amount of evidence that Mississippi Cottages are modular homes when affixed to permanent foundations. The Cottage building plans show that they have "Mississippi modular approval" designation and comply with the 2003 International Residential Code, among other national and international building standards.[147] The State Fire Marshal's Office has outfitted each Cottage with a "Mississippi Modular Data Plate" certifying that it is modular.[148] And the state of Mississippi's position is that the Cottages are modular when affixed to a permanent foundation.[149]

The Mississippi Supreme Court's decision in *Carpenter v. City of Petal* is illustrative.[150] There, the Court found that an ordinance limiting mobile homes to land zoned for mobile home parks was "arbitrary and unreasonable[.]"[151] The Court stated:

> We hold only that a per se restriction is invalid; if a particular mobile home is excluded from areas other than mobile home parks, it must be because it fails to satisfy standards designed to assure that the home will compare favorably with other housing that would be allowed on that site, and not merely because it is a mobile home.[152]

Gulf Coast cities have made the same mistake as the city of Petal. Rather than considering the Cottages' construction and design standards, their permanent characteristics, or their suitability for the neighborhoods concerned, the municipalities declared the units to be mobile homes to oust Cottage-dwellers from their homes. This course of action alone is arbitrary and capricious under Mississippi law.[153]

This "mobile versus modular" issue was thought to be resolved by litigation in 2009, in the suit brought by longtime residents of Waveland over their city's Cottage prohibitions.[154] The residents claimed that Waveland was not allowing Cottages to remain in the city permanently, even though Waveland accepted other modular homes without problem. After reviewing the issue, and seeing these arguments fully briefed in Plaintiff's Motion for Injunctive Relief, the city of Waveland's attorney acknowledged in court that the Cottages were modular and that the city would accept them when presented with complete permit applications. The Chancery Court Judge then acknowledged this admission, stating for the record that the Cottages were modular and could be placed under Waveland's existing ordinance that allowed modular homes in R-1, R-2, and R-3 areas.[155]

It is disappointing that at least two cities have declined to follow this case. Throughout 2009, the city of Long Beach issued permit denial letters stating that the Cottages were mobile homes and therefore could only be kept in mobile home parks.[156] And as discussed above, in June 2010, the city of Gulfport decreed that any dual-plated unit would be deemed a manufactured/mobile home.[157] This decision is arbitrary and capricious, because dual plating could just as easily require the unit to be treated under the higher modular home-building standard. It would be arbitrary and capricious to override the State Fire Marshal's determination of the Cottages without any evidence to the contrary.

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142. According to the state court of appeals, "[a]n act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending on the will alone, absolute in power, tyrannical, despotic, non-rational, implying either a lack of understanding of or disregard for the fundamental nature of things." City of Petal v. Dixie Peanut Co., 994 So. 2d 835, 837 (Miss. Ct. App. 2008) (citations omitted).
143. Capricious is defined as an act "done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles." *Id.* For an example of municipal capricious reasoning, see *United States v. City of Jackson, Miss.*, in which the Fifth Circuit cited approvingly a deputy city attorney telling the City Council that it "could not simply deny [a] permit for such capricious reasons as, 'We want it,' or 'We don't want it,' or the neighborhoods want it or don't want it." 359 F.3d 727, 729 (5th Cir. 2004). Those grounds, according to the attorney, were "not legal criteria." *Id.*
144. Substantial evidence means "such relevant evidence as reasonable minds might accept as adequate to support a conclusion. . . . [E]vidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred." State Oil & Gas Board v. Miss. Mineral & Royalty Owners Ass'n, 258 So. 2d 767, 779 (Miss. 1971) (quoting Central Electric Power Ass'n v. Hicks, 110 So. 2d 351, 357 (1959)). It is satisfied when the agency can show "more than a mere scintilla of evidence" or "something less than a preponderance of the evidence but more than a scintilla or glimmer." Mississippi Dep't of Envtl. Quality v. Weems, 653 So. 2d 266, 280-81 (Miss. 1995).
145. Carpenter v. City of Petal, 699 So. 2d 928, 932 (Miss. 1997); *accord* Mayor & Bd. of Aldermen v. Welch, 888 So. 2d 416, 419 (Miss. 2004).
146. *Id.*
147. *See* Building Plans, *supra* note 27.
148. *Id.*; *see also* Davis Letter, *supra* note 28.
149. Rice Letter, *supra* note 90.
150. 699 So. 2d 928.
151. *Id.* at 934.
152. *Id.* (quoting Cannon v. Coweta County, 389 S.E.2d 329 (Ga. 1990)).
153. *See id.*
154. *See Gambrell*, *supra* note 68.
155. Transcript of Hearing on Motion for Preliminary Injunction, Jan. 30, 2009, in *Gambrell*, *supra* note 69.
156. *See* Letters, *supra* note 87.
157. *See* discussion, *supra* Part III.

