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All That Glitters is Not Gold: A Critique of Waivers and Congressional Mandates on Community Development Block Grants

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ALL THAT GLITTERS IS NOT GOLD: A CRITIQUE OF WAIVERS AND CONGRESSIONAL MANDATES ON COMMUNITY DEVELOPMENT BLOCK GRANTS

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For you may palm upon us new for old: All, as they say, that glitters, is not gold.
John Dryden, The Hind and the Panther (1687)[1]

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1. The origin of this saying is difficult to pinpoint. In the 12th century, a French philosopher and theologian, Alain de Lille, wrote, "Do not hold everything gold that shines like gold." Both Chaucer (in "The House of Fame", c. 1383) and Shakespeare (in *The Merchant of Venice*, 1596) included similar language. John Dryden first used the word "glitters" in his poem "The Hind and the Panther" (1687). The line reads, "All, as they say, that glitters is not gold."

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I. INTRODUCTION

The passage of legislation authorizing significant public funding generates fundamental questions that require critical analysis. Firstly, there is the question of whether an inherent tension exists between the legislative intent of the law and the subsequent implementation and interpretation of a law and its mandates. This raises the companion question of how to best align such legal mandates to assure consistent implementation and enforcement. A third inquiry examines if there are "escape" clauses or waivers intended to provide greater flexibility to the parties carrying out the intent of the legislation. Finally, the question arises as to whether or not parties employ such waivers to evade and reshape the intent of the law to carry out an impermissible alternative intent.

Post-Katrina federal disaster recovery legislation provides billions of dollars for Gulf Coast recovery through the Community Development Block Grant Program ("CDBG"). Analysis of Mississippi's interpretation and implementation of the recovery legislation provides a window into the difficult fundamental questions regarding legislative intent. More specifically, Mississippi's approach to policy development and guidelines for the allocation of post-Katrina recovery funds provides an actual context for analyzing the impact of differing interpretations of legislative intent on low and moderate income households.

My analysis of the outstanding fundamental questions seeks to answer whether the government of Mississippi knowingly and intentionally chose to operate outside of the expressed legislative intent of the CDBG program. This article establishes a set of critical

points for exploration into this question. In light of the intent of the CDBG program and subsequent legislation, the policies and priorities of the program are critiqued as to the direct impact on low- and moderate-income homeowners and small business owners. A principal issue is whether these groups were intentionally denied CDBG funds in direct defiance of legislative intent.

Additionally, this article analyzes the velocity of the recovery efforts and its impact on these identified groups. If one accepts that a timely distribution of recovery funds is critical in the wake of a disaster, the consequence of any established pattern of delay in the distribution of recovery resources to low, as well as moderate, income impacted communities and classes of people could be catastrophic. Simply put, a significant delay in the distribution of recovery funds could translate into an insurmountable inability of low- and moderate-income households to recover from a catastrophic event.

This article also critiques the intentional diversion of CDBG funds to non-CDBG mandated recovery projects and evaluates the corresponding adverse impact on the neediest populations. It is also important to examine the provision of waivers and their possible abuse. Moreover, an analysis of spending patterns is required to determine whether the government designed and implemented a paucity spending strategy. Such a strategy would involve intentional under-spending of funds meant for low- and moderate-income households and the transformation of those resources into "surplus" funds for spending on other projects inconsistent with legislative intent.

In short, the primary goal of this article is to provide a potential framework to assess the complex, thorny, and often subjective decisions of governmental bodies in interpreting and executing legislative intent. This type of analytical framework is vital in insuring that low- and moderate-income households and small businesses can reconstitute themselves in their original communities after natural disasters like Hurricane Katrina. However, even in the best of circumstances, communities will change due to new housing codes and building regulations. Without this analytical framework, there is the impending grave danger of the wholesale redesign of communities after disasters. In other words, jurisdictions would have unbridled freedom to allocate funds as they see fit, which would allow the government to re-envision and redesign certain communities. This could be pursued as a strategy even if it means limiting the

ability of low- and moderate-income households to return to their former communities or to be made whole.

Currently, there are visible and troubling examples of the redesign of communities impacted by a natural disaster. By illustration, Mississippi's redevelopment of the Port of Gulfport ("Port Project") became the crown jewel for the reshaping of the Gulf Coast after Hurricane Katrina. Central to the process and strategy of reshaping was the designation of the Port Project as the economic development centerpiece. While people were in dire need of direct assistance in order to survive and return to their pre-Katrina standard of living, the Port Project became a principal priority. Funds were allocated and shifted to the Port Project, not only to restore it to its original size and condition, but also to finance a significant expansion project. This decision indicates the priorities of government officials in charge of disaster relief and demonstrates that the life-sustaining needs of those most adversely impacted by the disaster are not of primary concern to the officials charged with establishing and implementing the policies that govern the recovery efforts. Granted, the provision of indirect recovery relief through the expansion of infrastructure may potentially expand the tax base and create new jobs, but it withholds and delays the flow of immediate recovery assistance to many in need. Thus, the underserved are left to design a survival strategy, watching from the shadows as recovery funds are poured into the Port Project.

In the aftermath of the storm, the particular types of development that flourished highlight the reshaping most graphically. The reshaping scheme takes visible shape as the new port, high rise buildings, and casinos glitter in the skyline and take center stage along the white beaches of the coast. From the view of the underserved in the Gulf Coast communities, this reshaping represents a type of "fool's gold," making it terribly evident that everything that glitters is not gold, at least not for those awaiting basic assistance with housing.

A critical examination of the Gulf Coast recovery programs reveals a multidimensional puzzle, with a Rubik's Cube effect, as funds are reallocated, shifted, and renamed. At first glance, this puzzle appears to fit together to create a complete and coherent recovery picture. However, on closer evaluation, this recovery picture contains forced fits, missing pieces, and alterations, making any attempt to track and critique the expenditures difficult, if not impossible. In this article, I attempt to unravel a portion of the multidimensional puzzle by analyzing how funds were allocated and

subsequently expended. In doing so, I endeavor to demonstrate the cumulative adverse impact of the policies and implementation strategies of the recovery relief on the low and moderate income communities that the effort was designed to assist.

II. Overview

The full scope of the crisis caused by Hurricane Katrina may not be apparent for many years to come. In scores of areas across the Gulf Coast, the post-Katrina quality of life for untold residents has changed immeasurably. In the early morning hours of August 29, 2005, Hurricane Katrina made landfall along the Gulf Coast, slamming into the low-lying areas with devastating force.[2] "The damage from Hurricane Katrina to Mississippi's housing supply was of such magnitude as to create an immediate state of emergency: 70,000 homes were destroyed, and 160,000 were damaged."[3] Those residents who managed to evacuate returned to find their homes or apartments destroyed or uninhabitable. The Federal Emergency Management Agency's ("FEMA") slow response in providing housing forced residents to "[take] shelter wherever they could: in damaged but unoccupied structures, automobiles, churches, tents provided by early relief workers, or even blankets outside under trees."[4] Eventually, FEMA delivered a number of trailers to residents for temporary housing.[5]

The state of affairs in the Gulf Coast had become so acutely drastic with people in such desperate need that the U.S. Congress undertook to pass legislation in December 2005 to subsidize the relief and recovery effort in the Gulf States.[6] The Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act,

2. John Jopling, *Two Years after the Storm: The State of Katrina Housing Recovery on the Mississippi Gulf Coast*, 77 Miss. L.J. 873 (2008).

3. *Id.* at 873 (citing Office of Gov. Haley Barbour, One Year After Katrina: Progress Report on Recovery, Rebuilding and Renewal 15 (2006), *available at* http://www.governorbarbour.com/recovery/links/documents/oneyearafterkatrinaimages/OneYearAfterKatrina.pdf (last visited Apr. 25, 2010)).

4. *Id.*

5. Gov. Haley Barbour: *Preparation Vital During Quiet Part of Hurricane Season* (WLOX television broadcast Aug. 4, 2006). "Later, as FEMA trailers finally began to arrive, these temporary structures averaging 240 square-feet in size served as housing for many residents of South Mississippi. By the spring of 2006, 100,000 Mississippians were living in 37,000 FEMA trailers." *Id.*

6. Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

2006 ("the Act") was passed into law on December 30, 2005.[7] Through the Act, Congress appropriated $5.05 billion to Mississippi in CDBG funds for necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure directly related to the consequences of the covered disasters.[8] This appropriation of CDBG funds was designed to support a number of programs that were to be created by the Governor's office and approved by the U.S. Department of Housing and Urban Development ("HUD").[9] Administration of the CDBG funds fell under the auspices of the Mississippi Development Authority ("MDA").[10]

When the state initially received the CDBG funds, Congress expressly mandated how the funds were to be used.[11] Specifically, Congress provided that "[t]he State must certify that, in the aggregate, not less than 70 percent of the CDBG funds received by the state during a period specified by the state, not to exceed three years, will be used for activities that benefit persons of low and moderate income."[12] Congress also vested the Secretary of HUD with the discretion to waive requirements and modify standards upon application of the state, when such waiver would not be inconsistent with the overall purpose of the Act.[13] As such, the Secretary may waive the requirement that 70% of CDBG funds benefit low-to-moderate income individuals so long as at least 50% of the funds granted primarily benefit persons of low-to-moderate income, unless the state demonstrates a "compelling need."[14] However, Congress limited the Secretary of HUD's discretion in certain ways. For example, Congress expressly denied the Secretary of HUD the authority to waive requirements relating to fair housing, nondiscrimination, labor standards, and the environment.[15]

In an attempt to comply with Congress' directive, the MDA initiated the Homeowner Grant Assistance Program ("HAP"), which entailed two phases of fund allocation designed to assist homeown-

7. *Id.*

8. *Id.*

9. *Id.*

10. Jopling, *supra* note 2, at 877.

11. 24 C.F.R. § 570.484 (2009).

12. 24 C.F.R. § 570.484(a) (2009).

13. 119 Stat. at 2680.

14. *Id.*

15. *Id.*

ers who suffered damage caused by Hurricane Katrina.[16] The two phases of HAP, individually and collectively, sought to address the housing crisis caused by Hurricane Katrina. "Phase I was designed to help homeowners outside the federally-designated flood plain who suffered storm surge damage. Phase II [wa]s aimed at lower-income residents who suffered storm surge damage, whether inside or outside the flood plain. Neither phase assist[ed] residents who suffered only wind damage."[17]

Mississippi requested and received waivers from HUD for more than 80% of the total CDBG funds initially allocated for the relief and recovery effort, including HAP funds.[18] This practice of requesting and receiving waivers directly resulted in low-to-moderate income individuals and minorities being disproportionately undercompensated for their losses, or left out of the recovery effort altogether. Despite the unmet needs of these individuals, and Congress' intent to assist low-to-moderate income individuals, Mississippi authorized a plan to divert unspent CDBG funds to indirect recovery relief through economic development.[19]

In the fall of 2007, the Mississippi Development Authority publicized its Port Project.[20] The proposal described how the state would divert to the Port Project roughly $600 million of the $1.97 billion allocated for Phase I of the Homeowner Grant Assistance Program.[21] Even at a cursory glance, this reallocation of HAP funds to the Port Project raises the appearance of a questionable use of recovery funds. However, a more detailed critique is required to illuminate the harm suffered by low- and moderate-income communities due to the government's action. At a time when the housing crisis on the Gulf Coast remained bleak and unchanging, especially for low- and moderate-income individuals, the decision to divert $600 million from funds allocated for the massive housing recovery effort invites a close examination. The reallocation of program funds is contrary to Congress' intended use of the

16. John A. Lovett, *Rebuilding a Region: Housing Recovery Efforts in the Wake of Katrina and Rita*, 20 PROB. & PROP. 49, 51 (2006). Each phase of the HAP program is designated respectively as Phase I and Phase II. *Id.*

17. Jopling, *supra* note 2, at 878.

18. *Id.*

19. Mississippi Development Authority, Amendment 5: Port of Gulfport Restoration Program (Dec. 12, 2007), *available at* http://www.msdisasterrecovery.com/documents/PortofGulfportFinal12-12-07.pdf (last visited Apr. 25, 2010) [hereinafter PORT PROPOSAL].

