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American Dream Part III: Advancing and Improving the
Fair Housing Act

on the 5-year Anniversary of Hurricane Katrina

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The following statement is excerpted from a work-in-progress, in draft form, entitled:

Postcards from Post-Katrina New Orleans: Why government assisted housing seems destined to perpetuate racial segregation and what can be done about it?

Introduction

Consideration of the housing landscape in New Orleans following Katrina can provide an illustration of the dynamic in which federally assisted housing programs operate, the exclusionary tendencies of residential communities, and the way in which market forces and government subsidies operate together to perpetuate racial residential segregation.

Although laws prohibiting segregation and discrimination in the nation's housing programs are well-established, racial segregation persists in these programs. African Americans participating in federally assisted housing programs in New Orleans pre-Katrina experienced even higher levels of poverty concentration than the national average. Even more troubling is the fact that low income African Americans before Katrina had far less access to middle income neighborhoods throughout the New Orleans metro area when compared with low income whites.

Given that federally assisted housing programs in New Orleans have operated as engines of segregation and poverty concentration, rather than as gateways of opportunity for low income African Americans, Hurricane Katrina offered an opportunity for a new, more inclusive New Orleans where new federally assisted housing could respond to the regional housing needs of the community. However, as Orleans Parish attempted to reverse a dynamic where a majority of its occupants were renters with the second highest level of poverty concentration in the country, neighboring jurisdictions acted aggressively to avoid any demographic shifts that new rental housing, particularly new federally assisted rental housing, might bring. Rental bans proliferated throughout the region, primarily in communities that had previously served as affordable suburban alternatives for lower and middle income whites in prior decades. These communities sought not only to prevent the development of new rental housing, but to limit the repair of rental housing that pre-existed the storm. On closer examination, it appears that metro New Orleans communities that are least affordable, most homogeneous, and nationally recognized as desirable places to live have not passed sweeping rental bans, perhaps because no federally assisted housing has been proposed for these communities.

Given the extreme challenges and opportunities presented by the post-Katrina rebuilding experience in New Orleans, what can the first five years after Katrina teach us about affirmatively furthering fair housing?

The Law Prohibiting Segregation in Government-Assisted Housing Programs is Well-Established, and Yet . . .

The idea that public housing in the United States was created pursuant to a policy of racial segregation is not particularly controversial. In fact, government agencies, both federal and local, served in a leadership role in formalizing racially segregated housing patterns throughout the nation. In New Orleans, “the creation of racially segregated New Deal public housing developments was the first implementation of legally enforced residential segregation in the city.”¹

In the civil rights era, communities began to challenge government-sponsored segregation in federally assisted housing. As early as 1969, courts pronounced it unconstitutional to select sites for federally assisted housing developments on the basis of race.² Similarly, the U.S. Department of Housing and Urban Development, began in the late 1960s to issue rules and regulations prohibiting the concentration of new federally assisted housing exclusively in African American neighborhoods.³ As observed by one advocate, the idea that HUD “should no longer be permitted to routinely build new low-income housing in segregated, high-poverty neighborhoods” is a point “won” by civil rights advocates decades ago.⁴

HUD as the principal federal agency providing financial backing to local housing authorities, municipal governments, and private property owners need not be the central architect of discrimination to be held accountable. HUD has been found liable when it has done nothing to change a grantee’s operation in the face of “blatant segregation and an admitted determination to intentionally discriminate.”⁵ While awareness on HUD’s part is important in establishing its

¹ Elizabeth Fussell, *Constructing New Orleans, Constructing Race: A Population History of New Orleans*, JOURNAL OF AMERICAN HISTORY 94 (Dec. 2007), 846-55.

² See *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 913 (N.D. Ill. 1969) (the plaintiffs in this case also alleged discrimination in the assignment of tenants on the basis of race).

³ See *Young*, 628 F. Supp. at 1045-47 (discussing HUD’s site selection and marketing rules and regulations issued in 1967, 1972, and 1977 for a variety of federally assisted housing programs). *But see id.* at 1048 (discussing discriminatory implementation of site and neighborhood standards such that all Section 8 new construction units were built in white neighborhoods with no affirmative marketing programs providing access to persons of color).

⁴ Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 197 (Xavier de Souza Briggs ed., 2005).

⁵ *Clients’ Council v. Pierce*, 711 F.2d 1406, 1422 (8th Cir. 1983) (HUD provided over \$1,475,528 in funds to the Texarkana Housing Authority [THA] despite its findings spanning a decade of THA noncompliance with civil rights laws). See also *Garrett v. City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974) (“By failing to halt a city program [after it knew] discrimination in housing was being practiced and encouraged, HUD perpetuated segregation in public housing and participated in denial to the plaintiffs of their constitutional rights.”); *Young*, 628 F. Supp. at 1056 (“HUD’s intent to discriminate is established by the combination of HUD’s disingenuous assertions

liability for the discrimination and segregation being practiced by local housing agencies, courts have rejected HUD's claims of ignorance of widespread segregation in the programs it funds.⁶ As stated by Judge Justice in *Young v. Pierce*, "HUD does have a duty to know if it is funding discrimination."⁷

Nor is it necessary for a government agency to act with actual malice to be accountable for perpetuating segregation.⁸ A decision to continue funding programs and entities that perpetuate segregation is not likely to be accompanied by an intention to humiliate or cause others to suffer. Such decisions will more likely be made because of a kind of capitulation to the inevitability of segregation. The notion that segregation is inevitable makes it somehow acceptable. And yet, courts have inferred discriminatory purpose in such instances:⁹ "It is inconceivable that HUD would have so frequently acted to approve the [housing authority's] actions for so long unless its officials held the view that segregation and discrimination were acceptable."¹⁰

HUD's obligation extends beyond the prohibition on discrimination and also encompasses an affirmative duty to further fair housing in the programs it funds. For example, "Congress imposed on HUD a substantive obligation to promote racial and economic integration in administering the section 8 program."¹¹ Further, "[a]s part of HUD's duty under the Fair Housing Act, an approved housing project must not be located in an area of undue minority concentration, which would have the effect of perpetuating racial segregation."¹²

of ignorance, its actual knowledge of segregation, and its continuing financial support of each public housing site in the [36 East Texas] counties.").

⁶ *Young*, 628 F. Supp. at 1056-57 ("HUD has a duty to know how its money is spent, and in fact has known that it is supporting segregated housing in East Texas. Notwithstanding, it has continued to actively support the system in perhaps the most effective possible way-by paying for it. HUD has thus played a crucial and continuing role in creating and maintaining a large system of publicly funded segregated housing."); *Garrett*, 503 F.2d at 1246 ("The record supports a finding that HUD must have known of the discriminatory practices which pervaded the private housing market and the indications of overt prejudice among some of the persons involved in carrying out the urban renewal projects of the City").

⁷ *Young*, 628 F. Supp. at 1044.

⁸ *Gautreaux*, 296 F. Supp. at 914 ("there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of White neighborhoods."); *Clients' Council*, 711 F.2d at 1423 ("We do not suggest that HUD officials were motivated by malice, but we do believe that this record compels a conclusion that they acted at least in part because of a discriminatory purpose.").

⁹ *Clients' Council*, 711 F.2d at 1423 ("the only reasonable inference that can be drawn is that HUD's actions[continued funding of a housing authority it cited for discrimination] were motivated at least in part by a discriminatory purpose.").

¹⁰ *Clients' Council*, 711 F.2d at 1423.

¹¹ *Alschuler v. Dep't of Hous. and Urban Dev.*, 686 F.2d 472, 482 (7th Cir. 1982) (citing 42 U.S.C. §§ 1437f(a) & 3608(d)(5)).

¹² *Id.* at 482 (citing *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973); *Shannon v. U.S. Dept. of Hous. and Urban Dev.*, 436 F.2d 809, 820 (3rd Cir. 1970)).

Reversing Entrenched Patterns of Racial Segregation in Federally-Assisted Housing Programs has been Difficult. . .