### *D. Due Process*

The Mississippi Constitution provides that "[n]o person shall be deprived of life, liberty, or property except by due process of law."[158] Likewise, the federal Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[159] A violation of substantive due process under either Constitution occurs when the government deprives an individual of liberty or property.[160] Where a decision of a state or federal government "impinges upon a landowner's use and enjoyment of property, a landowning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrary or capricious."[161]

To prevail on a substantive due process claim, a plaintiff must first establish that he or she holds a property right protected under the Mississippi State Constitution or the Fourteenth Amendment's Due Process Clause. "Under this analysis, the hallmark of property . . . is an individual entitlement grounded in state law."[162] Once a plaintiff establishes a protected property right, the only remaining question is whether there is a "rational relationship" between the governmental action that impinges on that right and "a conceivable legitimate [governmental] objective."[163] Where, as here, there is no conceivable rational basis for governmental interference with a protected property right, a court should prohibit the offending activity.

In some Gulf Coast municipalities, Cottage residents who own their own land have a property right arising from the city's existing, regular zoning ordinance. In the city of Waveland, for example, that ordinance states:

> If the proposed excavation, filling, construction or movement as set forth in said plans is in conformity with the provisions of this Ordinance and other Ordinances of the City of Waveland, Mississippi, then in force, the Building Inspector *shall* sign and return one (1) copy of the plans to the applicant and *shall issue a building permit* upon payment of any required fees.[164]

By its use of "shall," the city of Waveland's ordinance gives no discretion to the city to deny qualified applicants. As such, because they are otherwise qualified applicants, Cottage residents with land have a property right to building permits to install permanent Cottages.

Additionally, cities have no conceivable rational basis for denying Cottage residents permits. It is a fact that every city along the Coast has previously granted identical building permits to owners of non-Cottage modular homes. The only conceivable distinction between Cottage modular homes and other modular homes is the fact that the Cottages are provided by MEMA. This is not a rational basis for the differing treatment.

Furthermore, insofar as zoning ordinances are enacted for the purpose of "conserving the value of land,"[165] cities cannot argue that Cottages will undermine property values because they have already allowed other modular homes to co-exist alongside site-built homes. Municipal practices of singling out one subsection of modular home residents directly undermines any arguments they may advance in furtherance of a legitimate government objective.

Because they are otherwise qualified applicants under existing municipal ordinances, Cottage residents have a protected property right to the building permits they seek. A city's refusal to grant such permits has no rational relationship to a legitimate government objective. A city's arbitrary and capricious rejection of Cottage residents' permits violates their right to due process under both the Mississippi State Constitution and the U.S. Constitution.