20. *Id.*

21. *Id.*; *see also* MISSISSIPPI DEVELOPMENT AUTHORITY, CDBG DISASTER RECOVERY EXPENDITURE OVERVIEW, (SEPT. 30, 2007), http://www.msdisasterrecovery.com/documents/093007%20DRGR%20Summary%20Report.pdf (last visited Apr. 25, 2010).

resources for disaster relief and recovery.[22] To deny assistance to minorities and impoverished people in the wake of a natural disaster in favor of funding economic development projects is inexcusable. As Frederick Douglass stated, "where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organized conspiracy to oppress, rob, and degrade them, neither persons nor property would be safe."[23]

III. KATRINA'S IMPACT ON THE LOW-TO-MODERATE INCOME GROUPS

The damage caused by Hurricane Katrina in Mississippi was devastating. The Governor's Commission Report, issued December 31, 2005, documented the extent of the damage wrought by Katrina and indicated that it was borne in significant and disproportionate part by low- and moderate-income households:

> About two-thirds of the housing units in [Hancock, Harrison, and Jackson] counties were occupied by households with income below the U.S. median level (approximately $42,000 as of the year 2000). In Hancock and Harrison Counties alone, almost 75 percent of the housing units were occupied by households living below the U.S. median income level.[24]

In the Mississippi coastal counties of Hancock, Harrison, and Jackson, "about 65 percent of the housing units exposed to the surge and over 57 percent of the units exposed to flooding were occupied by households with incomes below the U.S. median household income level."[25] The vast majority of small rental housing units were damaged by the hurricane and a significant portion suffered severe damage.[26] The program designed to address the need for small

22. 119 Stat. at 2779-80 (describing the Community Development Fund).

23. FREDERIC MAY HOLLAND, FREDERICK DOUGLASS: THE COLORED ORATOR 359 (Funk & Wagnalls 1891).

24. JAMES L. BARKSDALE, GOVERNOR'S COMM'N ON RECOVERY, REBUILDING, AND RENEWAL, AFTER KATRINA: BUILDING BACK BETTER THAN EVER 51 (Dec. 31, 2005), *available at* http://www.mississippirenewal.com/documents/Governors_Commission_Report.pdf (last visited Apr. 25, 2010).

25. *Id.* at 54.

26. U.S. DEPT. HOUS. URBAN DEV., CURRENT HOUSING UNIT DAMAGE ESTIMATES: HURRICANES KATRINA, RITA, AND WILMA FEBRUARY 12, 2006, 5 (revised April 7, 2006), *available at* http://www.dhs.gov/xlibrary/assets/GulfCoast_HousingDamageEstimates_021206.pdf (last visited Apr. 25, 2010) [hereinafter DAMAGE ESTIMATES REPORT]. According to the report, Hurricane Katrina damaged more than 80% of the rental housing stock (33,964 out of 42,288 units) in Mississippi's coastal counties. *Id.* at 28-30 (percentage calculated from Renter-Occupied Housing Units totals for Hancock, Harrison, and Jackson counties). Over 56% of the rental housing stock (19,172 out of 33,964 units) was single family rental units. *Id.*

rental units was estimated to construct only 6,000 rental housing units.[27]

Hurricane Katrina hit low-income renters especially hard. Over half of the rental housing stock damaged by the hurricane was leased to low-income persons.[28] Very low-income persons receiving federal voucher assistance also lost available housing stock.[29] Notably, a shortage of affordable housing existed prior to Hurricane Katrina.[30] As such, lower income residents are particularly dependent upon federally funded housing recovery programs because of the loss of such a large percentage of affordable housing. Planned construction for an estimated 5,730 Low Income Housing Tax Credit Units in the coastal area over the next few years would still leave a significant unmet need for low-income rental units.[31] Additionally, several of the projects approved by the Mississippi Home Corporation for tax credit funding have been placed on hold due to objections and complaints by local residents and local government officials.[32] As such, the pre-Katrina shortage of affordable housing is further exacerbated by the expanded necessity for the development of affordable housing for low-income households.

IV. Congressional Mandates for CDBG Funding

Congress intended for CDBG funds made available by the Act to principally benefit low- and moderate-income persons.[33]

> The primary objective of this chapter and of the community development program of each grantee under this chapter is the development of viable urban communities, *by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income.*[34]

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27. Press Release, Office of Gov. Haley Barbour, Low Income Mississippians Benefit from Recovery Housing Programs (Sept. 18, 2007), http://www.governorbarbour.com/news/archive/news/2007/sep/pr.LowIncomeHousingPrograms.htm (last visited Apr. 25, 2010) [hereinafter Press Release]. $262.5 million was allocated for small rental housing units. *Id.*

28. Barksdale, *supra* note 24, at 53-54.

29. Michael Kunzelman, *Unhabitable Habitats: Tenants Living in Squalor,* Sun-Herald (Biloxi), April 16, 2006, at A19 ("Before Katrina, the coastal office of the Mississippi Regional Housing Authority had 1,592 units of affordable housing. The hurricane damaged roughly 80 percent of those units, displacing 800 families . . . .").

30. Jopling, *supra* note 2, at 875.

31. Press Release, *supra* note 27.

32. Dana Enfinger, *NIMBYism Strikes in Mississippi,* Affordable Housing Finance, July 2007, *available at* http://www.housingfinance.com/ahf/articles/2007/jul/NIMBYISM0707.htm (last visited April 23, 2010).

33. 119 Stat. at 2680.

34. *See* 42 U.S.C. § 5301(c) (2009) (emphasis added).

HUD notifications emphasized this important purpose: "[t]he aggregate use of CDBG disaster recovery funds shall principally benefit low- and moderate-income families in a manner that ensures that at least 50 percent of the amount is expended for activities that benefit such persons."[35] An additional requirement includes the submission of a plan to demonstrate how the use of CDBG funds will prevent homelessness among low- and moderate-income individuals and families with children.[36]

Congress appropriated $11.5 billion in emergency CDBG funds for disaster recovery in the states hit by Hurricane Katrina.[37] The stated purpose for the CDBG funds was to primarily benefit low-to-moderate income individuals adversely affected by Katrina.[38] The rationale behind this expressly stated purpose is apparent. Those individuals with low-to-moderate income typically have little to no savings and live paycheck-to-paycheck. They rent or may have a mortgage payment, or they may live in public housing. As such, they do not have the means or wherewithal to recover without government assistance. Recognizing this dilemma, Congress allocated $11.5 billion to assist the impacted states in providing assistance for low- and moderate-income households.

Notably, at the time disaster funds are appropriated it is impossible to predetermine the definitive amount of resources which in fact may be needed for recovery. Recognizing this dilemma, limited discretion was granted to the Secretary of HUD to waive requirements and establish alternative standards for the use of CDBG funds by the states.[39] The Secretary was given authority to

35. Allocations and Common Application and Reporting Waivers Granted to and Alternative Requirements for CDBG Diaster Recovery Grantees Under the Department of Defense Appropriations Act, 2006, 71 Fed. Reg. 7666, 7671 at ¶ 20(i)(2) (Feb. 13, 2006).

36. 71 Fed. Reg. at 7669 ¶ 7 (b)(iii). "Each State must submit to HUD an Action Plan for Disaster Recovery that describes . . . [t]he grantee's overall plan for disaster recovery including . . . [h]ow the State will provide or encourage provision of adequate, flood resistant housing for all income groups that lived in the disaster impacted areas," including how it will "prevent low-income individuals and families with children (especially those with incomes below 30 percent of median) from becoming homeless." 71 Fed. Reg. at 7669 ¶ 7.

37. 119 Stat. at 2680.

38. *Id.* at 2779-80.

39. *Id.* at 2780.

> Provided further, that in administering the funds under this heading, the Secretary of Housing and Urban Development shall waive, or specify alternative requirements for, any provision of any statute or regulation that the Secretary administers in connection with the obligation by the Secretary or the use by the recipient of these funds or guarantees (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment), upon a request by the State that such waiver is required to facilitate the use of such funds or guarantees, and a finding by the Secretary that such waiver would not be inconsistent with the overall purpose of the statute, as modified.

Id.

waive any requirement—"except for requirements related to fair housing, nondiscrimination, labor standards, and the environment"[40]—so long as the waiver did not reduce the benefit to the low- and moderate-income households below the 50% requirement without "a finding of compelling need."[41] The 50% requirement for waiving the standard relating to low-to-moderate income individuals is above the minimum required for waiving other standards. This provides additional evidence that Congress intended the funds be used to benefit low-to-moderate income individuals.

A HUD notice published in the Federal Register provides that "[a] CDBG grantee uses its grant funds for eligible activities, such as rehabilitation of a single house, construction of a water and sewer line, providing childcare through a particular program, or making a loan to a small business."[42] Therefore, the state, as recipient of the CDBG funds, must use the grant to further these specific activities in order to be eligible to receive the funds. Furthermore, "[e]ach activity must demonstrate benefit by meeting one of the three national objectives of the CDBG program."[43] These national objectives include: (1) providing benefit to low- and moderate-income persons; (2) preventing or eliminating slums or blight; and (3) addressing urgent community needs for which no other funding exists.[44]

Mississippi's allocation of CDBG funds for the Port Project does not comport with Congress' intended use of these funds. At the time the Port Project was proposed, Mississippi failed to demonstrate a compelling need, and the Secretary of HUD's waiver, indicating that it *is* a compelling need, is directly contrary to HUD's own published notices.[45] Mississippi's use of the funds granted under the waivers from the 50% requirement run afoul of the first national objective for CDBG funds. A significant number of low-to-moderate income households continue to be left without any practical housing choices or any assistance under the policies and or programs implemented by the state. Hence, it is difficult to see how the primary benefit was to low- and moderate-income persons.

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40. *Id.*

41. *Id.*

42. Reconsideration of Waivers Granted to and Alternative Requirements for the State of Mississippi's CDBG Disaster Recovery Grant Under the Department of Defense Emergency Supplemental Appropriations To Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 73 Fed. Reg. 75733, 75735.

43. *Id.*

44. *Id.*

45. *Id.*; *see also* PORT PROPOSAL, *supra* note 19.

Closely tied to the first objective is the second objective of preventing or eliminating slums or blight. The elimination of slums often corresponds with the construction of low-to-moderate income housing. However, unlike in other projects, Mississippi has failed to invest a proportionate amount of funds into the reconstruction of affordable rental housing for low- and moderate-income households. Because the funds are not being used for this purpose, it is difficult to formulate a persuasive argument that the state can satisfy the second objective or fulfill Congress' express intent to assist low-to-moderate income individuals with the emergency funds.