Despite the well-established pronouncements against discrimination and segregation in the nation's housing programs, reversing patterns of racial segregation in federally assisted housing has proven difficult.¹³ The persistent and seemingly intractable segregation in the nation's housing programs is demonstrated by a 2008 HUD study entitled "Characteristics of HUD-Assisted Renters and Their Units in 2003."¹⁴ The study is based on census data collected in 2003 through the American Housing Survey (AHS) and matched with HUD rental assistance data.¹⁵ According to Julian and Daniel, who have analyzed the data, "poor Black renters, as a result of accepting HUD rental assistance, will be subjected to worse conditions or more segregated conditions, or both, compared to similarly situated Whites using HUD assistance," and compared to similarly situated poor Black renters not using any HUD assistance at all.¹⁶ Thus, not only are African Americans worse off than their white counterparts in federally assisted housing programs, but African Americans who participate in federally assisted housing programs seem to be worse off than those who do not. After pointing out the constitutional and statutory prohibitions against providing housing on such unequal terms, Julian and Daniel note that "much of the debate about national housing policy for the poor goes on as if these conditions did not exist, do not exist, and that the nation does not know about it."¹⁷

There are multiple possible explanations for the persistence of segregation in the nation's housing programs. Among them is the fact that programs creating significant amounts of housing, such as the federal Low-Income Housing Tax Credit (LIHTC) program, "are largely unregulated from a civil rights perspective."¹⁸

¹³ Patterns of racial segregation in public housing, once established, have persisted in the post-civil rights area. See *Young*, 628 F. Supp. at 1043-44 ("The information produced by HUD [in the early 1980s] indicates that the public housing sites it funds are segregated by race. Blacks live in one set of public housing sites, whites in another."). See also *id.* at 1045-47 (discussing twenty-year failure of federal housing agencies to reverse patterns of racial segregation in the federally assisted housing it funded following the end of de jure segregation).

¹⁴ U.S. DEP'T OF HOUS. AND URBAN DEV., CHARACTERISTICS OF HUD-ASSISTED RENTERS AND THEIR UNITS IN 2003 (2008), available at http://www.huduser.org/portal/publications/pubasst/hud_asst_rent.html.

¹⁵ *Id.* at 4-5. See also Elizabeth Julian & Michael M. Daniel, *HUD-Assisted Low-Income Housing: Is It Working and for Whom?* POVERTY & RACE, July/August 2009, at 3 (noting that "the information includes demographic data for hundreds of units, projects and neighborhood conditions for individuals living in HUD-assisted housing and those eligible for, but not receiving, such assistance.").

¹⁶ Julian & Daniel, *supra* note xx, at 6-7. In segregated housing developments historically, units that were occupied by African Americans were frequently inferior, suffering from a lack of maintenance and/or inferior construction methods. See *Clients' Council*, 711 F.2d at 1419 ("HUD found that black projects suffered from neglect 'in spite of constant and numerous complaints resulting from faulty original construction,' and there was 'no evidence' that needed repairs would be made.").

¹⁷ Julian & Daniel, at 7.

¹⁸ Tegeler, at 198 (discussing lack of anti-segregation controls as well in the HOPE VI public housing redevelopment program, low-income housing financed through incentives in the Community Reinvestment Act, and the Housing Opportunities Made Equal (HOME) program for housing rehabilitation).

Especially in New Orleans . . .

Prior to Katrina, New Orleans not only mimicked the national pattern of government assisted housing programs serving as engines of poverty concentration and segregation, but it also exceeded the national averages for such poverty concentration. Families participating in federally assisted housing programs in the New Orleans area were living in poorer neighborhoods, on average, than their counterparts in the nation's largest metropolitan areas.

Vouchers: The Housing Choice Voucher Program (HCV) is currently the largest rental assistance program administered by HUD.¹⁹ According to a HUD study of housing voucher use released in 2003, New Orleans had twice the percentage of voucher families living in neighborhoods with poverty concentrations above 30 percent (46.9%), compared with voucher families in the top 50 MSAs (22%).²⁰ Although New Orleans follows the national pattern of a higher level of poverty concentration for voucher use in central city neighborhoods compared with suburban ones, the level of concentration is much higher in both the central city of New Orleans as well as its suburbs. For example, in central city neighborhoods in the top 50 MSAs, 33.6% of voucher users live in neighborhoods above 30% poverty concentration, compared with over half, or 51.8%, for the central city of New Orleans.²¹ On the other hand, while only 6.1% of voucher users in the suburban neighborhoods of the top 50 MSAs live in neighborhoods above 30% poverty concentration, a startling 40.4% of voucher users in the suburbs of New Orleans live in these high poverty neighborhoods.²²

Consistent with national averages, families of color using the voucher program in the Greater New Orleans area were more concentrated in high poverty neighborhoods than their white counterparts. The starkest example of this phenomenon may be seen with respect to families living in neighborhoods with greater than 40 percent poverty concentration. Only 1.8% of white families using vouchers in the New Orleans MSA lived in such extreme poverty concentration, compared with 21.3% of African American households using vouchers.²³ When compared with

¹⁹ U.S. DEP'T OF HOUS. AND URBAN DEV., HOUSING CHOICE VOUCHER LOCATION PATTERNS: IMPLICATIONS FOR PARTICIPANT AND NEIGHBORHOOD WELFARE, at x (January 2003). The Housing Choice Voucher Program (HCV) is the current tenant-based housing subsidy program run by HUD; it was created in 1998, but evolved from a variety of other tenant-based assistance programs starting in 1975. *Id.* at iv (Foreward). The HCV program allows participants to use their subsidy for housing they have searched for and found in the private market. *Id.* at vii.

²⁰ U.S. DEP'T OF HOUS. AND URBAN DEV., *supra* note x at 33 and Table III-9 [hereinafter "HUD VOUCHER LOCATION PATTERNS REPORT"]. *See id.* at 26 (discussing poverty concentration levels and noting that "[f]amilies and neighborhoods are assumed to be negatively affected when poverty concentrations reach [levels of 30% and above]"). The 2003 HUD Voucher Location Patterns Report relies on then-current characteristics of voucher holders, but neighborhood characteristics derived from the 1990 census. *Id.* at 3. The use of the term "neighborhood" denotes the boundaries of census tracts. *Id.* at 122.

²¹ *Id.* at 27 and Table III-2.

²² *Id.* at 27 and Table III-2.

²³ *Id.* at 28 and Table III-5. Notably, African Americans (non-Hispanic) made up the vast majority, or 93.2%, of the 7864 total voucher users (7864) in the New Orleans MSA at the time of this study, with whites representing only 5.5% of total voucher users. *Id.* at Appendix B-1.

the top 50 MSAs, white voucher users in the New Orleans metro area were half as likely to experience extreme poverty concentration, whereas African American voucher users in the New Orleans metro area were twice as likely to experience such extreme concentration.²⁴

Public housing and project-based Section 8 subsidies: When considering public housing and project-based Section 8 programs as well as vouchers prior to Katrina, there was greater poverty concentration in the New Orleans metro area, on average, than in the top 50 MSAs. As well, there is increasing concentration when voucher programs are compared with project-based Section 8 programs and public housing, which follows the national trend. For example, whereas 46.9% of voucher users in the New Orleans metro area lived in neighborhoods of over 30% poverty concentration, 78.9% of all project-based Section 8 housing tenants lived in such neighborhoods, and an eye-popping 97.4% of public housing residents lived in such neighborhoods.²⁵ This compares with 22.2% of voucher users, 44.4% of Section 8 project-based tenants, and 66.1% of public housing residents living in over 30% poverty concentration in the nation's top 50 MSAs.²⁶ Stated another way, the average neighborhood poverty rate for public housing residents in 2000 was 74%, nearly double the poverty rate associated with neighborhoods of "extreme poverty."²⁷

LIHTC: Nationally, the Low Income Housing Tax Credit Program (LIHTC) is the nation's largest low-income housing production program,²⁸ and was a principal means of restoring rental housing to the New Orleans area after the 2005 storms. A study examining the neighborhood locations of family LIHTC developments between 1995 and 2001 reveals that in pre-Katrina metro New Orleans, absolutely no tax credit units (with at least two bedrooms) were placed in the lowest poverty census tracts (0-10%), compared with a rate of 41.3% nationally.²⁹ New Orleans was the *only* metro area in the nation's top 50 metro areas to have *no* tax credit units in

²⁴*See id.* In the top 50 MSAs nationally, 3.5% of whites lived in neighborhoods that had concentrations of poverty greater than 40 percent, and 10.6% of African Americans lived in such neighborhoods. *Id.* If voucher users who lived in New Orleans metro neighborhoods with greater than 30 percent poverty concentration are included, the numbers jump to nearly 26% for whites and 47.8 for African Americans. *See id.* at Table III-5.