### *E. Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[166] As the Supreme Court has explained, "[t]he purpose of the equal protection clause . . . is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[167]

Equal protection claims typically focus on the denial of a fundamental right, or disparate treatment, based upon membership in a protected class.[168] But the Supreme Court has consistently held that a person need not belong to a protected class to plead a successful equal protection claim. For example, in *Village of Willowbrook v. Olech*, a land use case, the Supreme Court held that a single plaintiff who did not belong to a protected class successfully pled an equal protection violation where she alleged that she had been "intentionally treated differently from others similarly situated and [that there was] no rational basis for the difference in treatment."[169] To successfully plead an equal protection claim, a plaintiff must show that he or she was intention-

158. Miss. Const., art. 3, §14.
159. U.S. Const. amend. XIV, §1.
160. *See* Simi Inv. Co., Inc. v. Harris County, 236 F.3d 240, 249 (5th Cir. 2000); *accord* Mohundro v. Alcorn County, 675 So. 2d 848, 852 (Miss. 1996) ("A due process violation requires that the party be deprived of a protected interest.").
161. *Harris County*, 236 F.3d at 249 (citations omitted).
162. *Id.* (citations omitted); *accord* Carter v. Mississippi Dep't of Corrections, 860 So. 2d 1187, 1194 (Miss. 2003) (holding that the analysis of whether there is a protectable property interest is the same under the state and federal constitutions because state law defines property interests under both).
163. *Harris County*, 236 F.3d at 249 (citations omitted); *accord* Moody v. Miss. Dep't of Public Safety/Highway Patrol, 729 So. 2d 1249, 1254 (Miss. 1999) (holding due process under Mississippi Constitution protects against "arbitrary and irrational government action").
164. City of Waveland Zoning Regulation, Ordinance #233 §903 ("Application for a Building Permit") (emphasis added).
165. City of Waveland Zoning Regulation, Ordinance #233.
166. U.S. Const. amend. XIV, §1.
167. Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923).
168. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (racial discrimination).
169. 528 U.S. 562, 564, 30 ELR 20360 (2000) (allowing a plaintiff to challenge a municipality's requirement that she grant a 33-foot easement, where others similarly situated granted easements one-half as large, on equal protection grounds).

ally treated differently than others similarly situated and that such difference in treatment was "irrational."[170]

Cottage residents have sought building permits to keep permanently their modular homes within residential districts. Gulf Coast cities have issued such permits to other modular homeowners—just not for Cottage residents. Cottage residents have been treated differently than other similarly situated individuals. Moreover, all available evidence demonstrates that the cities intended to create an artificial distinction between Cottage modular homes and other modular and site-built homes. As the U.S. Court of Appeals for the Fifth Circuit has explained, intent in the context of equal protection requires only that a city's actions were not undertaken accidentally.[171] Where, as here, a city purposefully creates a distinction between Cottage residents and non-Cottage modular homeowners, any resulting disparate treatment will form the basis of an equal protection claim.

In Waveland, for example, when the Cottage residents sought building permits to put their modular homes on permanent foundations, the city indicated that permits would not be granted to any Cottages.[172] Furthermore, the city of Waveland's mayor's public comments show that he considered Cottages to be different from other modular and site-built homes, even though the city's ordinances provided no textual support for his distinction.[173] Regardless of whether the city acted in bad faith, the Equal Protection Clause requires only that the city meant to distinguish between Cottages and other modular homes. Clearly, the city did.

Even if a city had an otherwise rational basis for distinguishing between Cottages and other modular homes, the fact that a city had selectively granted building permits to some modular home owners undermines any legitimate governmental interest distinguishing between modular homes and site-built homes. In the context of zoning regulations, the Fifth Circuit has explained that selective enforcement of an ordinance will give rise to a constitutional claim, because selective enforcement is per se irrational. In *Bennett v. City of Slidell*,[174] the court found a city's refusal to issue plaintiff an occupancy permit was unconstitutional, even though the plaintiff was in violation of a local zoning ordinance that required him to pave his parking lot. The court found the city building inspector had "singled out Bennett's occupancy application for a *strictissimi* application of Slidell's zoning ordinance, by requiring him to pave his parking lot while his neighbors were allowed to cover their lots in oyster shells.[175] The court held that this type of selective enforcement has no rational basis.[176]