The third national objective is a catch-all provision that covers "urgent community needs for which no other funding exists."[46] Mississippi and the Secretary of HUD may argue this objective justifies the allocation of funds in the manner contemplated and executed by them. However, I question this assertion. The third national objective set forth for the use of CDBG funds predicates funding for urgent need based upon a lack of available funding from other sources. Here, a variety of different sources, including the state's general budget, private funding, outsourcing to private companies, port revenues, and other federal grant programs are available as resources for the Port Project. Thus, Mississippi could have funded the Port Project through an assortment of different methods and provided more direct assistance to the low-to-moderate income individuals still in need. Instead, the Governor of Mississippi requested that HUD allow Mississippi to divert $600 million from CDBG funds intended to restore safe and affordable housing, in order to fund the expansion of the Port.[47] This request does not comply with the CDBG funding objectives.

V. THE PORT OF GULFPORT RESTORATION PROJECT

A. *The Initial Proposal*

In November 2005, Mississippi Governor Barbour presented to Congress and members of the Mississippi Legislature a request for federal funding, beyond FEMA Disaster Relief, to address recovery needs.[48] Included in the Governor's presentation was a proposal from the Mississippi Development Authority entitled the Port of Gulfport Restoration Program Amendment 5, which was intended "to provide funding to the Mississippi State Port Authority to facili-

46. *Id.*

47. PORT PROPOSAL, *supra* note 19, at 2.

48. *Id.*

tate the restoration of public infrastructure and publicly owned facilities that were destroyed by Hurricane Katrina, to provide mitigation against future damage and to provide for the long term recovery of the operating capacity of the Port."[49] Nowhere in this stated purpose for the Port Project does Mississippi mention a significant benefit for low-to-moderate income individuals. Regardless, the Secretary of HUD approved this project and approved funding the project through the reallocation of funds intended to restore safe and affordable housing in the worst struck areas of Mississippi. Thus, Mississippi was given license to use nearly $600 million of CDBG funds on the Port Project, instead of using the funds—as Congress intended—to develop housing for low-to-moderate income individuals. The question then arises: "What benefit, if any, will the Port Project confer upon the poor, the minorities, and the jobless in and around Gulfport?"

B. *Maritime Jobs Created by the Port of Gulfport*

In order to evaluate potential benefits that may be conferred upon low-to-moderate income workers by the Port Project, it first must be ascertained what benefits the Port of Gulfport provided before Hurricane Katrina. Pre-Katrina, there were 3,200 direct, induced, and indirect maritime jobs associated with the Port in 2005; as of 2007, there were only 2,000.[50] Prior to Katrina the Port supplied a total of 2,058 direct maritime jobs, of which 205 were held by individuals with low-to-moderate income levels.[51] Thus, of all the direct maritime jobs derived from the Port, only 9.96% were held by low-to-moderate income workers. Extrapolating this percentage to the potential job creation, only 10% of the funds used for the Port Project will benefit persons of low-to-moderate income. In contrast, Congress intended that at least 50% of the CDBG funds benefit low-to-moderate income individuals.[52] This dichotomy illustrates that Mississippi has focused less on the low-to-moderate income worker than the federal government mandated.

By 2007, direct maritime jobs had fallen to only 1,286, of which low-to-moderate income individuals held 141 of those jobs.[53] This equates to only 10.96% of the direct maritime jobs being held by low-to-moderate income individuals. Looking to the 2007 Master

49. *Id.* at 12.
50. *Id.* at 4.
51. *Id.*
52. 119 Stat. at 2780.
53. PORT PROPOSAL, *supra* note 19, at 4-5.

Plan, which Mississippi's Port Authority approved, the Port Authority estimates that by 2015, the Port Project will create 5,400 direct, indirect, and induced jobs.[54] However, applying the percentage of low-to-moderate workers before Katrina to the Port Authority's projection, the Port Project will only result in a total of approximately 540 jobs being held by low-to-moderate income workers. The MDA qualified this program under the low-to-moderate national objective by granting applicants with low-to-moderate incomes first access to those positions vacant before Katrina, and those positions created by the expansion. Although the program appears to satisfy the national objective to serve low-to-moderate income individuals, in reality it will not. The Port Project fails to meet the national objective of benefiting low-to-moderate income individuals because it provides no more jobs to low-to-moderate income workers than pre-Katrina. The Port Project does not primarily benefit low-to-moderate income workers, since it is unlikely to result in the employment of a greater percentage of low-to-moderate income workers. Additionally, while the Port Project grants a preference to low-to-moderate income workers, the program fails to distinguish between pre-Katrina Mississippi residents and recent immigrants to the state. This serves to create competition for those low-to-moderate income workers living in Mississippi before the hurricane. Furthermore, Mississippi's failure to restore safe and affordable housing prevents low-to-moderate income workers from taking advantage of the few jobs available at the Port because they essentially have no available housing.

Some argue that the job expansion caused by the Port Project satisfies the public benefit waiver. However, it is unlikely that the Port Project will satisfy the public benefits waiver when evaluating the potential job creation for low-to-moderate income workers and for low-skilled labor. On the other hand, it is much more likely that—through increased mechanization—the proposed plan will result in *fewer* jobs for low-skilled labor. The state requested an extension of the waiver approved under the State's Economic Development Plan to evaluate the public benefit of the planned Port Project.[55] This argument would be feasible if port expansion funds were to be diverted from the Economic Development Program, not the Housing Assistance Program. The public benefit waiver request is predicated upon the fact that economic develop-

54. *Id.* at 4.

55. *See* 24 C.F.R. § 570.482(f) (2005) (standards for evaluating public benefit).

ment activities for job creation can only be measured in the aggregate, and must create or retain at least one full-time, permanent job per $35,000 of CDBG funds used.[56] It is not HUD policy to include indirect jobs in the expected job creation total, and it is not HUD practice to use such a long time horizon as this proposal does (until 2015). This is especially the case here, where there is an immediate and direct need. Indeed, under this proposal, any fair assessment of the proposal demonstrates the astronomical ratio of CDBG dollars spent per job. If the state was allowed until 2010 to meet its jobs creation potential, then there would be, according to the projections in the Port Proposal, a net increase of only 1,062 direct jobs, *which adds up to about $600,000 per job.*[57] Finally, given the lack of affordable housing, low- and moderate-income workers would face a challenge finding an affordable place to live in order to take a job created by the Port expansion.[58]

C. *Veiled Funding for the Port Expansion Project*

In both the *One Year Later* and *Two Years Later* reports issued by the Office of Governor Barbour, there is no mention of allocating CDBG funds towards the restoration of the Port of Gulfport. It is first mentioned in the economic section of the *Three Years Later* report. The governor's office claims that this "$600 million [Port Project] will re-establish the state's shipping industry" and recapture a major portion of the region's job base.[59] However, the governor's office fails to specify the source of the $600 million. Clearly, Mississippi must pull the $600 million from some other project in which CDBG funds were originally allocated. According to the U.S. Government Accountability Office ("GAO"), between 2006 and 2008, Mississippi reallocated almost $800 million of its CDBG housing funds toward economic development, thus reducing the state's housing allocation from 63% to 52%.[60] The GAO noted

56. *Id.*

57. *See* PORT PROPOSAL, *supra* note 19, at 4.

58. Dana Enfinger, *NIMBYism Strikes in Mississippi*, AFFORDABLE HOUSING FINANCE, July 2007, *available at* http://www.housingfinance.com/ahf/articles/2007/jul/NIMBYISM0707.htm (last visited April 25, 2010).

59. OFFICE OF GOVERNOR HALEY BARBOUR, THREE YEARS AFTER KATRINA: PROGRESS REPORT ON RECOVERY, REBUILDING AND RENEWAL 19-20 (Aug. 29, 2008), *available at* http://governorbarbour.com/images/ThreeYearsAfterKatrina.pdf (last visited Apr. 25, 2010) [hereinafter THREE YEARS AFTER KATRINA].

60. THE STEPS COALITION, HURRICANE KATRINA: HAS MISSISSIPPI FALLEN FURTHER BEHIND? TRENDS & CHALLENGES IN MISSISSIPPI'S DISASTER RECOVERY 3 (Sept. 24, 2009), *available at* http://www.stepscoalition.org/downloads/news/headlines/k+4_report.pdf (last visited Apr. 25, 2010).

that Mississippi diverted $600 million in unused housing funds to bankroll a port expansion.[61] As of August 2009, the first round of construction contract awards, totaling more than $11 million had been completed and a second round was underway.[62] At the same time, the Port Authority and MDA began the initial draw-down of more than $20 million in allocated CDBG funds.[63] However, the $20 million was not allocated from a line item included in the original $5.4 billion of CDBG funds awarded post-Katrina because the Port Project had not been proposed at that time. Instead, Mississippi took these "allocated" CDBG funds from a separate project. Using CDBG funds for the expansion of the Port Project directly contradicts the stated Congressional intent for the use of the CDBG funds. Congress never intended to subsidize the expansion of the port at the expense of the low-to-moderate income individuals still struggling to return to safe and affordable housing.

Prior CDBG proposals for home recovery did not mention the Port Project, although some evidence indicates that Mississippi planned this project well before the hurricane.[64] "Before Hurricane Katrina, the Port of Gulfport was undertaking a $114 million, five-year construction plan from 2000 to 2005. Between 2000 and 2010, the Port of Gulfport expected construction projects to total $200 million."[65] In its proposal for the Port Project, the state sought a

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61. *Id.*

62. OFFICE OF GOVERNOR HALEY BARBOUR, FOUR YEARS AFTER KATRINA: PROGRESS REPORT ON RECOVERY, REBUILDING AND RENEWAL 16 (Aug. 29, 2009), http://www.governorbarbour.com/images/28.8.09FourYearsAfterKatrina.pdf (last visited Apr. 25, 2010) [hereinafter FOUR YEARS AFTER KATRINA].

63. *Id.*

64. The Governor's Commission Report recommended that: (1) a Coastal Port Council be created to run the ports; and (2) an inland port similar to the port proposed at the Port of Gulfport be built. BARKSDALE, *supra* note 24, at 34-35. "Funding resources would include the Mississippi Development Authority, the state of Mississippi, and Harrison and Jackson counties." *Id.*

65. Letter from The Steps Coalition, Inc., to Gray Swope, Mississippi Development Authority (Sept. 24, 2007), *available at* http://www.stepscoalition.org/downloads/news/reports/port_comment_11.pdf (last visited Apr. 25, 2010). *See also* JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW (PEER), REPORT TO THE MISSISSIPPI LEGISLATURE: THE IMPACT OF HURRICANE KATRINA ON MISSISSIPPI'S COMMERCIAL PUBLIC PORTS AND OPPORTUNITIES FOR EXPANSION OF THE PORTS, at 95, *available at* http://www.peer.state.ms.us/reports/rpt487.pdf (last visited April 23, 2010) (2006) [hereinafter PEER REPORT]. The PEER Report also notes that:

> The Port of Gulfport last had an update to its master plan in 2003. One of the main issues the port has faced is the balance between the shipping process and the recreational activities on leased port property. The port is working with the Department of Transportation regarding access for both recreational and cargo handling purposes. The port authority also has design plans for a cruise market whereby the port would receive per passenger wharfage of $2.50 to $4.75, plus charges for parking and miscellaneous items. The port authority also plans to continue expansion into the forest products arena, with importation of Brazilian lumber and exportation of paper and pulp products.

diversion of $600 million from the CDBG funds, with little discussion about the extent of the damage to the Port caused by the hurricane.