²⁵ *Id.* at Table III-9.

²⁶ *Id.* at 31.

²⁷ ALAN BERUBE AND BRUCE KATZ, *KATRINA'S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA* 5 (2005).

²⁸ Tegeler, at 201. "The Low Income Housing Tax Credit provides investors in rental housing developments a credit against their federal income tax obligations. State agencies receive an allocation of tax credit each year from the U.S. Treasury, which they in turn allocate to developers of rental housing . . ." JILL KHADDURI, LARRY BURON, & LEN LAM, *LIHTC AND MIXED INCOME HOUSING: ENABLING FAMILIES WITH CHILDREN TO LIVE IN LOW POVERTY NEIGHBORHOODS?* 2 (2004). These developers must reserve a percentage of units for households with incomes ranging from 30 to 60 percent of the area median income. *Id.*

²⁹ KHADDURI ET. AL., at 13, 15 (for purposes of this study, 1990 census data was used). This study sought to make comparisons between the locational choices of families with children using housing vouchers and the placement of LIHTC units occupied by families. Because the LIHTC program does not keep data relative to family occupancy, the study uses units of two bedrooms or more as a proxy for family occupancy. *See id.* at 4.

the lowest poverty neighborhoods during this pre-Katrina period.³⁰ Southern cities such as Charlotte (71.5%), Nashville (64.3%), Atlanta (32%), and Houston (26.2%) all managed to place tax credit units in their lowest poverty neighborhoods over the same time frame.³¹

Racial segregation in NOLA generally: who bears the costs? When considering the New Orleans population generally prior to Katrina, Orleans Parish was a portrait of racial segregation. Despite the trend in the 1990s towards decreasing segregation, New Orleans between 1980 and 2000 became more racially segregated, with the average African American resident in 2000 living in a neighborhood where 82% of fellow residents were African American.³² Further, in 2000, African Americans were not settled uniformly across the metropolitan area.³³ For example, while 60.1% of households in Orleans Parish were African American in 2000, only 33.4% of New Orleans MSA households were African American and only 6.1% of all households in St. Bernard Parish were African American.³⁴

What have been the consequences of racial segregation for residents of New Orleans? Are whites and African Americans similarly segregated by income?³⁵ The 2000 U.S. Census data show that low income African Americans are more concentrated in high poverty neighborhoods than any other low income group in the metro area. On the other hand, low income whites have greater access to low poverty, middle income neighborhoods than any other low income group in the metro area.

By 2000, a quarter of New Orleans's neighborhoods (47) were considered to be ones of "extreme poverty," that is, with at least 40 percent of residents there having family incomes below the federal poverty line.³⁶ Low-income African Americans (42.6%) lived in these neighborhoods of extreme poverty in the City of New Orleans at roughly four times the rate of low-income whites (10.9%).³⁷ Twice the percentage of low-income African Americans in the City of New Orleans lived in extreme poverty, compared with African Americans in large U.S. cities nationwide.³⁸ When considering the New Orleans metro area as a whole before Katrina, low-income African

³⁰ *Id.* at 14-15. Six percent of families using vouchers in the New Orleans metro area used them in census tracts with 0-10% poverty. *Id.* at 15.

³¹ *Id.* at 14-15.

³² BERUBE & KATZ, at 3.

³³ Declaration of Dr. Calvin P. Bradford at 6, Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, No. 2:06-CV-07185 (E.D. La. December 15, 2008,) (using 2000 census data).

³⁴ Declaration of Dr. Calvin P. Bradford, at 7 (calculating data from U.S. Census Bureau, Table H14 – Tenure by Race of the Householder, Census 2000 Summary File 1 (SF1) 100 Percent Data).

³⁵ Prior to Katrina, New Orleans can be characterized as largely biracial. See Elizabeth Fussell, *Constructing New Orleans, Constructing Race: A Population History of New Orleans*, 94 JOURNAL OF AMERICAN HISTORY 846-55 (2007) (discussing the assimilation of Latin and Asian immigrants prior to Katrina and noting that "[t]he biracial dynamic of the city was hardly challenged by the small numbers of Latin American migrants—mostly Cubans, Hondurans, Mexicans, and Nicaraguans—that arrived in the city at distinct moments in the mid-twentieth century and the Vietnamese migrants that arrived in the late 1970s.").

³⁶ BERUBE & KATZ, at 3. New Orleans as of 2000 ranked second-highest in the nation for percentage of poor people living in extreme-poverty neighborhoods. *Id.* at 3 & Table 1.

³⁷ *Id.* at Appendix A.

³⁸ *Id.* at 3 (Table 1).

Americans (32%) lived in neighborhoods of extreme poverty at a rate *ten times greater* than that of low-income whites (3%).³⁹

The effects of extreme poverty concentration have been well-documented.⁴⁰ What about neighborhoods of low poverty? How may they be characterized? HUD has defined a low poverty neighborhood as a census tract in which fewer than 10 percent of the residents live in households with incomes below the poverty line.⁴¹ Some commentators have described these neighborhoods as “solidly middle class” with a majority (over 75%) of the residents owning homes and a miniscule number (1.6%) on public assistance.⁴² A healthy majority of Americans in metro areas (58%) lived in low poverty neighborhoods in 2000.⁴³ When considering neighborhoods with 10-20% of residents living in households with incomes below the poverty line, a majority own homes and only 4% receive public assistance.⁴⁴ Twenty-four percent of Americans live in these neighborhoods.⁴⁵ Thus, 82% of the U.S. metropolitan population in 2000 lived in what could be described as middle class neighborhoods.

Low-income whites before Katrina had overwhelmingly greater access to low poverty, middle-income neighborhoods in metro New Orleans than did low income African Americans. Low-income whites (30%) were *fifteen times more likely* than low income African Americans (2%) to live in the lowest poverty neighborhoods of metro New Orleans (less than 10% of people living in below-poverty households).⁴⁶ In Orleans Parish, where 70% of the region’s low-income African Americans live, only 1% lived in the lowest poverty neighborhoods.⁴⁷

Interestingly, low-income whites lived in middle income neighborhoods in metro New Orleans pre-Katrina nearly as often as Americans as a whole across all income groups. When considering middle-income neighborhoods at less than 20% poverty, the vast majority, or 72%, of low income whites in the New Orleans metro area lived in these neighborhoods, compared with only 19% of low income African Americans.⁴⁸

Despite the significant racial disparities in apparent access to middle-income neighborhoods throughout the metro area, low income groups in general seemed to fare better in the New

³⁹2000 U.S. Census Data, compiled with the assistance of the Fair Housing Justice Center, New York, New York.

⁴⁰BERUBE & KATZ, at 5-7 (discussing multiple human costs of concentrated poverty);

⁴¹KHADDURI ET. AL., at 3 (deriving HUD’s definition from the Moving to Opportunity program).

⁴²*Id.* at 3 (using 2000 census figures).

⁴³*Id.*

⁴⁴*Id.* at 3-4.

⁴⁵*Id.* at 4.

⁴⁶U.S. CENSUS BUREAU, CENSUS OF POPULATION AND HOUSING (2000) (compiled with the assistance of the Fair Housing Justice Center, New York, New York).

⁴⁷*Id.*

⁴⁸*Id.*

Orleans suburbs pre-Katrina than in the City of New Orleans.⁴⁹ For example, in Orleans, only 12% of low-income African Americans lived in middle income neighborhoods below 20% poverty.⁵⁰ On the other hand, in Jefferson Parish, the suburban parish adjacent to Orleans, 33% of low income African Americans lived in neighborhoods of less than 20% poverty.⁵¹ In St. Tammany Parish, across Lake Pontchartrain from Orleans, a majority of low-income African Americans, or 63%, lived in these neighborhoods.⁵² Low income whites in suburban New Orleans had overwhelming access to middle income neighborhoods, with 80% living in neighborhoods below 20% poverty in Jefferson Parish and a whopping 93% of low income whites living in these middle-income neighborhoods in St. Tammany Parish.⁵³

Thus, although low income African Americans before Katrina were more likely to have access to a middle class neighborhood in suburban New Orleans than in Orleans Parish, they had far less access to middle income neighborhoods throughout the metro area when compared with low income whites. Given the concentration of federally assisted housing in high poverty neighborhoods in the New Orleans metro area, which exceeds national averages, it appears that federally assisted housing programs in New Orleans have operated as engines of segregation and poverty concentration, rather than as gateways of opportunity for low income African Americans.