Similarly, Gulf Coast municipalities are selectively enforcing their zoning ordinances by granting permits to some modular homeowners but not to Cottages. But equal protection is supposed to prevent this type of discrimination, because there is no rational basis for distinguishing between Cottages and other modular homes.[177]

Thus, if a city takes the position that all modular homes may not be placed in R-1, R-2, and R-3 districts under its existing zoning ordinances, *Bennett* instructs that it cannot selectively enforce that violation exclusively against Cottage residents.[178] Since it is accepted that every city along the Gulf Coast has granted some modular homeowners permits to permanently place their modular homes in residential areas, Cottage residents are entitled to the same treatment.

### *F. Fair Housing*

Finally, federal fair housing laws should also prohibit local jurisdictions from enforcing anti-Cottage ordinances. The Fair Housing Act and its amendments protect persons in seven protected classes from acts of housing discrimination.[179] The protected classes are race, color, religion, national origin, sex, disability, and familial status (presence or anticipated presence of children under 18 in the household).[180] The Act was intended to "prevent the increase of segregation" of protected classes and replace isolation with "truly integrated and balanced living patterns."[181]

Among many other things, unlawful housing discrimination includes refusing to rent, sell, or negotiate for property based on protected class status, set different terms or conditions on housing based on protected class status, or provide different housing services based on protected class status.[182] Exclusionary zoning can constitute an unlawful housing practice.[183] In the disability context, unlawful housing discrimination includes a housing provider or policymaker's refusal to reasonably accommodate a person with a disability.[184]

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170. Lindquist v. City of Pasadena, 525 F.3d 383, 386 (5th Cir. 2008).
171. *Id.* (equal protection claim did not require animus or ill will).
172. *See Plaintiffs' Brief in Support of Their Motion for a Preliminary Injunction*, *supra* note 118, exh. G. An identical situation was initially presented in the city of Long Beach.
173. *See, e.g.*, Al Showers, *Plaintiffs Explain Their Decision to Take Waveland to Court*, WLOX, Jan. 23, 2009, *available at* http://www.wlox.com/Global/story.asp?S=9725412 (noting that the city is working on "rules for permanent cottages").
174. 697 F.2d 657 (5th Cir. 1983).
175. *Id.* at 661.
176. *See id.*
177. *See id.*
178. 697 F.2d at 661 (finding an equal protection violation because the building inspector "ignor[ed] the existence of similar violations in other parts of town").
179. 42 U.S.C. §§3601 et seq.; *see also* U.S. Dep't of Housing and Urban Development, Fair Housing Laws and Presidential Executive Orders, http://www.hud.gov/offices/fheo/FHLaws/ (last visited Jan. 1, 2011).
180. U.S. Dep't of Housing and Urban Development, *supra* note 179.
181. Otero v. New York City Housing Authority, 484 F.2d 1122, 1134 (2d Cir. 1973) (quotation marks and citations omitted).
182. U.S. Dep't of Housing and Urban Development, Fair Housing—It's Your Right, *available at* http://www.hud.gov/offices/fheo/FHLaws/yourrights.cfm (last visited Jan. 1, 2011).
183. *See, e.g.*, Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926-28 (2d Cir. 1988); Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).
184. Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act, at 1 (May 17, 2004), http://www.hud.gov/offices/fheo/`/huddojstatement.pdf [hereinafter HUD-DOJ Statement].

Here, three different legal theories involving the Fair Housing Act may support the permanent placement of Mississippi Cottages. We examine each in turn.