A review of the Joint Legislature's PEER Report makes it clear that the damage to, and even the value of, the Port at Gulfport is only a fraction of the amount that would be diverted to this project. According to the PEER Report, a January 31, 2006 assessment of the Port found that the port suffered $50,556,175 in damage from the hurricane, but retained an assessed value of $127,573,778.[66] The Port had at least $108 million in insurance on the premises and has been in negotiations with its insurance carrier.[67] These figures indicate that the Port Project is designed to do more than simply repair the damage to the Port of Gulfport caused by Hurricane Katrina.[68] The premise of the project is a vast expansion of the Port—a project that was planned and discussed well before the hurricane. The Port Project included the proposed construction of a new "intermodal/inland port facility" two miles inland, a rail yard, and a wheeled storage area. In short, the Port Project is a major new development that will cost *twelve times* more than the damage to the existing port and about *five times* the assessed value of the existing port.[69]

The Port Project does not meet the requirements of CDBG appropriation because the state has not sought a waiver of the requirement that at least 50 percent of the funds primarily benefit persons of low- and moderate-income. Such a waiver requires a "finding of compelling need."[70] In the past, Mississippi acknowledged that most of its proposals for these CDBG funds required such a waiver, and accordingly sought one, including a waiver for Phase I of the Homeowners Assistance Program. Indeed, as previ-

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> The port has attracted some of Louisiana's cargo through the Crowley *liner* service, and may obtain some of New Orleans's lumber, frozen goods, and other cargo.

Id. at 40.

66. *Id.* at x. It also appears that until now the State never contemplated using the CDBG grants for this program. The PEER report indicates that the expected source of funds to repair the Port of Gulfport were "Port funds, FEMA, and insurance." *Id.* The Governor's Commission report states that funds would come from MDA, the state of Mississippi, and Harrison and Jackson Counties. BARKSDALE, *supra* note 24, at 35.

67. Letter from The Steps Coalition, Inc., to Gray Swope, Mississippi Development Authority 9 (Sept. 24, 2007), *available at* http://www.stepscoalition.org/downloads/news/reports/port_comment_11.pdf (last visited Apr. 25, 2010) (citing Holbrook Mohr, *House Chairman Refuses to Allow Update on Katrina-damaged Port during Hearing*, Associated Press, Feb. 15, 2007).

68. Although the Port was damaged by the storm, the Port Proposal indicates that by 2006 the Port was on its way to recovery and operating at approximately two-thirds of pre-storm capacity. PORT PROPOSAL, *supra* note 19, at 3.

69. *See generally* PORT PROPOSAL, *supra* note 19.

70. 119 Stat. at 2780.

ously noted in the introduction, these waivers covered 80% of the total CDBG appropriation for Mississippi. However, in the proposal for the Port Project, Mississippi did not set percent requirements, creating the necessity for a waiver.

D. *Alternate Sources of Funding for the Port*

The proposed funding of the Port Project is a dramatic departure from the purpose of the CDBG program's emergency hurricane relief grant. Mississippi is taking advantage of the extensive hurricane relief money to finance an economic development project drawn up well before the damage caused by the hurricane. It is important to note that ports typically do not receive government funding for expansion. Government entities customarily fund such projects by issuing bonds guaranteed with expected revenues. It is also the established practice to offer land grants to private enterprises as incentive for investment to fund infrastructure improvements.

As of March 2009, only twenty-four of the eighty-six CDBG Community Revitalization projects awarded were under construction, and only five of the sixty-seven CDBG Regional Waste and Wastewater projects awarded were under construction.[71] As of August 2009, the Community Revitalization project had only disbursed approximately $28.8 million of the awarded $234.8 million.[72] Similarly, while about $241 million in CDBG funds has been allocated to Mississippi, as of August 2009, Mississippi had only spent $57.5 million.[73] In other words, a significant amount of money is available for projects such as the Port and badly needed housing funds should not be diverted.

Mississippi has already received extremely large amounts of federal money for infrastructure projects and economic development. For example, the governor's *Two Years Later* report states that "FEMA has obligated more than *$2.3 billion* to Mississippi through the Public Assistance Reimbursement Program to repair, replace, or restore damaged publicly owned facilities and those of certain nonprofit organizations."[74] Notably, the "rebuilding of public

71. FOUR YEARS AFTER KATRINA, *supra* note 62, at 13.

72. *Id.* at 14.

73. *Id.* at 16.

74. OFFICE OF GOVERNOR HALEY BARBOUR, TWO YEARS AFTER KATRINA: PROGRESS REPORT ON RECOVERY, REBUILDING AND RENEWAL 20 (Aug. 29, 2007), *available at* http://governorbarbour.com/images.TwoYearsAfterKatrina.pdf (last visited March 15, 2010) [hereinafter TWO YEARS AFTER KATRINA].

buildings and replacement of their contents—represents the largest permanent work category. There are 865 large building projects set to take place, with an estimated price tag of nearly $500 million. Small public facility projects account for another $30 million."[75] In addition to the Public Assistance Reimbursement Program funds, the Port Project may qualify for other types of funding.[76] There are also several state grant programs for which the Port Project may qualify.[77] Thus, adequate alternative sources of funding exist for the Port Project and financial resources should not be diverted from the housing programs that are so needed. Mississippi's Port Project is extraordinary because of this diversion of funds from essential housing programs to an alternative, discretionary expansion project.

VI. Mississippi's Flawed Recovery and Renewal Plan

A. *The Governor's Commission on Recovery, Rebuilding, and Renewal*

In response to the destruction caused by Hurricane Katrina, Mississippi Governor Haley Barbour requested the formation of a privately funded commission to identify problems, explore funding options, and recommend approaches for implementation. In December 2005, the Governor's Commission on Recovery, Rebuilding, and Renewal ("Commission") issued a report detailing its recommendations for Mississippi's renewal plan.[78] With a particularized focus on aiding the "hardest hit communities," the Commission issued 238 recommendations—36 in the "Housing" category, including various strategies for the development of affordable housing.[79] However, Mississippi's actual disbursements and expenditures do not follow the Commission's recommendations. Instead,

75. *Id.*

76. Barksdale, *supra* note 24, at 35.

77. Section 65-1-20 of the Mississippi Code established the Office of Intermodal Planning to fund infrastructure improvements for the state's ports. Miss. Code Ann. § 65-1-20 (1994). Correspondingly, section 57-61-41 of the Mississippi Code authorizes the Mississippi Development Authority to provide low interest loans for ports that are seeking to revitalize or to expand and Section 65-1-707 provides for grants for improvements in public facilities. Miss. Code Ann. §§ 57-61-41, 65-1-707 (2009). Thirty-eight percent of these funds are specifically allocated for port development. § 65-1-707. Ports can use the funds for dredging activity or to fund capital improvement. *Id.*

78. Barksdale, *supra* note 24.

79. *Id.* at iv, 48-76. The Commission's housing recommendations included short term analyses, pilot efforts, changes to building and zoning codes, and financial mechanisms. *Id.* at 48-76.

the state has left the neediest population substantially unassisted by making it harder for these individuals to access necessary funding.

More than half of the Mississippi households severely affected by Katrina were "below the U.S. median household income level."[80] Thus, the Commission recommended that these low-income residents be designated as "Investment Areas" and that the target market that receives federal funds include these "Investment Areas."[81] This form of directing housing resources to low-income/wealth residents would be based on a version of the U.S. Treasury Department's Investment Area Criteria.[82] One major advantage to this funding approach would be that "[b]y using existing models, speed and accountability [would] be increased."[83]

The Commission initially recommended that several assessments be conducted. These included: (1) county-by-county and community-by-community housing needs assessments, (2) a best practices assessment to analyze zoning ordinances, model codes, and management practices, and (3) a barriers assessment to aid the creating of safe and efficient housing.[84] The Commission recommended that these assessments be executed as soon as possible, suggesting the completion of a full report within six months.[85]

In order to "ensure that enough affordable housing options [were] available to support the area's residents and employment base," the Commission urged the state to oversee local government implementation of permanent affordable housing goals.[86] These required plans would be created based on the above-stated assessments.[87] The Commission further suggested that local governments provide developers with "incentives to encourage [them] to incorporate a greater percentage of affordable housing within their projects" in place of, or in addition to, requiring developers "to develop a minimum percentage of affordable housing."[88] Such incentives might include "density bonuses that allo[w] higher densities than would normally be allowed within the zoning requirements [or] expedited permitting."[89] Another recommendation included a

80. *Id.* at 54.
81. *Id.* at 63-64.
82. *Id.* at 64.
83. *Id.*
84. BARKSDALE, *supra* note 24, at 55-56.
85. *Id.* at 55-56.
86. *Id.* at 62.
87. *Id.*
88. *Id.* at 62-63.
89. *Id.* at 63.

combination of tax incentives to developers and lower interest rate loans through a federal mortgage pool.[90] The tax incentives would "allow home builders to sell the homes at cost with after-tax incentives that [would] guarantee them an effective net profit."[91]

The Commission also encouraged the expansion of low income housing tax credits ("LIHTC") for "all areas affected by the hurricane."[92] By doing so, these tax credits would create a greater incentive for developers to build affordable housing and make rental rates more reasonable in all hurricane-affected areas, "not solely in areas of high poverty concentration."[93] In a complimentary manner, the Commission recommended that "[a] percentage of units in all LIHTC projects . . . be dedicated to very low-income families."[94] The State of Mississippi would need to lobby HUD to "make a policy revision," so that the existing funds may be redirected.[95]

The Commission endorsed several "pilot projects to test ideas quickly."[96] These projects included creating a program to develop permanent housing on a site currently being used for temporary housing.[97] This program would serve several purposes, including the development of an efficient process for transitioning from temporary to permanent accommodation. The program would also demonstrate that when these temporary housing modules were no longer needed they could be developed into affordable permanent residences.[98]

Based on the information set out in the annual progress reports of the Governor's Office, it is unclear as to whether the low-income residents were designated as "Investment Areas" based on a version of the U.S. Treasury Department's Investment Area Criteria.[99] Upon review of the reports it is also difficult to determine whether the governor provided developers with incentives to promote the construction of affordable housing.[100]

The Governor's Commission stated in its report that "the presence or absence of assets, and insurance on those assets, [would]

90. BARKSDALE, *supra* note 24, at 64-65.
91. *Id.* at 65.
92. *Id.* at 67.
93. *Id.*
94. *Id.*
95. *Id.*
96. BARKSDALE, *supra* note 24, at 56.
97. *Id.* at 56-57.
98. *Id.* at 57-58.
99. *Id.* at 64.
100. *Id.* at 62-63.

determine who [could] participate in the long-term rebuilding of South Mississippi."[101] Since many homeowners did not have significant assets or flood insurance, the Commission recommended renewal strategies geared towards "asset-building among low-wealth families and communities."[102] Even after Mississippi allocated CDBG funds for the intended purpose of benefiting the "hardest hit communities," those low-to-moderate income individuals still have not received enough support.[103]

In May 2008, a representative of Mississippi's Office of Recovery and Renewal testified in a Congressional oversight hearing that its housing programs would restore or exceed the 52,512 housing units with major and severe hurricane damage.[104] Three programs were the key to the state's assurance: (1) long-term workforce housing, (2) small rental assistance, and (3) low income housing tax credit properties.[105] In reality, these three programs will fall 18,500 units short of prior forecasts, according to figures in the Mississippi Housing Data Project, a report commissioned by Governor Barbour.[106]

B. *Homeowner Grant Assistance Program*

The Mississippi Development Authority initiated the Homeowner Grant Assistance Program ("HAP") which entailed two phases of fund allocation designed to assist homeowners who suffered damage caused by Hurricane Katrina.[107] The two phases of HAP, individually and collectively, sought to address the housing crisis caused by the disaster. However, despite being designed to correct the housing problem, Phase I and Phase II had dramatically different purposes, goals, and practical impacts. While "Phase I was designed to help homeowners outside the federally-designated flood plain who suffered storm surge damage," Phase II was "aimed at lower-income residents who suffered storm surge damage," regardless of whether or not their home was located in the flood

101. *Id.* at 48.