After Katrina, the Infusion of Federal Housing Assistance Offered an Opportunity to Reverse, or at Least not Repeat, Racially Segregated Housing Patterns . . .

In the aftermath of the devastation that cost lives and property across the metropolitan area, Hurricane Katrina did present New Orleans with an opportunity for a “do over” in one respect. New Orleans has for decades battled crushing poverty that has fallen disproportionately on its African American population. This multi-generational poverty has thrived in highly racially segregated neighborhoods beset by low-performing schools, high crime rates, and limited access to healthy neighborhood amenities, i.e. with few tools of opportunity for residents. As in many other communities experiencing persistent patterns of racial residential segregation, federally assisted housing has played a pivotal role. But post-Katrina New Orleans would be presented with an unprecedented level of federal resources that could be put to the task of “undoing”

⁴⁹ Not surprisingly, the percentage of individuals living below the poverty line decreases outside of extreme-poverty neighborhoods in Orleans Parish from 54.6% to 21.6%. KHADDURI ET. AL., *supra*, at 4 (using 2000 census figures). When one considers the metro area outside of Orleans Parish, the rate decreases further to 13.1%. *Id.*

⁵⁰ *Id.*

⁵¹ U.S. CENSUS BUREAU, *supra*.

⁵² *Id.*

⁵³ *Id.*

entrenched patterns of racial residential segregation and the poverty that seems to inevitably accompany segregation.⁵⁴

In the early days of the post-Katrina recovery period, certain plans emerged that suggested that not all of New Orleans should be rebuilt. Property owners in certain low-lying neighborhoods were aghast at the notion that their communities might be designated as “green space” neighborhoods. Presumably, they would be forced to sell their low-lying properties and relocate to higher ground. Neighborhood groups targeted for “green spacing” quickly organized and fended off any suggestion that not every property owner could return and rebuild. Rebuilding ensued in single-family, owner-occupied neighborhoods in a highly de-centralized, unregulated manner, albeit at varying rates and levels in varying places.

The post-Katrina recovery story for multi-family housing is markedly different. While representative governments of low-lying neighborhoods quickly understood that any suggestion of limiting the rebuilding of flood-damaged, single family neighborhoods might constitute political death, the use of a local government’s regulatory power to “greenspace” multi-family housing complexes instead seemed to garner valuable political capital for locally elected officials.⁵⁵

Are Segregation and Poverty Concentration Inevitable in Post-Katrina New Orleans?

As some commentators have stated, “[c]oncentrated poverty is not an inevitable phenomenon.”⁵⁶ And yet, our segregated past, present, and future may be linked by the same enduring fears, policies, and customs. Without a better understanding of our history, we seem destined to repeat it. In the uncertainty of the post-Katrina New Orleans landscape, fear of neighborhood change has been palpable. “You hear people say we don’t want any multifamily because there is a perception that (the buildings) automatically translate to Section 8 tenants, crime or other problems.”⁵⁷

There are two impulses -- pulling in opposition directions – that seem to operate in tandem to perpetuate concentrated poverty and segregation. One impulse is to take whatever affordable

⁵⁴ See ALAN BERUBE & BRUCE KATZ, *KATRINA’S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA* 2 (2005) (noting that “local and regional leaders will have an unprecedented opportunity to rebuild a New Orleans that is more inclusive, more sustainable, and more economically healthy than its predecessor”).

⁵⁵ See, e.g., Staff Reports, *Complex issue: Kenner apartment ban angers affordable-housing advocates*, NEW ORLEANS CITYBUSINESS, April 12, 2008, available at 2008 WLNR 6953861 (reporting that a multi-family development ban in Kenner would keep a 15-acre demolished apartment complex site “an open grassy field” for at least another year);

⁵⁶ BERUBE & KATZ, at 4.

⁵⁷ Staff Reports, *supra* (quoting Wendell Dufour, director of UNO’s Division of Planning in the Center for Urban and Public Affairs).

housing can be gotten, an approach that might be described as “get the housing now.”⁵⁸ The other impulse is to block affordable housing in all forms. This conflict between those who would seem to accept affordable housing anywhere, in any configuration, and on any terms, and those who would seem to accept it nowhere, in no configuration, and on no terms help fuel the worst fears of each camp.

The “anywhere-ists” most fear the potential for the “nowhere-ists” to succeed in abolishing a federal role in the provision of housing for low income households. Thus, the first priority for the anywhere-ists is to secure as much federally assisted housing as possible. On the other hand, the nowhere-ists most fear the potential for the “anywhere-ists” to develop federally supported housing next door to them. Thus, the first priority for the nowhere-ists is to block federally assisted housing in all forms, regardless of the development details. They may point to the abundant failures of government housing programs with respect to poor maintenance and mismanagement to justify their fears of blight, crime, and lowered property values. Worse, the nowhere-ists may associate poor persons of color with historic management and maintenance failures and even blame them for those failures. As a result, many of these nowhere-ists associate neighborhood stability with racial and socio-economic homogeneity and are singularly focused on blocking federally assisted housing as a means of maintaining that homogeneity.

The path of least resistance for both groups, it appears, is to allow for the continued creation of federally assisted housing in impoverished and/or isolated communities. In this scenario, both groups are able to have their primary concerns addressed. The anywhere-ists achieve the development of federally assisted housing. The nowhere-ists keep it out of their communities.

This conflict reflects a fundamental failure of American housing policy with respect to both its vision and its implementation at the federal, state, and local levels. The resulting path of least resistance, i.e., the provision of federally assisted housing for low income families outside of, or away from, high opportunity neighborhoods and communities, represents a kind of toxic cocktail of market failure and government impotence. As those working for more equitable and inclusive communities have recognized, “[i]ncreasing the supply of affordable housing is essential to improving housing opportunity, but achieving racial equity will require more. To reach equity goals, affordable units must be spread across the region.”⁵⁹

⁵⁸ See, e.g., *Thompson v. U.S. Dep’t Of Hous. and Urban Dev.*, 348 F.Supp.2d 398, 444 (D.Md. 2005) (noting in federal civil rights action challenging historic segregation and discrimination in Baltimore’s public housing programs “a further consideration informing the decisions of housing policymakers was the goal of housing as many as possible of the individuals and families that needed public housing . . . we were simply looking to be able to put a roof over people’s heads.”).

⁵⁹ Angela Glover Blackwell & Judith Bell, *Equitable Development for a Stronger Nation: Lessons from the Field in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 290 (Xavier de Souza Briggs ed., 2005).

Anywhere-ists

The need for affordable “workforce” housing in the post-Katrina recovery period has been acute.⁶⁰ In the immediate aftermath of the 2005 storms, the devastation of over 200,000 single family homes and multi-family rentals, along with a large influx of recovery-related workers, created enormous demand for rental housing.⁶¹ This dynamic resulted in both median rents and median incomes rising. According to one study of the New Orleans metro area, the median gross rent rose 27 percent, from \$676 in 2004 to \$856 in 2007.⁶² In Orleans Parish, median gross rents rose 44 percent over the same period.⁶³ Rents rose nationally only 4 percent over the same period.⁶⁴ Although median incomes also rose, fewer workers earning less than \$20,000 lived in the New Orleans area in 2007 while job vacancies remained high in occupations paying less than \$20,000.⁶⁵ Further, the proportion of renters to homeowners fell from 39 to 34 percent between 2004 and 2007, suggesting that many displaced low income renters may be unable to return home.⁶⁶

Renters in post-Katrina New Orleans struggled more with affordability than renters nationwide, according to the 2007 American Community Survey Data. While nationally, 49% of all renters paid more than 30 percent of their income on housing costs (including utilities) – the measure of affordability frequently used by HUD and others measuring housing cost burdens⁶⁷ – 54% of renters throughout the metropolitan New Orleans area paid unaffordable housing costs, and 60% of renters in Orleans Parish paid unaffordable housing costs.⁶⁸ With respect to suburban parishes, St. Tammany Parish renters were particularly strained, with 61% paying unaffordable housing costs; Jefferson Parish renters were comparable to the national rate, with 51% paying unaffordable rental housing costs relative to income.⁶⁹ According to the Greater New Orleans

⁶⁰ For a separate discussion of the fair housing issues surrounding the demolition of the “Big Four” public housing developments in the City of New Orleans following Hurricane Katrina, see Stacy E. Seicshnaydre, *The More Things Change, the More They Stay the Same: In Search of a Just Public Housing Policy Post-Katrina*, 81 TUL. L. REV. 1263 (2007).