### 1. Disparate Impact on Persons With Disabilities

Fair housing claims can be brought not just for intentional discrimination, but also under a "disparate impact" theory. This applies when "a facially-neutral policy or practice, such as a hiring test or zoning law, [has a] differential impact or effect" of denying housing opportunities to one or more protected classes.[185] "Often, such rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied."[186]

Although rumors abound, because local officials along the Gulf Coast have not been recorded making obviously, intentionally discriminatory statements about a particular protected class (or person) that would be hurt by an anti-Cottage ordinance, the disparate impact theory is likely more viable here than an intentional discrimination claim. In the Cottage context, therefore, the plaintiffs would have to show that the facially neutral zoning ordinance had a negative disparate effect on Cottage residents, and that Cottage residents are members of a protected class.[187]

Unfortunately for legal advocates, MEMA claims not to have collected data on the protected class status of residents it houses or those it turns away.[188] This failure, which may violate federal law in and of itself,[189] has significantly limited efforts to understand the impact of the Cottage program on racial and ethnic minorities. (One study reported that the racial composition of Cottages was roughly that of the general population,[190] although one would want to check the implementation of this on the ground to confirm that there was not a pattern or practice of discrimination in the permitting process.)

MEMA has, though, collected data on the disability status of Cottage residents. The data are significant: In 2007, the year that Cottages started to be delivered, persons with disabilities made up 20% of Harrison County residents.[191] The percentage was similar for the state of Mississippi.[192] The Cottage program, however, housed a significantly higher percentage of persons with disabilities. Bay St. Louis' Cottages had a 26.6% disability rate, unincorporated Jackson County's had 27.5%, D'Iberville's had 29.3%, and Gautier's had 46%. Persons with disabilities appear more likely to occupy Cottages than other kinds of homes. Therefore, ordinances that target Cottages—on their face or not—are likely to disproportionately harm persons with disabilities.

The data are even more discouraging when considered on a household level. The federal evaluation of the Cottage program reported that an astonishing 43% of Cottages were housing at least one person with a disability.[193]

Thus, anti-Cottage ordinances *may* have a disparate impact on racial and ethnic minorities—there is not sufficient data to know for sure—but they appear to have a disparate impact on persons with disabilities.[194] When cities seek to exile Cottages to mobile home parks, they are also exiling persons with disabilities, pushing them farther from mainstream civic life. While more evidence needs to be gathered, this suggests that a fair housing claim under this theory could properly be brought against a city working to limit the locations of the Cottages placed within its borders.

### 2. Failure to Reasonably Accommodate Persons With Disabilities

Fair housing laws were expanded in 1988 to include persons with disabilities as a protected class.[195] The amendments created new categories of relief, including a disabled person's right to "reasonable accommodations."

Specifically, the Fair Housing Act as amended now prohibits housing providers from refusing "to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling."[196] The federal government agencies ultimately in charge of enforcing reasonable accommodations have come up with several textbook examples, including the following:

> A housing provider has a policy of requiring tenants to come to the rental office in person to pay their rent. A tenant has a mental disability that makes her afraid to leave her unit. Because of her disability, she requests that she be permitted to have a friend mail her rent payment to the

185. *Town of Huntington*, 844 F.2d at 933 (citation omitted).
186. *Id.* at 935.
187. They would also have to establish the link between the municipal ordinance and the denial of the right to purchase their unit from MEMA. *See* Cox v. City of Dallas, Tex., 430 F.3d 734, 741-42, 745 (5th Cir. 2005). This should not be difficult, since MEMA will not sell a Cottage to its resident unless it meets all city ordinances.
188. *See* Letter from Mike Womack, Director, Mississippi Emergency Management Agency, to Andrew Canter, Equal Justice Works Fellow & Staff Attorney, Mississippi Center for Justice (Dec. 15, 2008) (on file with authors).
189. *See* 24 C.F.R. §§121.1 and 121.3. It is believed that before 1995, 42 U.S.C. §3608(a) required HUD to annually collect "data on the racial and ethnic characteristics of persons eligible for, assisted, or otherwise benefiting under each community development, housing assistance, and mortgage and loan insurance and guarantee program administered by such Secretary." Other authorities may also require such data collection on the part of MEMA.
190. *See* Abt Case Study, *supra* note 33, at 44.
191. U.S. Census, American Community Survey one-year estimates for Harrison County, Mississippi (2007).
192. U.S. Census, State of Mississippi Profile for Selected Social Characteristics (2000), *available at* http://factfinder.census.gov.
193. *See* Abt Case Study, *supra* note 33, at 44.
194. *See* Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P., 488 U.S. 15, 17 (1988) (affirming a case in which the U.S. Court of Appeals for the Second Circuit "found discriminatory impact because a disproportionately high percentage of households that use and that would be eligible for subsidized rental units are minorities, and because the ordinance restricts private construction of low-income housing to the largely minority urban renewal area").
195. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.
196. HUD-DOJ Statement, *supra* note 184, at 1.