102. BARKSDALE, *supra* note 24, at 48.

103. *Id.*

104. THE STEPS COALITION, *supra* note 60, at 6 & n.4 (citing *Emergency CDBG Funds in the Gulf Coast: Uses, Challenges, and Lessons for the Future, Before the Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Services*, 110th Cong. 110 (2008) (statement of Jack Norris, Executive Director, State of Mississippi Governor's Office of Recovery and Renewal), *available at* http://financialservices.house.gov/hearing110/norris_-_ms_(complete).pdf (last visited Apr. 25, 2010)).

105. *Id.* at 6.

106. *Id.*

107. Lovett, *supra* note 16, at 49, 51.

plain.[108] "Neither phase assist[ed] residents who suffered only wind damage,"[109] and both Phase I and Phase II left many low to moderate income households without recovery assistance.

1. *Phase I of the Homeowner Grant Assistance Program*

In March 2006, the MDA released its first plan, subject to HUD approval. HUD released $3.4 billion of the $5 billion allocation for HAP disbursements.[110] In order to qualify for Phase I assistance, an applicant was required to meet the following criteria:

(1) You owned and occupied your home as of August 29, 2005;
(2) Your home was located in the Mississippi Counties of Harrison, Hancock, Jackson, or Pearl River;
(3) Your home was your primary residence on August 29, 2005;
(4) You maintained homeowner's insurance on the property; and,
(5) Your home was outside the pre-Katrina designated flood zone (FEMA-designated one-hundred-year flood zone) on August 29, 2005, yet suffered flood damage as a result of Hurricane Katrina.[111]

Ironically, these requirements focused only on homeowners with insurance who lived outside of the flood plain when it was the flood plain that suffered the worst damage. Not only did this area suffer the worst damage, most of the coastal residents inside the flood plain lacked flood insurance. In fact, "[o]ver 90 percent of the homes in Harrison County did not have flood insurance."[112] Even though the Commission's goal was to "help people without insurance bridge the affordability gap, Phase I was not focused on this objective."[113] The Phase I requirements "were premised on the belief that these homeowners made a good faith effort to protect their homes" with insurance, which make them a priority for assistance.[114] In contrast to this belief, many low- and moderate-income families could not afford flood insurance. Additionally, insurance is a private contract entered into by the homeowner and the insurance company, and the insurance companies were not providing the resources to fund Phase I grants to homeowners. Instead, the funds

108. Jopling, *supra* note 2, at 878.

109. *Id.*

110. Lovett, *supra* note 16, at 51 (citing Mississippi Development Authority Partial Action Plan, Final Plan, *available at* http://www.mshomehelp.gov.approved%20ap.pdf (last visited Apr. 25, 2010)).

111. Mississippi Home Help, Katrina Homeowner Grants, Phase I Grant Program Guidelines, http://www.mshomehelp.gov/guidelines.htm (last visited Apr. 25, 2010).

112. BARKSDALE, *supra* note 24, at 50.

113. *Id.*

114. TWO YEARS AFTER KATRINA, *supra* note 74, at 14.

were from federal tax dollars. The funding provided by Congress was not restricted or limited to parties with private contracts for insurance, but was intended for citizens in need of assistance. Simply put, the state's plan for Phase I did not treat all taxpayers equally. The proof of insurance condition resulted in a disproportionately large number of low-to-moderate income individuals being left out of the recovery effort.

2. *Phase II of the Homeowner Grant Assistance Program*

In an effort to correct the disproportionate lack of assistance for low-to-moderate income individuals and minorities, Mississippi initiated Phase II of the HAP. Phase II differed from Phase I in that homeowners who lived inside the flood plain were eligible, but a household income requirement of 120% or below of the Area Median Income ("AMI") was added. The maximum compensation level was $100,000.[115] The MDA redirected "$700 million of the $3 billion initially allocated for Homeowner Assistance Grants to the Phase II Homeowner Grant Assistance Program."[116] The requirements for Phase II eligibility were:

(1) You owned and occupied your home as your primary residence on August 29, 2005;
(2) Your home was located in Harrison, Hancock, Jackson, or Pearl River Counties;
(3) Your home received flood surge damage as a result of Hurricane Katrina; and
(4) Your household income was at or below 120% of the AMI.[117]

As indicated, Phase II was specifically designed in order to assist and benefit low-to-moderate income individuals who suffered damage as a result of Hurricane Katrina.

An overarching problem with this program stemmed from the discrepancy in the amount of allocations for each phase. Phase I, directed to assist the homeowners *with* insurance and *not* in the floodplain, originally received $3.4 billion of CDBG funds. After the MDA redirected $700 million of the Phase I funds to Phase II, Phase I was still left with a hefty $2.7 billion. The applicants eligible for receiving assistance under Phase II were the residents for whom

115. MISSISSIPPI DEV. AUTH., HOMEOWNER ASSISTANCE PROGRAM MODIFICATION NUMBER 4: PHASE II 2 (2006), *available at* http://www.mshomehelp.gov/p2_action_plan.pdf (last visited Apr. 25, 2010) [hereinafter MODIFICATION NUMBER 4].

116. *Id.*

117. Mississippi Home Help, Katrina Homeowner Grants, Phase II, Housing Needs Assistance Program Guidelines, http://www.mshomehelp.gov/p2_guidelines.htm (last visited Apr. 25, 2010).

Congress originally intended the CDBG funds to benefit. Notably, Phase II was designed to assist those Mississippians in the most striking need of aid, the low-to-moderate income individuals, but the CDBG funds distributed to Phase II did not even amount to 30% of those allocated to Phase I. In fact, the *Two Years After* Report states that "[m]ore CDBG funds have been allocated for Phase I than for any other CDBG program."[118] Not only did the residents eligible for Phase I assistance have a higher maximum compensation level of $150,000, they could choose whether to apply for relief through the program or to file an insurance claim instead.[119] Consequently, the insured homeowners were protected in at least one of two reliable ways.

As of October 2006, Mississippi's total insurance claim payments had peaked at $11.9 billion.[120] Of this, "[o]ver $2.4 billion in flood insurance claims ha[d] been paid to Mississippi homeowners after Katrina."[121] The amount of flood insurance payouts combined with the $2.7 billion in Phase I assistance adds up to over $5 billion in available aid for those insured residents. Alternatively, only Phase II protected the low-income residents who were unlikely to be able to afford insurance if they wished to receive direct housing assistance in the form of compensation. The grants for these homeowners existing beneath the poverty line came from a pool of $700 million, far less than the money pool available to the insured residents. While HAP was reaching an end, several insurance companies agreed to reopen numerous Hurricane Katrina claims on the Gulf Coast and continue to provide payments to the insured residents.[122]

Although Phase I and Phase II applicants were "eligible for an elevation grant of up to $30,000 to help defray the added costs of elevating their homes in accordance with the Advisory Base Flood Elevations," they were still required to foot the bill for the additional prerequisites necessary to rebuild.[123] The program assistance only reached the residents' uncompensated housing damage.[124] "Th[e Phase II] program contain[ed] the same [stringent] building code, [higher] elevation and flood insurance requirements of Phase

118. TWO YEARS AFTER KATRINA, *supra* note 74, at 13.

119. *Id.* at 14.

120. *Id.* at 17.

121. *Id.* at 18.

122. *Id.* at 17-18.

123. *Id.* at 14.

124. *Id.*

I. In addition, the Phase II covenant require[d] that hazard insurance, as well as flood insurance, be maintained on the damaged property in perpetuity."[125] These insurance requirements prevented many residents from applying for the HAP, due to the considerably higher insurance premiums contrasted with those before Katrina.[126]

The *Three Years After* Report indicates that more than $1 billion were disbursed through HAP in the first two years after Katrina.[127] It should be noted that this report fails to show that at that time, "over $976 million had been given to more than 13,500 homeowners" in Phase I and approximately $40 million had been distributed to Phase II applicants.[128] Hence two years after Katrina, the Phase II residents received less than 5% of the $1 billion disbursed through the entire program. Although applications for both phases were still being processed as of the end of August 2008, final grant disbursements were expected to be concluded by the end of that year.[129] As of August 2009, 18,829 grants had been paid in Phase I and 8,881 in Phase II.[130] At that time, payments distributed to Phase I and Phase II applicants amounted to $1.49 billion and $500 million respectively.[131] The total of $2 billion used for HAP proved to be far less than the $3.4 billion originally allocated to the entire program. Not only did HAP fail to distribute the maximum amount of CDBG funds allocated to this program, but the low-income Phase II applicants, those in the most critical need of assistance, received far less than the insured Phase I applicants.

Landowners have realized a loss in value due to new regulations and code requirements for rebuilding in the area.[132] There is a lack

125. OFFICE OF GOVERNOR HALEY BARBOUR, ONE YEAR AFTER KATRINA: PROGRESS REPORT ON RECOVERY, REBUILDING AND RENEWAL 19 (Aug. 29, 2006), *available at* http://www.governorbarbour.com/recovery/links/documents/oneyearafterkatrinaimages/OneYearAfterKatrina.pdf, (last visited Apr. 25, 2010) [hereinafter ONE YEAR AFTER KATRINA].

126. TWO YEARS AFTER KATRINA, *supra* note 74, at 18.

127. THREE YEARS AFTER KATRINA, *supra* note 59, at 5.

128. TWO YEARS AFTER KATRINA, *supra* note 74, at 12, 14.

129. THREE YEARS AFTER KATRINA, *supra* note 59, at 13.

130. FOUR YEARS AFTER KATRINA, *supra* note 62, at 9.

131. *Id.*

132. In the regulatory area, the courts essentially mandate that property be judged as void of all economic value and economic use before you find a compensable taking has occurred. I argue a commensurable quasi-taking occurs when a government regulation in effect deprives one, due to their wealth, of the ability to use ones property for its intended use. Where a regulation covers a property and forces the owner of the property into a framework that demands the sale of the property in order to receive some economic value or the property must remain vacant and an unused, the impact of the regulation is the same. The disturbing dichotomy is that if the government regulation is viewed as depriving the property

of insurance coverage currently on properties in the affected area that do not have mortgages or are "heir properties," meaning concurrently owned family properties. A great amount of HAP funds remain unspent. However, the Office of Governor Barbour created a chart in the *Four Years After* Report that portrayed $2 billion allocated to HAP, thus making it appear as though the program had distributed the full amount allocated.[133] In reality, the remaining $1.4 billion were redirected from HAP to another program unrelated to housing recovery. Both Phases fell short of satisfying the basic goals of the Commission's recommendations leaving a disproportionately large number of low-to-moderate income individuals and households, especially renters, left out of the recovery effort.