⁶¹ POLICYLINK, BRINGING LOUISIANA RENTERS HOME: AN EVALUATION OF THE 2006-2007 GULF OPPORTUNITY ZONE RENTAL HOUSING RESTORATION PROGRAM 7 (2007).

⁶² GREATER NEW ORLEANS COMMUNITY DATA CENTER, CHANGES IN NEW ORLEANS METRO AREA HOUSING AFFORDABILITY: BASED ON 2004 AND 2007 AMERICAN COMMUNITY SURVEY DATA 11 (2009), available at <http://www.gnocdc.org/HousingAffordability>.

⁶³ *Id.* at 12.

⁶⁴ *Id.* at 11.

⁶⁵ *Id.* at 10. See also BUREAU OF GOVERNMENTAL RESEARCH, THE HOUSE THAT UNCLE SAM BUILT: THE CONTINUED EXPANSION OF SUBSIDIZED HOUSING IN NEW ORLEANS 5 (2009) (noting rising rents as well as fact that median wage rose in the metro area from \$13 to \$16.83 per hour).

⁶⁶ GREATER NEW ORLEANS COMMUNITY DATA CENTER, at 10.

⁶⁷ Although measuring housing affordability for residents already resettled in New Orleans is important and helpful, this indicator of affordability excludes households who have not been able to return to New Orleans or afford the rental housing that is available, such as “displaced households priced out of the market, homeless families and those squatting in blighted buildings.” See *id.* at 3.

⁶⁸ *Id.* at 8-9 (the percentage of renters in the metropolitan area paying unaffordable housing costs in 2007 [54%] was up six points from the pre-Katrina rate of 48% in 2004).

⁶⁹ *Id.* at 9.

Community Data Center, “[r]ental affordability is particularly critical in Orleans because 48 percent of households are renters, as compared with only 21 percent in St. Tammany and 33 percent nationwide.”⁷⁰

Given the urgent need for rental housing following Katrina, there was a corresponding movement to maximize the number of rental units developed as replacement for what was lost. Yet, only 27% of damaged rental units were slated for replacement with public dollars in the metro New Orleans area as of 2008.⁷¹ Moreover, only 2,600 units scheduled for replacement via public subsidies were open for occupancy statewide as of mid-2008.⁷² When considering affordable units, only 17,112 of the 53,210 affordable rental units with severe or major damage (32%) were in the pipeline for replacement in metro New Orleans as of mid-2008.⁷³

Projections concerning the location of these replacement rental units suggests that the path of least resistance has emerged as the operating principle for the location of assisted housing in post-Katrina New Orleans. With the passage of time, nearly all of the suburban parishes surrounding Orleans have insisted that they have “enough” rental housing and need no new development of such housing. Yet when individual parishes are examined, it appears that Orleans Parish, the parish with the highest proportion of rental housing prior to the storm,⁷⁴ had the highest percentage of rental housing scheduled to be replaced with public subsidies, or 33%.⁷⁵ On the other hand, parishes with smaller proportions of rental units prior to the storm, Jefferson, Plaquemines, St. Bernard, and St. Tammany, had even lower projections for replacement of the rental housing they had lost. For example, Jefferson had 13,972 rental units damaged, but only 1,840 (13%) scheduled for replacement with public subsidies.⁷⁶ St. Bernard had 5,936 rental units damaged, but only 924 (16%) scheduled for replacement with public subsidies.⁷⁷ When the subset of rental housing that is affordable is examined, it appears that Orleans Parish was slated to replace 37% of its affordable units, with Jefferson and St. Bernard

⁷⁰ *Id.*

⁷¹ POLICYLINK, A LONG WAY HOME: THE STATE OF HOUSING RECOVERY IN LOUISIANA 8 (2008). For purposes of determining the level of rental housing likely to be replaced, the PolicyLink authors considered those units with funding allocations from government programs, including the Gulf Opportunity (GO) Zone LIHTC Program and Small Rental Property Program (SRPP), less than half which represent units that are completed, under construction, or have closed financing. *Id.* at 9. The authors did not include units scheduled for repair with private insurance proceeds. *Id.*

⁷² *Id.* at 9.

⁷³ *Id.* at 17 (for purposes of this calculation, data was derived using the five parishes of Jefferson, Orleans, Plaquemines, St. Bernard, and St. Tammany).

⁷⁴ According to the 2000 Census, over half, or 53.5%, of the occupied housing units in Orleans Parish were renter-occupied, compared with lower percentages in surrounding parishes: 36.1% in Jefferson, 21.1% in Plaquemines, 25.4% in St. Bernard, and 19.5% in St. Tammany. U.S. CENSUS BUREAU, QT-H2 TENURE, HOUSEHOLD SIZE, AND AGE OF HOUSEHOLDER: 2000 (2000).

⁷⁵ POLICYLINK, at 9.

⁷⁶ *Id.* at 9.

⁷⁷ *Id.* at 9.

only slated to replace 17% and 22% of their affordable units, respectively.⁷⁸ Stated another way, of the 7474 affordable tax credit units in the pipeline in the metro New Orleans area as of mid-2008, 6268, or 84%, were slated to be developed in Orleans Parish.⁷⁹ Thus, rather than using the recovery as an opportunity to correct historic imbalances in the mix of rental to owner-occupied housing, poverty concentrations, or racial segregation occurring throughout the region, the region is poised to use the recovery as a means of accelerating the regional imbalance.

There is no question that the need for affordable housing in New Orleans following the storms was and is enormous. Yet, the great need for low income housing cannot continue to be used as a blanket justification for whatever inequity and segregation results from these programs.⁸⁰ Typically, “[i]n order to get the affordability benefit of federal housing assistance, low-income Black families must accept a higher level of both substandard living conditions and racial inequality than exists for very low-income Black tenants not using HUD rental assistance. Low-income Whites do not have to make this trade-off.”⁸¹

Nowhere-ists . . .

Local governments for decades have sought veto power over the location of subsidized housing units within their borders. Following Katrina, one locally elected official in suburban New Orleans requested state legislation that would have given parish governments veto power over any housing program of the Louisiana Housing Finance Agency proposed in any parish.⁸² This legislative initiative died on the vine, but it demonstrates the enduring quest for exclusion of subsidized housing via the local veto.

⁷⁸ *Id.* at 17 (Orleans was slated to replace 14,004 affordable rental units out of 37,790 such units with severe or major damage; Jefferson was slated to replace 1,414 affordable rental units out of 8,515 such units with severe or major damage; and St. Bernard was slated to replace 869 affordable rental units out of 3,935 such units with severe or major damage).

⁷⁹ *Id.* (data reflects activity in Jefferson, Orleans, Plaquemines, St. Bernard, and St. Tammany parishes). Similarly, 7736 of the projected 9638 Small Rental program units, or 80%, were slated for development in Orleans Parish. *Id.*

⁸⁰ *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907, 914 (N.D. Ill. 1969) (despite the “praiseworthy and urgent goals of low cost housing . . . a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued.”) (citing *Brown v. Bd. of Education of Topeka*, Shawnee County, Kansas, 347 U.S. 483 (1954)); *Clients’ Council v. Pierce*, 711 F.2d 1406, 1423 (8th Cir. 1983) (“HUD argues that its actions [continued funding of a housing authority it had repeatedly cited for discrimination] were an inevitable consequence of its legitimate desire to provide low income housing, but the agency did not have to approve, support, and lobby in favor of the THA’s discrimination in order to provide adequate low income housing.”).