> rental office as a reasonable accommodation. The provider must make an exception to its payment policy to accommodate this tenant.[197]

If a person with a disability makes a reasonable request for accommodation, the housing provider must show "it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider's operations."[198] This is a fact-specific inquiry.[199]

We have discussed how Cottage residents and members of their household are more likely to be persons with disabilities. A reasonable accommodation theory therefore may have been viable to overcome the city of Waveland's convoluted argument against Cottage permanency, described below.

Recall that Waveland would not allow Cottages to remain permanently in residential neighborhoods because it deemed the units "mobile homes."[200] This decision would have required MEMA, which had an agreement with Waveland to remove units in accordance with city policy, to remove the Cottages and displace their residents.

After the removal, however, MEMA would "decommission" the unit, declare it no longer part of the Alternative Housing Pilot Program, and dispose of it by auction, donation to nonprofits, or some other method.[201] Once the Cottage was no longer part of MEMA's program, it would then be allowed to enter Waveland again per the city's usual zoning ordinance allowing modular homes. This complicated process would essentially remove MEMA as an arguable barrier to the permanent placement, and force Waveland to treat the new owner of the Cottage as any other modular homeowner seeking a permit.

On these facts, several residents with disabilities requested that Waveland reasonably accommodate their mobility impairments by waiving them from the absurd move-out, move-in requirement Waveland was imposing.

Of course, the city's argument was likely made with an expectation that no Cottage resident would be able to afford moving a unit back into the city and paying for its permanent installation—something that MEMA had promised residents in cities that allowed permanent placements. It is unsurprising that one month after receiving the disabled residents' request, the city tightened this loophole by passing an emergency moratorium on the installation of single-section modular homes in Waveland.[202] Cottages are single-section modular homes.

The reasonable accommodation theory was ultimately not tested in the Cottage context. And it is unknown how it would have fared against the city's likely defenses of "undue burden" and "fundamental alteration" to its zoning ordinance. Residents filed suit on other theories of relief. On these unique facts, it may not be useful to future situations, but is presented as another possible application of fair housing law to the Mississippi Cottage situation.

### 3. The False Claims Act

The final theory of relief presented here is not a claim under the Fair Housing Act, but instead involves the intersection of fair housing law with the False Claims Act.[203] This is a relatively new area of litigation sparked by a $62.5 million fair housing settlement in Westchester County, New York, in 2009.[204]

The Westchester litigation was brought by the Anti-Discrimination Center (ADC), a New York nonprofit concerned about residential segregation in Westchester County, among other issues. The ADC knew that fair housing law requires the federal government to "affirmatively further fair housing in all Federal programs and activities relating to housing and urban development throughout the United States."[205] It also knew that this obligation extends to state and local recipients of certain federal funds, who then must themselves certify that they are affirmatively furthering fair housing.[206] If a municipality files a false certification to receive the federal money, it is effectively committing fraud.

This is where the False Claims Act comes into play. Oversimplifying the procedure greatly, this law allows persons who know of fraud against the federal government to intervene and recover the funds on behalf of the government.[207] In exchange for its work, the party bringing suit receives a share of the proceeds.