C. *Small Rental Assistance Program*

After Katrina, the lack of affordable rental housing caused rent on the Gulf Coast to skyrocket, creating a full-circle dilemma.[134] Low-income families were particularly devastated as over 80% of the rental housing stock was damaged.[135] To comply with Congress' intent in providing the funding for hurricane relief, the state's hurricane recovery strategy is expected to alleviate the rental housing crisis. However, the current allocation of recovery funds actually exacerbates, or at least plays a major role in perpetuating, the rental housing crisis.

As part of its effort to administer the CDBG funds, the MDA established the Small Rental Assistance Program ("SRA Program"). The purpose of the SRA Program is "to provide affordable rental housing by offering incentives for small-scale rental property owners—owners of properties containing between one and four rental units."[136] The SRA Program was originally allocated $262.5

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owner of all economic value, the 5th Amendment and the applicable due process clause would require a payment of just compensation (to the owner). However, when the regulation forces the owner to sell the property to a private party and it destroys all of the normal features/aspects/dimensions of the negotiation process, by placing the knowledge in the hands of the private party, that the owner must sell or allow the property to remain idle; thus depriving the owner of just bargaining power. A property owner is denied property rule protection for this tract due to his wealth status. Without the income to sustain paying taxes, mortgage amounts, cost necessary to live in another location and other amounts necessary to keep the title to the property, the owner cannot say, 'no I will not sell' and must accept the price offered by the private party because they are without bargaining power. The sale is forced due to their income and the regulations that encumber the tract.

133. FOUR YEARS AFTER KATRINA, *supra* note 62, at 9.

134. TWO YEARS AFTER KATRINA, *supra* note 74, at 15.

135. See *supra* notes 24-26 and accompanying text.

136. Mississippi Small Rental Assistance Program Application Guidebook 1 (Oct. 1, 2007), *available at* http://www.msdisasterrecovery.com/documents/SRAP%20Book%201.4%2010012007.pdf (last visited Apr. 25, 2010) [hereinafter SRA PROGRAM GUIDEBOOK].

million and is expected to "provide loans, in an aggregate amount up to $250 million, to owners of small rental properties located in Hancock, Harrison, Jackson, and Pearl River counties."[137] Landlords in these four coastal counties are offered four types of assistance under the SRA Program: (1) rental income subsidy assistance; (2) repair or reconstruction reimbursement for Katrina-damaged property; (3) reconstruction or conversion reimbursement for non-Katrina damaged property; and, (4) new construction reimbursement.[138]

Initially, the SRA Program was expected to provide for the construction and rehabilitation of 6,000 rental housing units.[139] However, in Governor Barbour's *Four Years After* Report, the projected total number of units was lowered to 4,000.[140] Notably, as of August 2009, only 1,120 rental housing units were occupied[141]—a far cry from the 19,000 or more single family rental housing units damaged by Hurricane Katrina.[142] The *Four Years After* Report also depicts the amount allocated to the SRA Program as $232.5 million—$30 million less than the original allocation.[143] This reduced allocation is likely a result of the redirection of those housing funds to an unrelated project.

The most glaring problem with the SRA Program is the small percentage of CDBG funds allocated to the program. Mississippi received more than $5.4 billion in funding from HUD, but only distributed 4.3% of these funds to the SRA Program.[144] Certainly, other redevelopment programs are worthy of funding, but the SRA Program directly aids the most needy demographic of the population—the demographic that Congress expressly intended to receive a large portion of the recovery funds. Simply put, such a small allocation of CDBG funds is unjustifiable because the storm dispropor-

137. Mississippi Development Authority Small Rental Assistance Program CDBG Disaster Recovery Action Plan 2-3 (June 12, 2007), *available at* http://www.msdisasterrecovery.com/documents/SmallRentalFinal%206_12.pdf (last visited Apr. 25, 2010) [hereinafter SRA PROGRAM ACTION PLAN].

138. *Id.* at 3; SRA PROGRAM GUIDEBOOK, *supra* note 136, at 1.

139. Press Release, *supra* note 27.

140. FOUR YEARS AFTER KATRINA, *supra* note 62, at 9.

141. *Id.*

142. DAMAGE ESTIMATES REPORT, *supra* note 26, at 28-30 (total calculated from source).

143. FOUR YEARS AFTER KATRINA, *supra* note 62, at 9.

144. SRA PROGRAM ACTION PLAN, *supra* note 137, at 2-3. "Mississippi received a $423,036,059 allocation in CDBG funding from HUD as part of the $5.2 billion federal appropriation through the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006." *Id.* at 2. Additionally, Mississippi received a $5.058 billion HUD allocation "from the $11.5 billion federal appropriation through HR 2863." *Id.*

tionately impacted rental housing and low-to-moderate income people.

D. *Alternative Housing Program*

In order to further the idea of sustainable recovery, the Mississippi Alternative Housing Program was developed.[145] This program corresponded with the Commission's pilot project recommendation and was "intended to address several key areas, including the speed of construction and deployment to the site, safety and improved living conditions."[146] This program, also known as the Mississippi Cottage, was created to "replace travel trailers" and provide an alternative "approach to transitional emergency housing," which would "be designed in a way that it [could] be removed from the site once a permanent home [was] constructed."[147] Congress initially appropriated $400 million for the Mississippi Cottage pilot project and Mississippi applied to FEMA for these funds.[148]

Mississippi received $281 million for the two-year pilot program, set to expire in March 2009.[149] Mississippi planned to "pursu[e] options to install the modular units permanently once the temporary program [was] complete."[150] Three years after Katrina, two alternative housing designs were produced and a third design was under development.[151] The Park Model, the first one-bedroom unit, was occupied on June 21, 2007, two years after Katrina.[152] By August 2008, 2,800 units had been occupied and installed. An additional 200 units were to be donated to nonprofits to provide affordable housing for their constituents.[153] Approximately 3,000 to 4,000 units were estimated to be constructed and occupied during the remaining time of the two-year period.[154] In contrast to the estimate, the number installed in August 2008 defined the peak of the program, and the estimated goal of 3,000 to 4,000 units was never

145. ONE YEAR AFTER KATRINA, *supra* note 125, at 10.

146. *Id.*

147. *Id.*

148. *Id.*

149. THREE YEARS AFTER KATRINA, *supra* note 59, at 12-3.

150. *Id.* at 12.

151. *Id.*

152. TWO YEARS AFTER KATRINA, *supra* note 74, at 16.

153. THREE YEARS AFTER KATRINA, *supra* note 59, at 12.

154. TWO YEARS AFTER KATRINA, *supra* note 74, at 16.

reached.[155] As of August 2009, 1,700 units were still categorized as temporary and had not yet become permanent.[156]

This program, designed "to construct and install better housing for those living in FEMA travel trailers and mobile homes," did not meet its full potential within the projected and reasonable time frame.[157] Three years from the date of the hurricane, 4,300 trailers remained.[158] Four full years after Katrina, 475 FEMA travel trailers and mobile home units are still in the state.[159] Equally as important, many individuals have no alternate housing other than FEMA trailers, many of which are contaminated with formaldehyde.[160] In an effort to prevent formaldehyde poisoning, the CDC and FEMA conducted studies of the trailers used as emergency temporary housing.

> CDC's preliminary evaluation of a scientifically established random sample of 519 travel trailers and mobile homes tested between Dec. 21, 2007 and Jan. 23, 2008 showed average levels of formaldehyde in all units of about 77 parts per billion (ppb). Long-term exposure to levels in this range can be linked to an increased risk of cancer, and as levels rise above this range, there can also be a risk of respiratory illness. These levels are higher than expected in indoor air, where levels are commonly in the range of 10-20 ppb. Levels measured ranged from 3 ppb to 590 ppb.[161]

Despite these findings and the dangerous implications of living in these trailers, people continue to reside in them throughout southern Mississippi. Unfortunately, those residents are not there by choice—they have nowhere else to go as a result of the slow start to the Mississippi Cottage program. Increased complexity resulted from a lack of affordable rental housing in and around the Gulf Coast of Mississippi.

E. *Low Income Housing Tax Credit Projects*

An additional element of Mississippi's housing recovery plan includes using LIHTC as a means to spur development of affordable rental apartments. These credits provide federal income tax incen-

155. FOUR YEARS AFTER KATRINA, *supra* note 62, at 9.

156. *Id.*

157. THREE YEARS AFTER KATRINA, *supra* note 59, at 12.

158. *Id.* at 3.

159. FOUR YEARS AFTER KATRINA, *supra* note 62, at 4.

160. FEMA, CDC Releases Results of Formaldehyde Level Tests: FEMA to Expedite Relocation of Residents from Temporary Housing Units. Release Date, http://www.fema.gov/news/newsrelease.fema?id=42606 (last visited Apr. 25, 2010).

161. *Id.*

tives for the development of apartments affordable to low- and moderate-income households.[162] Only families with a household income at or below 60% AMI would be eligible to occupy these LIHTC apartments.[163] The monthly rent for a two-bedroom LIHTC apartment in the three costal counties would be $650 or less.[164]

The Gulf Opportunity Zone Act authorized the Mississippi Home Corporation to annually allocate approximately $35 million in LIHTC in 2006, 2007, and 2008.[165] In August 2007 a total of $68 million in LIHTC had been allocated to Mississippi's six lower counties with an expectation that over 5,700 rental housing units would be constructed.[166] One year later, the total number of expected units increased to 5,823 units.[167] Remarkably, the governor's report includes an expected increase in the number of units to be built, but fails to disclose any increase in the total amount of LIHTC allocations. The governor's *Four Years After* Report indicates that a total of $105 million in LIHTC had been allocated, with 3,900 to 5,000 units projected and a total of 2,281 units online.[168] Initially the program appears to have successfully re-built a large number of the apartments destroyed by Hurricane Katrina, thereby alleviating the rental housing crisis. However, a closer inspection reveals that even once the additional 1,600 to 2,700 units are constructed, a shortage of *affordable* rental housing units will continue to exist.

In 2008 the MDA funded a housing recovery assessment to help guide the state's housing policies.[169] The Mississippi Housing Data Project ("Housing Study") began in May 2008, three full years after the hurricane, and sought to "assess the timing and relationships of the housing recovery of population, the geographic distribution of damage and recovery, and on damage and recovery as they impact various sub-populations."[170] While the Housing Study projected

162. THREE YEARS AFTER KATRINA, *supra* note 59, at 15.

163. *Id.*

164. *Id.*

165. *Id.*

166. TWO YEARS AFTER KATRINA, *supra* note 74, at 15.

167. THREE YEARS AFTER KATRINA, *supra* note 59, at 15.

168. FOUR YEARS AFTER KATRINA, *supra* note 62, at 9. The expected number of apartment units quoted in the four year report is based on Mississippi's three coastal counties, not the six counties on which the two year report was based. These reporting inconsistencies make it difficult—but not impossible—to analyze the direct impact of LIHTC upon the rental housing market.