⁸¹ Elizabeth Julian & Michael M. Daniel, *HUD-Assisted Low-Income Housing: Is It Working and for Whom?* POVERTY & RACE, July/August 2009, at 6.

⁸² See HB No. 223 (Regular Session 2007) (“The [LHFA] shall have no authority to approve or allocate housing tax credits or to approve or implement any housing program within a parish without the prior approval of the parish governing authority”); *Times-Picayune*, Meghan Gordon, Jefferson’s housing restrictions attacked, February 17, 2007 (discussing the fact that the LHFA awarded tax credits to a Gretna housing development despite the opposition of the Jefferson Parish council; in response, one Councilman sought legislation that would require prior local approval of LFHA tax credit projects as a matter of state law).

Although Hurricane Katrina displaced households of all incomes, races, and ethnicities, census estimates indicated that 60% of those displaced in the New Orleans MSA were African American.⁸³ In Orleans Parish, an estimated 73% of the population affected by the hurricane, or 272,000 people, were African American.⁸⁴ Further, over half (52.8%) of those living in damaged areas were renters.⁸⁵ Thus, a substantial number of African American renters were displaced in Hurricane Katrina, enough to threaten the segregated housing patterns in place before the storm.

Suburban jurisdictions appear to have sought to avoid the “do over” opportunity that the storm presented, taking measures that reflect significant fear about the way in which their pre-Katrina demographics might be altered in the rebuilding effort. For example, rather than merely banning *new federally assisted* housing, some jurisdictions have taken the additional precaution of banning *all new rental* housing. Further, jurisdictions have not only blocked *new rental* housing, but have taken steps to eliminate rental housing that *pre-existed* Hurricane Katrina.

The metropolitan-wide racial impact of the zoning bans on multi-family and government-assisted housing proliferating in metropolitan New Orleans post-Katrina has been demonstrated in litigation challenging the zoning bans.⁸⁶ With respect to bans on rental housing generally, African American households are more than twice as likely as white households to live in rental units in metropolitan New Orleans.⁸⁷ Furthermore, an ordinance that excludes housing programs that serve low-income households -- such as the Low Income Housing Tax Credit program and other subsidy programs operated by the U.S. Department of Housing and Urban Development -- exclude a disproportionate number of African-American households.⁸⁸ The racial disparities are augmented when families [households with at least two persons] are considered, compared with the population at large. These disparities increase as income decreases. These impacts are calculated using 2007 American Community Survey data compiled by the Census Bureau.⁸⁹

⁸³ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs’ Application for a Preliminary Injunction (Rec. Doc. 6-3, at 24) (citing C. Bradford Aff. 7).

⁸⁴ *Id.* at 7 (citing John R. Logan, *The Impact of Katrina: Race and Class in Storm-Damaged Neighborhoods*, at 7, available at <http://www.s4.brown.edu/Katrina/report.pdf>) (hereinafter “Logan Report”).

⁸⁵ *Id.* at 8 (citing Logan Report at 7).

⁸⁶ In calculating metropolitan-wide racial impacts, Dr. Bradford used the seven-Parish New Orleans Metropolitan Statistical Area (defined by the U.S. Office of Management and Budget in 2003), which included the Parishes of Orleans, Jefferson, Plaquemines, St. Bernard, St. Charles, St. John the Baptist, and St. Tammany. See Declaration of Dr. Calvin P. Bradford, December 15, 2008, Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 126-4, at 6 & n.3.

⁸⁷ *Id.* at 3 (finding that the disparate impact of a metro-wide rental housing ban on African Americans is statistically significant, with 51.70% of African American households in metro. New Orleans consisting of renters, compared with only 25.03% of white households).

⁸⁸ *Id.* at 3-4 (finding statistically significant disparities between African Americans and whites when considering a variety of low income ranges and tiers [relevant to low income housing programs]).

⁸⁹ *Id.* at 5 & 10-11.

Terrytown

Terrytown, a small suburb of New Orleans created in 1960, is located on the West Bank of Jefferson Parish.⁹⁰ According to long-time residents, many families moved to Terrytown from New Orleans because they could not afford to buy a home in the City, while the housing was more affordable on the West Bank.⁹¹ This included veterans using the GI bill to buy their first home.⁹² These early residents searching for affordable housing on the West Bank, many with subsidies, were white, largely relocating from the Irish Channel neighborhood in New Orleans.⁹³ By 2000, however, Terrytown had experienced a demographic shift, integrating to nearly 35% black, up from nearly 20% in 1990, only 5% in 1980, and .35% in 1970.⁹⁴

Following Katrina, elected representatives of Gretna and Terrytown (on the West Bank of Jefferson) joined the chorus of those opposing the use of recovery dollars to create replacement rental housing in their communities. On October 18, 2006, a Jefferson Parish councilman from Gretna and Terrytown sponsored a resolution making it clear to agencies charged with overseeing the housing recovery that Jefferson Parish objected to any applications by developers to build apartment complexes or single-family homes in Gretna or Terrytown using low income tax credits.⁹⁵ Council members unanimously approved this district-specific measure without discussion. Even groups that would seem to pose the least threat, such as the displaced elderly, were unwelcome. One of the applications pending at the time of Roberts's resolution was a 200-unit building proposed by Volunteers of America for residents over the age of 62. This project would have replaced 199 flooded units of elderly housing in eastern New Orleans. After the project for elderly housing succeeded in obtaining \$6.29 million in tax credits from the state despite the Parish's resolution, the Council succeeded, via surprise resolution, in imposing an 18-month land use study that would halt development on the site while the Parish considered changing the zoning of the site from multi-family to single-family residential.⁹⁶ This zoning change resulted in the non-profit developer's decision to abandon the project, resulting in the project returning to Orleans Parish, where it had been located prior to Katrina.

⁹⁰ Allen Powell II, *Terrytown celebrates 50 years of small- town living with big-city amenities*, TIMES-PICAYUNE, March 5, 2010, available at http://www.nola.com/news/index.ssf/2010/03/terrytown_celebrates_50_years.html (last visited July 12, 2010).

⁹¹ *Id.* ("For \$12,900 up to \$19,000, one could buy a new house with modern conveniences such as central air conditioning.").

⁹² *Id.* (according to a long time Terrytown resident, "[m]any of the original homeowners were veterans taking advantage of the GI Bill.").

⁹³ *Id.*

⁹⁴ U.S. CENSUS BUREAU, DP-1. PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (2000) (Terrytown); U.S. CENSUS BUREAU, DP-1. GENERAL POPULATION AND HOUSING CHARACTERISTICS: 1990 (1990) (Terrytown); Minnesota Population Center. *National Historical Geographic Information System: Pre-release Version 0.1*. University of Minnesota (2004), available at <http://www.nhgis.org> (Terrytown 1970 and 1980 census data).

⁹⁵ Meghan Gordon, *More housing for poor opposed: Roberts says those from city unwelcome*, TIMES-PICAYUNE, October 19, 2006 (directing resolution to Louisiana Recovery Authority and Louisiana Housing Finance Agency).

⁹⁶ Meghan Gordon, *Charity, Jeff sued after plan to build housing craters*, TIMES-PICAYUNE, February 22, 2007; Meghan Gordon, *Nonprofit drops plan for senior housing; Parish restrictions prevent use of tax credits, nonprofit says*, TIMES-PICAYUNE, Feb. 17, 2007, at 1, available at 2007 WLNR 2986604.