The ADC brought suit claiming that Westchester County had filed false certifications with the federal government from 2000-2006 in order to receive tens of millions of dollars in federal housing funding.[208] The claim was for violating the False Claims Act, although the case necessarily entailed showing that the county had not met

197. *Id.* at 6.
198. *Id.*
199. *Id.*
200. *Plaintiffs' Brief in Support of Their Motion for a Preliminary Injunction*, *supra* note 118, at 5.
201. Letter from Andrew Canter, Equal Justice Works Fellow & Staff Attorney, Mississippi Center for Justice, to John "Tommy" Longo, Mayor, City of Waveland (Jan. 15, 2009), *available at id.* exh. L.
202. City of Waveland Ordinance No. 332 (passed Feb. 18, 2009).
203. 31 U.S.C. §§3729 et seq.
204. Anti-Discrimination Center, Westchester False Claims Case, http://www.antibiaslaw.com/westchester-false-claims-case.
205. EO No. 12892 (Jan. 17, 1994), *available at* http://www.hud.gov/offices/fheo/FHLaws/EXO12892.cfm.
206. U.S. HUD, Community Development Block Grant Entitlement Communities Grants, *available at* http://www.hud.gov/offices/cpd/communitydevelopment/programs/entitlement/ (last visited Jan. 10, 2011):
> Requirements. To receive its annual CDBG entitlement grant, a grantee must develop and submit to HUD its Consolidated Plan . . . . [T]he Consolidated Plan must include several required certifications, including that . . . the grantee will affirmatively further fair housing. HUD will approve a Consolidated Plan submission unless the Plan (or a portion of it) is inconsistent with the purposes of the National Affordable Housing Act or is substantially incomplete.

207. Press Release, U.S. DOJ, Westchester County Agrees to Develop Hundreds of Units of Fair and Affordable Housing in Settlement of Federal Lawsuit, at 3, Aug. 10, 2009, *available at* http://www.justice.gov/crt/about/hce/documents/westchester_pr.pdf.
208. *Id.*

its obligations under fair housing law.[209] The trial judge found that Westchester County had "utterly failed" to meet its fair housing obligations and that Westchester's certifications during the contested period were all "false or fraudulent."[210] The consent decree required a variety of relief, including but not limited to "the development of 750 units of fair and affordable housing in areas with low racial and ethnic diversity," court monitoring, a $30 million fine, and a $7.5 million payment to the ADC.[211]

Perhaps more importantly, this theory and its underlying claims "have become a central focus of [HUD] Secretary [Shaun] Donovan's efforts,"[212] and anecdotally, have led to a great deal of interest and discussion among housing advocates.

This use of the False Claims Act could significantly advance Cottage advocacy along the Coast. Mississippi received $5.5 billion in federal Community Development Block Grant funds.[213] Each municipality along the Coast has easily received tens of millions, if not more, for economic development, physical infrastructure, housing, and other needs. These municipalities have qualified for these funds by signing certifications stating that they are affirmatively furthering fair housing. Their treatment of Cottages, though, suggests that they are not affirmatively furthering fair housing; in fact, they may be affirmatively harming fair housing. It is an area ripe for pursuit.

The False Claims Act is a complex area of the law with a number of unique procedural bars to recovery.[214] It is presented here only as one possible way in which local governmental decisions to restrict or prohibit the permanent placement of Mississippi Cottages is contrary to the Fair Housing Act.

## V. Conclusion

Hurricane Katrina demonstrated that FEMA's temporary housing program was a short-term housing solution at best. The Mississippi Cottage program provided an opportunity to develop a successful model of post-catastrophe temporary-to-permanent housing. Even though as implemented the program was not sufficient to achieve a full and fair rebuilding—the Cottages represent a relatively small part of the housing need of the Coast population—it was a promising solution that has unquestionably benefitted thousands of families, at least temporarily.