169. *Id.* at 5.

170. *Id.*

that 100% of the Pre-Katrina housing supply would be available by mid-2011, the Housing Study found that "while availability is not a problem, affordability is."[171] Specifically, the Housing Study found an increase in affordable housing was needed for "as many as 5,000 lower-income households."[172] Thus, even after years of recovery efforts and over $105 million in LIHTC, 5,000 members of Mississippi's neediest residents are still in need of government assistance.

F. *The Treatment of Wind Damage versus Surge Damage*

Notably, the state's recovery plan left out Mississippians who suffered wind damage to their homes, a total of approximately 32,500 owner-occupied housing units and approximately 16,900 renter-occupied units.[173] Over 7,750 of the owner-occupied housing units suffering wind damage were without hazard or flood insurance.[174] The cost to repair a home with major damage ranged between $33,000 and $53,000, while the cost to repair a home with catastrophic damage ranged between $70,000 and $210,000.[175] The average wind damage insurance settlement among the three coastal counties was $15,869 and did not cover the full cost of repairs.[176] For homes with wind damage, after deducting the average insurance payout, the unmet need starts at $17,000 for major damage, and $54,000 for catastrophic damage.

A large number of low-income African-American households in Mississippi's coastal communities exclusively suffered wind damage because segregated patterns of settlement placed African-American families on the north side of the railroad tracks.[177] When Katrina hit, the railroad tracks functioned as a levee, protecting these homes from flood damage.[178] Nonetheless, an appreciable number of these residences were of older construction, with greater deferred maintenance, and greater vulnerability to windstorm damage than other residences.[179] Unlike their counterparts in Louisiana, these Mississippians have been left out of the so-called "compre-

171. *Id.* at 6.

172. *Id.*

173. DAMAGE ESTIMATES REPORT, *supra* note 26, at 28-30 (total calculated from source).

174. *Id.*

175. Letter from The Steps Coalition, Inc., to Gray Swope, Mississippi Development Authority 7 (Sept. 24, 2007), *available at* http://www.stepscoalition.org/downloads/news/reports/port_comment_11.pdf (last visited Apr. 25, 2010).

176. *Id.*

177. *Id.*

178. *Id.*

179. *See generally* BARKSDALE, *supra* note 24, at 51-54.

hensive" recovery plan. Mississippi is aware of the need to help low-income homeowners whose homes suffered wind damage, but the state has rejected repeated calls to include wind-damaged homes among the homes eligible for the home grant programs. As such, the Mississippi housing crisis continued because the state's recovery plan fails to adequately redress the destruction caused by Hurricane Katrina.

VII. Impact on Minority Hurricane Victims

Taking a microscopic view of Katrina's devastation, the storm had a disproportionate impact on minorities. In the hurricane damaged parts of Mississippi, African-Americans, Latinos, and Vietnamese have higher poverty rates and lower rates of homeownership than whites. "According to the 2000 U.S. Census, African-American populations have higher poverty rates and lower homeownership rates than white populations in the hurricane-affected area."[180] In total, the African-American poverty rate is 27.1% compared to 10.4% for whites. The overall homeownership rate is 49.8% for blacks compared with 74.0% for whites, with some communities, such as Latinos and Vietnamese, having an even greater disparity.[181] Due to the economic disparities and institutionalized discrimination, African-Americans, Latinos, and Vietnamese, are more likely than whites to be renters. Renters made up half of the residents in the low-income communities on the coast, African-Americans in those Gulf Coast communities are even more likely to be renters, particularly in Gulfport and Moss Point/Pascagoula, where the prevalence of renters is 63% and 67% respectively.[182] Similar to African-Americans, Latinos and Vietnamese are more likely than whites to be renters due to lower average incomes.[183] A significant number of Vietnamese and Latino households, who resided on the Gulf Coast, lost their homes, businesses, and community support systems just as others did. Thus both groups needed specialized assistance in the recovery effort.[184]

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180. Oxfam America, Recovering States? The Gulf Coast Six Months After the Storm 7 (Feb. 2006).

181. *Id.* at 8.

182. *Id.* at 13.

183. Estimate from National Alliance of Vietnamese American Service Agencies.

184. According to the National Alliance of Vietnamese American Service Agencies and local community leaders, an estimated 10,000 Vietnamese reside in Mississippi, but are severely undercounted in the census. According to the 2000 Census, some 5,387 Vietnamese reside in Mississippi.

A. *Legal Challenges Under the Fair Housing Act*

In past proposals, Mississippi included a blanket statement claiming to have conducted an Analysis of Impediments to Fair Housing (AI), and that these impediments "will be addressed" at annual implementation workshops. This alone will not meet its Fair Housing Act (FHA) obligation. Only a general reference to the AI conducted in July 2004 is included.[185] This AI is outdated, and the Plan's rote statement indicates that Mississippi has not identified or addressed impediments to fair housing goals since Katrina. Mississippi falls short of its affirmative obligation through the state's failure to assess current impediments since the storm, even on an interim basis. A restatement of the language required for fair housing certifications without more is insufficient.[186] If the state does not actually consider impediments to fair housing in its proposed plan, including the disproportionate exclusion of minorities, its certification does not comport with the affirmative obligations, and HUD should question the plan as "inaccurate."[187] In fact, the overall plan itself is a new impediment to fair housing, since it disproportionately excludes people of color from the housing assistance needed. As a second omission, Mississippi does not include their standard fair housing language in this proposal. As Mississippi made proposal after proposal, large numbers of low-to-moderate income individuals and families, many of whom are disproportionately minority or persons with disabilities, became displaced due to the loss of housing stock from the storm and through rent increases. Those increases priced many low-to-moderate income residents out of the market. Failure to address this indicates a violation of the FHA.[188]

B. *Recovery Plan Inadequacies*

The question as to whether the administration of CDBG funds satisfies the Fair Housing Act obligation to "affirmatively further"

185. MISSISSIPPI DEVELOPMENT AUTHORITY, MISSISSIPPI ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING: FINAL REPORT, April 9, 2004, *available at* http://www.mshomecorp.com/development/pdf/Fair%20Housing.pdf (last visited Apr. 25, 2010).

186. *See* 42 U.S.C. § 5304(b) (2); 24 C.F.R. § 91.325(a) (1).

187. 24 C.F.R. § 91.500(b) (3).

188. Schmidt v. Boston Housing Authority, 505 F. Supp. 988, 993-94 (D.C.Mass.1981) ("The Fair Housing Act . . . was enacted in 1968 to prohibit a wide variety of discriminatory housing practices ranging from a discriminatory refusal to rent or sell on the basis of race to discrimination in the terms and conditions of housing. The legislative history of the Act reveals that in enacting this legislation Congress was attempting to remedy its past failures in ending racial discrimination in housing by espousing the concept of affirmative action.").

fair housing also needs a critical examination. The "[b]road and inclusive language of the Fair Housing Act (FHA) must be given generous construction to carry out a policy that Congress considered to be of the highest priority."[189] In administering these CDBG funds, the state is subject to the FHA, which prohibits discrimination by intent or effect.[190] The FHA states that it is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[191]

The goal of the FHA is to prevent unlawful discrimination based on race, regardless of whether the discrimination involves disparate treatment or disparate impact.[192] The state, like HUD and other agencies administering federal programs "relating to housing and urban development," is required to administer all such programs "in a manner affirmatively to further" fair housing.[193] This provision imposes "a substantive obligation to promote racial and economic integration" in federal housing programs.[194] Under the FHA, this affirmative duty is not merely to refrain from discrimination, but also to use federal programs to actively promote the goals of the FHA. This includes not intentionally, nor disproportionately, excluding African-Americans or other minorities—including persons with disabilities and families with children—from participating in proposed programs. The affirmative duty also includes not contributing to the displacement and exclusion of residents of the Mississippi Gulf Coast, who are also members of groups protected by the FHA.[195]

At a minimum, this obligation to affirmatively further fair housing requires that the state (like HUD and other state agencies, such as local housing authorities) to consider the effects of housing policy decisions on racial segregation.[196] Mississippi courts have char-

189. Nevels v. W. World Ins. Co., 359 F. Supp. 2d 1110 (W.D. Wash. 2004).

190. 42 U.S.C. § 3604(a) (2009).

191. 42 U.S.C. § 3604(b) (2009).

192. Lumpkin v. Farmers Group, Inc, No. 05-2868, 2007 U.S. Dist. LEXIS 98949, at *6 (W.D. Tenn. July 6, 2007).

193. 42 U.S.C. § 3608(d), (e) (2009).

194. *See, e.g.*, Alschuler v. HUD, 686 F.2d 472, 482 (7th Cir. 1982).

195. *See, e.g.*, NAACP, Boston Chapter v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 154-55 (1st Cir. 1987); Anderson v. Alpharetta, 737 F.2d 1530, 1535 (11th Cir. 1984); *see also* Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 72 (D. Mass. 2002).

196. In *Shannon v. HUD*, the Third Circuit found that the agency's failure to consider the effects of its housing policies on racial segregation was impermissible. 436 F.2d 809 (3d Cir. 1970). The holding is clear: an agency cannot meet its affirmative obligations under the Civil

acterized the FHA by stating, "This chapter is an appropriate and constitutionally permissible exercise of congressional power under the 13th Amendment to the United States Constitution to bar all racial discrimination, private as well as public, in sale and rental of real property."[197]

C. *Discriminatory Impact of State Action*

The decisions of Governor Haley Barbour and the MDA concerning the reallocation of nearly $600 million from housing programs to fund the Port Project has not furthered the FHA's affirmative obligations to promote the goal of fair housing throughout the United States. Traditionally, HUD has borne the responsibility of ensuring that the affirmative goals of the FHA are met and furthered in public and private real estate transactions. Disturbingly, HUD approved the reallocation of the CDBG funds from Phase I of the Homeowners' Assistance Program to fund the Port Project.[198] Subsequently, HUD approved the reallocation of nearly $51.6 million from Phase II of the HAP in order to fund the Port Project.[199] HUD's failure to stop Governor Barbour and the MDA from redirecting money to the Port Project, intended for low-to-moderate income individuals, has not gone unnoticed: "HUD has abdicated its oversight role—it has failed to ensure that housing needs of thousands of low- and moderate-income families decimated by Katrina come first."[200]

As previously noted, to grant a reallocation of funds, HUD was required to grant a waiver ensuring that at least 50% of the funds

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Rights Acts unless it gathers data and considers all relevant racial and socioeconomic factors related to its decision's effects. *Id.* at 821-22. Numerous precedents similarly require agencies to collect data and consider the racial impacts of their housing decisions. *See, e.g.*, Alschuler v. HUD, 686 F.2d 472, 482 (7th Cir. 1982); Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 78 (D. Mass. 2002); Project B.A.S.I.C. v. Kemp, 776 F. Supp. 637, 642 (D.R.I. 1991); Young v. Pierce, 685 F. Supp. 975, 978 (E.D. Tex. 1988); Bus. Ass'n of Univ. City v. Landrieu, 660 F.2d 867, 869 (3d Cir. 1981); Jones v. Tully, 378 F. Supp. 286, 292 (E.D.N.Y. 1974); Blackshear Residents Org. v. Hous. Auth. of Austin, 347 F. Supp. 1138, 1147 (W.D. Tex. 1971).