In addition to blocking new development, some Jefferson Parish officials and constituents failed to support the restoration of certain hurricane-damaged apartment complexes and then used the disrepair of these units to oppose the creation of new subsidized developments.⁹⁷ One councilman's strategy was to allow existing apartments to deteriorate to the point that demolition was the only option:⁹⁸ "I would prefer some of the multifamily housing units be removed and replaced with green space or another form of housing."⁹⁹ Officials seem to equate all multi family housing with concentrated poverty and crime,¹⁰⁰ use the blight of hurricane-damaged apartments to oppose any new development, and appear to be focused on reducing the stock of multi-family housing even below pre-Katrina levels.¹⁰¹

Of course, one might say that constituents are equally, if not more, concerned about the prospect of new affordable housing options in their neighborhoods.¹⁰² According to a prominent landowner in the district: "'I would say now we're just getting a disproportionate share of the lower-income families than we had before. . . . It's changing the whole complexion of the area.'" Those in Terrytown and other neighborhoods on the West Bank of Jefferson Parish claim: "I think we have our fair share of multifamily housing already."¹⁰³ As of 2000, Terrytown had a higher proportion of renter-occupied housing than Jefferson Parish as a whole, with the Parish having 36.1% of occupied units inhabited by renters, while 47% of occupied units in Terrytown were rentals.¹⁰⁴

⁹⁷ Meghan Gordon, Jefferson's housing restrictions attacked, *Times-Picayune*, February 17, 2007.

⁹⁸ Deon Roberts, Jeff councilman opposes blighted apartment rehab, *NEW ORLEANS CITYBUSINESS*, May 26, 2007 (quoting Councilman Roberts: "If they fall into further disrepair, that's only better. That only furthers our ability to get some of these rat holes torn down. I think it's all part of a strategic process.").

⁹⁹ *See id.* (discussing his preference for the Parish to purchase multi-family housing developments to allow for demolition of existing rental housing).

¹⁰⁰ *Id.* (quoting Councilman Roberts: "'Our experience in Jefferson Parish clearly shows that clustered multifamily housing for the most part has not been managed properly, usually leads to blight, has a tremendous effect on school performance scores, crime and economic development.'"). Constituents are equally sour: "We don't need any more apartments, period, in Terrytown of any kind." *See* Meghan Gordon, Jefferson's housing restrictions attacked, *TIMES-PICAYUNE*, February 17, 2007 (quoting the president of the Terrytown Civic Association).

¹⁰¹ *See* Deon Roberts, Jeff councilman opposes blighted apartment rehab, *NEW ORLEANS CITYBUSINESS*, May 26, 2007 (quoting Councilman Roberts: "'If I have my prerogative, any of them we can get our hands on to tear down, we're going to. Especially the ones that are blighted and a nuisance.'"); *see also* Deon Roberts, Land shortage stifles for large apartment development in New Orleans, *NEW ORLEANS CITYBUSINESS*, May 15, 2006 (discussing Roberts' interest in tearing down roughly 1,500 apartment units within three complexes because of high crime and the landlord's failure to make repairs).

¹⁰² *See* Meghan Gordon, Terrytowners resist low-income housing; Group seeks homes for senior citizens, *TIMES-PICAYUNE*, November 2, 2006 (reporting that an "overflow crowd" of Terrytown residents rallied behind the efforts of Chris Roberts to stop new low-income housing in his district, with audience members "rolling their eyes and cackling" at the responses of VOA's executive vice president regarding VOA's senior citizen housing proposal).

¹⁰³ Deon Roberts, Land shortage stifles for large apartment development in New Orleans, *NEW ORLEANS CITYBUSINESS*, May 15, 2006.

¹⁰⁴ U.S. CENSUS BUREAU, QT-H2 TENURE, HOUSEHOLD SIZE, AND AGE OF HOUSEHOLDER: 2000 (2000) (Jefferson Parish); U.S. CENSUS BUREAU, DP-1. PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (2000) (Terrytown).

Kenner

The City of Kenner, founded in 1855 and classified as a city in 1952, is located ten miles west from downtown New Orleans in Jefferson Parish.¹⁰⁵ Between 1990 and 2000, the African American, Hispanic and Asian population grew over 30% -- from 29.9% to 38.9%.¹⁰⁶ The City acknowledges that, given recent trends, the City is likely to become increasingly diverse: “Current trends suggest that Kenner will become less populated, older, and more ethnically and racially diverse over the next 15 to 20 years. What is likely is that the future population will hover somewhere close to existing levels, but increase slightly and continue to diversify.”¹⁰⁷

In mid-2007, the city of Kenner sought a moratorium on the development of new multi-family residential units, pending the completion of a land use plan by the University of New Orleans.¹⁰⁸ Officials cited the “great impact” of multi-family development on “adjacent neighborhoods, public infrastructure, traffic density, [and] the demand for public services.”¹⁰⁹ Kenner’s Mayor described multi-family residential housing as “the most volatile and the most humanly-dense of residential land uses,” justifying a temporary halt in construction until a land use plan could be prepared.¹¹⁰ The passage of the moratorium was put off until April 3, 2008, when the Kenner City Council unanimously approved a ban on the issuance of permits for construction of developments with five or more apartments, citing “an abundance of multi-family property in the City of Kenner.”¹¹¹ Constituents made their sentiments plain. According to Kenner City Councilman Joe Stagni: “I think this [multi-family housing] is something that our citizens have spoken out very strongly against.”¹¹² At least one developer thought it odd that the moratorium would be placed on housing, rather than commercial development, given that the population has remained flat since the 1980s: “That’s what the city of Kenner needs – it needs housing.”¹¹³ As might be expected, several developments were in the planning stages at the time the Kenner

¹⁰⁵ <http://www.kenner.la.us/history.html>; <http://www.kenner.la.us/govern.html>.

¹⁰⁶ *Id.* at 7.

¹⁰⁷ *Id.* at 16.

¹⁰⁸ Press Release, City of Kenner, Office of the Mayor, Moratorium Sought on Multi-Family Units, May 18, 2007. *See also* Mary Sparacello, Multifamily housing faces halt; Kenner awaits land-use plan, *TIMES-PICAYUNE*, June 6, 2007, at Metro-1, *available at* 2007 WLNR 10528001 (noting that Kenner signed a \$25,000 contract with UNO to conduct a post-Katrina update of a land use study begun in 2000 entitled, “Pattern for Progress”).

¹⁰⁹ Press Release, City of Kenner, Office of the Mayor, Moratorium Sought on Multi-Family Units, May 18, 2007.

¹¹⁰ *Id.*

¹¹¹ *See* Summary No. 10,564, Ordinance No. 9662, An Ordinance Enacting and Imposing a Moratorium Upon the Issuance of Building Permits for Multi-Family Residential Construction in the City of Kenner (April 3, 2008); Complex issue: Kenner apartment ban angers affordable-housing advocates, *NEW ORLEANS CITYBUSINESS*, April 12, 2008. This author was interviewed and quoted in a newspaper article following the April 3, 2008 ban. *See, e.g.*, Mary Sparacello, Kenner accused of housing violation; Group says apartment ban is discriminatory, *TIMES-PICAYUNE*, April 11, 2008, at Metro-1, *available at* 2008 WLNR 6791234 (“Even if a government entity (is) not trying to exclude a particular group, a court could rule that a government’s action has a disproportionate impact on a protected group.”).

¹¹² Mary Sparacello, Multifamily construction ban OK’d; Kenner moratorium to last for one year, *TIMES-PICAYUNE*, April 4, 2008, at Metro-1, *available at* 2008 WLNR 6343160.

¹¹³ Mary Sparacello, Multifamily housing faces halt; Kenner awaits land-use plan, *TIMES-PICAYUNE*, June 6, 2007, at Metro-1, *available at* 2007 WLNR 10528001 (quoting developer Henry Shane).

City Council proposed and passed the moratorium.¹¹⁴ Yet, the Kenner City Council insisted that the ban was not targeted to particular properties.¹¹⁵

The ban on new multi-family housing had the potential to eliminate rental units in Kenner that existed before Hurricane Katrina. In particular, the Redwood Apartment complex on North Kenner consisted of 400 units before the storm and housed many low income renters.¹¹⁶ Despite the fact that this demolished development had already existed before the storm, the homeowners living adjacent to the site approached the redevelopment of the apartment complex as though a change in land use was being proposed. Neighbors expressed concern about noise, traffic, safety, and inadequate infrastructure and sought a multi-family construction ban that would keep the site vacant.¹¹⁷ Thus, the Kenner multi-family housing moratorium adopted post-Katrina threatened to reduce the number of rental units available there compared with those existing before the storm.¹¹⁸ As one constituent puts it: “The less apartments, the better.”¹¹⁹

Despite the Council’s protestations that “an abundance” of rental housing exists in Kenner,¹²⁰ it may not all be affordable to its residents. In March 2008, less than a month before the multi-family housing ban, thousands of people are reported to have lined up outside of the Kenner housing authority office to apply for federal rental assistance vouchers.¹²¹ Did the city of Kenner pursue the multi-family housing ban “despite” the demonstrated needs of its residents,¹²² or did the “thousands” of needy residents create concern on the part of Kenner officials that some action needed to be taken to prevent the influx of federal subsidies into the City?