This solution, however, cannot be permanent if local governments make siting difficult or impossible. Post-disaster housing should, after all, be "fair"—both in terms of including low-income and minority communities in traditional residential neighborhoods, and in the formal requirements of federal fair housing law. This Article has presented evidence and arguments that Cottage residents were not treated fairly by their local governments. As a result, many found their opportunity to establish permanent, safe, and affordable housing after Katrina delayed or stymied.

An equitable housing policy would support inclusionary zoning and focus on creating choice, so that residents can choose neighborhoods that best meet their needs.[215] There has been substantial debate about removal of low-income people from areas of concentrated poverty. However, as seen in Gulfport, there has been a concerted effort to push Mississippi Cottage residents from traditional residential neighborhoods into low-wealth, less desirable areas.

With respect to legal strategies to combat this exclusionary push, we note that federal enforcement of the Fair Housing Act is inadequate. In recent years, the DOJ has taken a limited number of housing discrimination cases.[216] This is in contrast to the "over 3.7 million fair housing violations involving race" that HUD estimates to happen annually.[217]

Mississippi Cottage residents are consumed with the effort to rebuild their lives and to get their homes sited. They simply do not have the time or, after years of struggling with FEMA, insurance companies, or their local governments, the *energy* to file individual complaints to the federal government. Either HUD or the DOJ, though, could choose to enforce the laws and seek to withhold federal funding because of these exclusionary zoning practices.[218]

The post-Katrina Mississippi Cottage is an example of how well-intended federal and state government programs can be met with a discriminatory policy environment at the local level. In spite of repeated and ongoing disasters on the Mississippi Gulf Coast, local governments must consider the genuine needs of the most socially vulnerable residents, many of whom continue to seek permanent housing and finally achieve a full recovery.

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209. Specifically, Westchester County "was aware that racial and ethnic segregation and discrimination persisted in its municipalities," was required to analyze impediments to fair housing and desegregation, and yet over several years never identified "impediments to fair housing based on race or ethnic background or resulting from the effects of racial or ethnic segregation." *Id.* at 2. This violated Westchester's duty to affirmatively further fair housing.
210. Anti-Discrimination Center, *supra* note 204.
211. Press Release, *supra* note 207.
212. *Protecting the American Dream (Part I): A Look at the Fair Housing Act, Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 87 (2010) (prepared statement of John P. Relman, Founder and Director, Relman & Dane).
213. U.S. GAO, GAO-09-541, Gulf Coast Disaster Recovery, Community Development Block Grant Program Guidance to States Needs to Be Improved 5 (2009), *available at* http://www.gao.gov/new.items/d09541.pdf.
214. *See, e.g.*, Jeremy Telman, *When Does the False Claims Act's Jurisdictional Bar Preclude* Qui Tam *Actions?*, ContractsProf Blog, May 4, 2010, *available at* http://lawprofessors.typepad.com/contractsprof_blog/2010/05/when-does-the-false-claims-acts-jurisdictional-bar-preclude-qui-tam-actions.html.
215. *See* Tracie L Washington et al., NAACP Reports, Housing in New Orleans: One Year After Katrina 22-23 (2006) *available at* http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/publications/Housing_in_NOLA_KI_OppAg_NAACP.pdf.
216. john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 Ind. L. Rev. 605, 616 (2008) ("In 2006 alone, the DOJ only brought thirty-one housing and civil enforcement cases, of which a mere eight involved racial discrimination claims. In 1994, 194 such claims were brought.").
217. *Id.*
218. *See* Stacy Seicshnaydre, *Housing: Creating an Affordable and Inclusive Community*, *in* From the Lake to the River Founds, Report to Mayor Nagin's Bring New Orleans Back Commission: An Alternative Vision for Rebuilding, Redevelopment, and Reconstruction 6, 9 (2005), *available at* http://www.fromthelaketotheriver.org/files/final_report_11.29.pdf.