197. United States v. Real Estate Dev. Corp., 347 F. Supp. 776 (N.D. Miss. 1972). *See also*, United States v. L & H Land Corp., 407 F. Supp. 576 (S.D. Fla. 1976); United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973), *aff'd in part, remanded on other grounds*, 509 F.2d 623 (9th Cir. 1975).

198. Desiree Evans, *HUD gives Mississippi the go-ahead to divert funds from housing to port expansion*, THE ONLINE MAGAZINE FOR THE INSTITUTE FOR SOUTHERN STUDIES, Nov. 25, 2008, http://www.southernstudies.org/2008/11/hud-gives-mississippi-the-go-ahead-to-divert-funds-from-housing-to-port-expansion.html (last visited Apr. 25, 2010).

199. *Id.*

200. *Id.* (quoting Interview by Sun Herald with Reilly Morse, Attorney, Mississippi Center for Justice).

used would directly benefit low-to-moderate income individuals. To grant this waiver, the Secretary of HUD must find that it is "not inconsistent" with the CDBG program's primary purpose—"the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, *principally for persons of low and moderate income*."[201]

The allocation of funds to projects such as the Port Project does not advance this primary purpose, and in fact violates the FHA. Secondly, the close connection between Title VII of the Civil Rights Act of 1964 and Title VIII of the FHA connotes similar readings of the prohibitions contained in each, respectively.[202] Therefore, it has been successfully argued that facially neutral policies or practices regarding real estate transactions, that have the effect of discriminating against a minority or other protected class, are a violation of the FHA. In other words, the disparate impact analysis from Title VII is equally applicable to FHA violations.[203] The availability of a disparate impact argument in FHA cases is of particular importance in the analysis of the MDA's and HUD's actions.

In an analysis of whether the policies of the MDA have violated the FHA, it is necessary to point out that Congress believed the FHA requirements were of such necessity that the Secretary of HUD was denied the authority to waive such requirements.[204] In the nearly four-and-a-half years that have passed since Katrina decimated the Gulf Coast, Mississippi has repeatedly sought waivers of the overall benefit requirement from HUD, and HUD has acquiesced to the majority of these requests. These waivers and their effect on the minorities of Mississippi constitute a violation of the FHA.[205] In the wake of Katrina, Congress passed Public Law 109-

201. 42 U.S.C. § 5301(c) (2009).

202. *Cf.* Meyer v. Bear Road Assocs., 124 Fed. Appx. 686 (2d Cir. 2005) (vacating summary judgment order where plaintiffs alleged that a facially neutral rental policy charged groups larger than four tenants living in two-bedroom or three-bedroom apartments more money, had disparate impact on families with children and stated a claim for discrimination under Fair Housing Act).

203. Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, at 523-25 (1998).

204. 119 Stat. at 2780.

205. *See* Budnick v. Carefree, 518 F.3d 1109 (9th Cir. 2008) (finding that plaintiff-developer failed to establish a prima facie case of disparate impact under the Fair Housing Amendments Act where plaintiff did not set forth any evidence, statistical or otherwise, from which it could be concluded that town's permit practices had a disproportionate impact on the disabled). Conversely, a plethora of statistical data and other evidence is available to show that Mississippi's practices regarding the reallocation of CDBG funds have had a disproportionate impact on minorities, thereby constituting a violation of the FHAA.

148, which appropriated $5.058 billion to Mississippi to aid in the relief and recovery effort.[206] As aforementioned, Congress intended this money to primarily benefit those of low-to-moderate incomes in the gulf coast of Mississippi. However, the compliance with this intention is not evident in the spending habits of the MDA or in the waivers granted by HUD.

Initially, the MDA allocated $3.26 billion to HAP, designed to assist homeowners in Mississippi who suffered damage to their properties.[207] However, of this $3.26 billion allocated, only $950 million went to benefit such low-to-moderate income individuals.[208] Phase I of HAP received a waiver from HUD for nearly $3 billion of that allotment from the overall benefit requirement. The MDA allocated only $105 million to rebuild public housing, which was close to completely wiped out.[209] This small amount, when considered in the light of the ever growing need for public housing, is simply not enough to make any significant difference. More troubling, the small amount is certainly not enough to further the FHA's affirmative obligation of fair housing, when the majority of those seeking public housing are minorities. Because Governor Barbour, the MDA, and HUD have continued to siphon off crucial funds intended primarily to benefit low-to-moderate income individuals in order to fund economic development projects, those who have suffered the longest, waiting for assistance, are unlikely to ever get help.

Despite arguments from the MDA that it is committed to promoting the national objectives for assisting low-to-moderate income individuals, its actions indicate otherwise. Although not intentionally discriminating, the facially neutral policies of Mississippi and the MDA have the effect of denying minorities safe and affordable housing. This disparate impact is a violation of the FHA, which on its own would be sufficient support in opposition to reallocating funds from Phase I and Phase II of HAP to the Port Project. This improper reallocation is even more egregious in light of the number of persons still in need of direct recovery assistance. Thousands of people are left in distressing need as a result of Hurricane Katrina, the majority of whom are minorities existing below the poverty line. Policies and programs that fail to offer direct assistance or provide only a minimal benefit to those of low-to-moderate income status

206. 119 Stat. at 2780.

207. Lovett, *supra* note 16, at 20.

208. *Id.*

209. *Id.*

appear ill-advised. Whether intentional or not, this policy of funding the port by defunding projects designed to assist those of low-to-moderate incomes has an undeniable negative effect. The cumulative impact is to deny minorities safe and affordable housing at the same rate as was offered to others deemed worthy but in less need of assistance. This effect is discriminatory and contradicts the policy and spirit of the FHA.

VIII. Conclusion

The housing crisis resulting from Hurricane Katrina has certainly not been resolved, and in fact, for many it has worsened. Thus, the situation still requires a concerted effort to create effective solutions. Four years after the hurricane, Governor Barbour's office stated "while availability is not a problem, affordability is."[210] Perhaps contributing to the difficulty was Governor Barbour's deadline for the start of construction of rebuilding projects.[211] He reportedly "pushed local governments to quicken [these] projects by placing a September 1, 2009 deadline."[212] Nevertheless, this deadline, four full years after Katrina, came a little too late. In its *Four Years After* Report, Governor Barbour's office admitted that:

> [r]educed affordability in both the rental and homeowner markets has been driven by the fundamental changes in the housing landscape that occurred after Katrina . . . includ[ing]:
> - higher insurance costs
> - the replacement of old, less expensive housing with newly constructed, more expensive housing
> - added costs to comply with higher elevation requirements
> - the delay in restoration of low-income housing associated with the longer timeframes of rebuilding public and deeply subsidized housing.[213]

Each of these changes was foreseeable, but programs and policies were not designed or implemented to prevent their occurrence. Instead, the allocation and subsequent expenditures of CDBG funds, in all income-targeted programs, expended less money at a slower pace than the income exempt programs. This created a four-year delay in recovery for those least able to stretch their personal and temporary resources until relief arrives.[214]

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210. Four Years After Katrina, *supra* note 62, at 6.

211. *Id.* at 3.

212. *Id.* at 3.

213. *Id.* at 6.

214. The Steps Coalition, *supra* note 60, at 8.

In the allocation of CDBG funds, a prevailing pattern of failing to meet the government's commitment to address the needs of low- and moderate-income people emerged. The Secretary of HUD granted waivers on the condition that Mississippi "give reasonable priority for the balance of its funds to activities that will primarily benefit persons of low and moderate income."[215] Indeed, in each of its approvals, HUD repeats the state's commitment to meet this basic purpose of CDBG funding: "Previously, the state agreed to examine other housing needs and to pursue other sources of funding to provide assistance for other compelling housing needs [for special needs and low-income renters]. . . . HUD expects the state to continue these efforts."[216] Despite these agreements, the Port Project ignores this purpose. A consistent pattern of failing to meet this commitment evolved; a pattern that violates the requirement of the CDBG appropriation. HUD regulations require the state to certify that "[t]he action plan has been developed so as to give the maximum feasible priority to activities that will benefit low- and moderate-income families."[217] The pattern established by the state's agreement and subsequent failure to fulfill its promises suggests that the requirement is not a priority for the state of Mississippi, which if proven, is contrary to the intent of Congress.

After more consideration the state will hopefully cease its diversion of any additional funds from this direct expansion of affordable housing. This is imperative as the housing crisis remains extremely severe, in particular with respect to the need for affordable rental housing. Many who evacuated the area will never be able to return due to the slow pace of expenditures dedicated to affordable housing. Only 6% of CDBG funds have been allocated to rental housing despite the fact that the impact of the storm clearly fell disproportionately on renters.[218] Families remain in FEMA trailers, many of which are contaminated with formaldehyde. They have nowhere to go because of the lack of affordable rental housing. Over one-third of HAP remains unspent and based on the unabated affordable housing crisis resources are needed to address this disastrous situation. Significant expansion of programs for rental property is especially needed. Thus, if HAP funds are to be diverted, they should be diverted to the Small Rental Assistance

215. Additional Waivers Granted to and Alternative Requirements for the State of Mississippi under Public Law 109-148, 72 Fed. Reg. 48810 (Aug. 24, 2007).

216. *Id.*

217. 71 Fed. Reg. at 7671 ¶ 20(I) (2) (emphasis added).

218. BARKSDALE, *supra* note 24, at 5.

program and to the Mississippi Cottage pilot program, which could alleviate the terrible situation of persons remaining in temporary trailers.

Hurricane Katrina was, without doubt, the worst natural disaster to befall the United States in our nation's history. Prior to Katrina, Mississippi had a higher than average number of individuals living below the AMI, or below the average income level in that area. However, because Katrina disproportionately impacted these individuals, the situation in Mississippi for low-to-moderate income households worsened exponentially. In response to this crisis, Congress initially designated over $5.05 billion in relief and recovery aid for Mississippi. In allocating the funds to this state, Congress expressly mandated that the funds primarily benefit those of low-to-moderate income. This mandate has been waived time and again by the Secretary of HUD at the behest of the State of Mississippi. Congress explicitly denied the Secretary of HUD the authority to waive requirements relating to the FHA and yet, the waivers granted by HUD since 2006 have had this very effect. These facially neutral policies underlying HAP violate the FHA, fail to further Congress' intent to primarily benefit low-to-moderate income individuals and, in the end, harm those whom Congress intended to help. When so many are remaining in critical need of so much support, any reallocation of money intended to assist them is directly contrary to Congress' intent. The economically disadvantaged and minorities of Mississippi were neglected in the recovery effort. Therefore, while Mississippi claims the goal of its recovery policy is to build a better state for the future, one must wonder what kind of state they are building and will it actually be better for everyone. Today, the answers to these ever important questions remain elusive, but if the policies enacted thus far are any indication, Mississippi is not building a better state for those with low-to-moderate income. This may well produce a forced migration of this population to other states and increases the wealth per capita in the state, thereby increasing the average incomes in the state.[219] Such an occurrence directly contradicts the founding principle of our nation: "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[220]

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219. For a discussion of the impact of large out-migration in a short period of time, *see* FRANK LEVY, DOLLARS AND DREAMS: THE CHANGING AMERICAN INCOME DISTRIBUTION 105 (1987).

220. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).