¹¹⁴ Complex issue: Kenner apartment ban angers affordable-housing advocates, NEW ORLEANS CITYBUSINESS, April 12, 2008 (referring to concerns of investors that “[t]he ban already puts in limbo at least two developments in planning stages and threatens investment in future mixed-income projects”).

¹¹⁵ Mary Sparacello, Multifamily construction ban OK’d; Kenner moratorium to last for one year, TIMES-PICAYUNE, April 4, 2008, at Metro-1, *available at*, 2008 WLNR 6343160 (quoting Councilwoman Michele Branigan, “This is an issue that is citywide. . . it’s not particular to one piece of property.”). *But see* Complex issue: Kenner apartment ban angers affordable-housing advocates, NEW ORLEANS CITYBUSINESS, April 12, 2008 (referring to comments of Kenner City Councilman Joe Stagni that “the law is a response to [neighborhood] opposition” relating to the Redwood Apartment complex).

¹¹⁶ Complex issue: Kenner apartment ban angers affordable-housing advocates, NEW ORLEANS CITYBUSINESS, April 12, 2008.

¹¹⁷ *Id.* When Kenner officials put off the blanket ban on multi-family construction in June 2007, they opted instead to conduct “a study” of the 15 acres of vacant land that included the Redwood apartments. *See* Mary Sparacello, Multifamily construction ban OK’d; Kenner moratorium to last for one year, TIMES-PICAYUNE, April 4, 2008, at Metro-1, *available at*, 2008 WLNR 6343160. The University of New Orleans conducted the study and recommended in early 2008 that the site be used for both residential and commercial development. *See id.*

¹¹⁸ *But see* Mary Sparacello, Multifamily construction ban OK’d; Kenner moratorium to last for one year, TIMES-PICAYUNE, April 4, 2008, at Metro-1, *available at*, 2008 WLNR 6343160 (noting that developments receiving approval prior to the ban’s passage would proceed, including a complex in south Kenner that was in the process of being rebuilt).

¹¹⁹ *See* Complex issue: Kenner apartment ban angers affordable-housing advocates, NEW ORLEANS CITYBUSINESS, April 12, 2008.

¹²⁰ *See id.* (quoting Councilman Joe Stagni); *see also id.* (the UNO study commissioned in mid-2007 of the site of the Redwood apartment complex found “no shortage of multifamily housing in Kenner).

¹²¹ *Id.*

¹²² *Id.* (quoting real estate investment banker and commissioner of the Louisiana Housing Finance Agency Mark Madderra: “There is clearly a significant demand for affordable housing in Kenner as evidenced by the long line of people who showed up to apply for affordable housing, and it concerns me that the government hasn’t recognized that need.”).

In 2000, renter-occupied housing comprised 39% of all occupied housing in Kenner, slightly above the rate for Jefferson Parish as a whole, but nowhere near the proportion for Orleans Parish.¹²³ Also, this proportion of renter-occupied housing in Kenner in 2000 had decreased from 41% in 1990.¹²⁴ Although the UNO study ultimately found no shortage of multi-family housing, it does not recommend a complete ban either, recommending some “high-density residential development” in parts of the city as well as mixed use residential development on the Redwood apartment complex site.¹²⁵ Further, when a jurisdiction like Kenner considers whether there is a “shortage” of rental housing, it is typically considering whether the housing need is being met for existing residents, not for renters across the region. Also, the conclusion that there is no “shortage” does not necessarily support a reduction in rental units, such as that sought by residents and city officials.

St. Bernard Parish

St. Bernard Parish is located five miles east of downtown New Orleans.¹²⁶ In 2000, St. Bernard Parish was 88.3% white and 7.6% African American. A 30-foot tidal surge spawned by Hurricane Katrina damaged or destroyed *all* of the 26,000 homes in St. Bernard Parish.¹²⁷ As of August 2008, 37,000 people had returned, representing only slightly more than half of the pre-Katrina population of 68,000.¹²⁸ In late 2008, St. Bernard Parish’s President made this pitch: “Displaced residents, visitors, *and new residents* are all welcomed to share in what has long been one of Louisiana’s best kept secrets.”¹²⁹ Despite the urgent efforts of the Parish to re-grow its population and rebuild its housing stock and infrastructure, St. Bernard has issued a number of restrictive zoning ordinances that seem to undermine these goals.

In the immediate aftermath of the storm, in November 2005, the Parish passed an ordinance establishing “a moratorium on the re-establishment and development of any multi-family dwellings in St. Bernard Parish throughout the disaster recovery period.”¹³⁰ The moratorium was designed so that only existing multi-family units were considered for redevelopment, and then only if the Council’s concerns were met with respect to “placement irregularities, over density

¹²³ See U.S. Census Bureau, QT-H2. Tenure, Household Size, and Age of Householder: 2000 (2000) (Kenner). Kenner reports its dominant residential land use to be single family residential, at 16,639 units or 83.4% of all residential units. Two-, three- and four-unit buildings comprise 4,285 units, or a total of 8.36% of all residential units. Multi-family structures (more than four units) comprise a total of 6043 units or 8.03% of all residential units. <http://www.kenner.la.us/history.html>; <http://www.kenner.la.us/govern.html>.

¹²⁴ U.S. Census Bureau, QT-H1. Occupancy, Tenure, and Age of Householder: 1990 (1990) (Kenner).

¹²⁵ *Complex issue: Kenner apartment ban angers affordable-housing advocates*, NEW ORLEANS CITYBUSINESS, April 12, 2008.

¹²⁶ Letter from Craig P. Taffaro Jr., St. Bernard Parish President, Katrina, in *THREE YEARS LATER, HURRICANE RECOVERY PROGRESS REPORT FOR ST. BERNARD PARISH, LOUISIANA, FROM DEVASTATION TO DETERMINATION. FROM PROMISE TO PROGRESS* 8 (August 2008), available at <http://www.sbpq.net/images/stories/sbpq3yr.pdf>.

¹²⁷ *Id.* at 2 (August 2008).

¹²⁸ *Id.* at 2.

¹²⁹ *Id.* at 8.

¹³⁰ Ordinance SBPC #632-11-05, Introduced by Craig Taffaro, District D, adopted November 1, 2005 (found at Civ. Action No. 2:06-cv-07185, Rec. Doc. 167-3 (E.D. La.)).

problems and quality of life issues.”¹³¹ High density within the Parish was considered more than two eight plex structures in a one block radius.

Other communities after Katrina had passed bans on rental housing, to be sure, but St. Bernard Parish took a more creative approach. On September 29, 2006, the Parish passed its infamous “blood relative” ordinance.¹³² This ordinance prohibited the rental of single family residences “by any person or group of persons, other than a family member(s) related by blood within the first, second or third direct ascending or descending generation(s), without first obtaining a Permissive Use Permit from the St. Bernard Parish Council.”¹³³ The ordinance went so far as to prohibit the “occupancy or use” of the single family dwelling by anyone other than a blood relative.¹³⁴ The stated purpose of the “blood relative ordinance” was to encourage owners of single family residences to return and rebuild homes and resume living in the parish, as well as “to maintain the integrity and stability of established neighborhoods as centers of family values and activities.”¹³⁵ Violators, including both lessors and lessees, were subject to civil and criminal misdemeanor penalties consisting of various fines and penalties imposed for each day that the property was rented in violation of the ordinance.¹³⁶ Single family property owners renting those homes at the time of the passage of the blood relative ordinance were exempted from its coverage.¹³⁷ By restricting rentals in this way, the Parish allowed rentals to “insiders” (i.e., blood relatives of existing residents), while denying rentals to “outsiders.”

The Greater New Orleans Fair Housing Action Center (GNOFHAC) challenged the blood relative ordinance, alleging that the ordinance “was passed with the intent and has the effect of denying and otherwise making unavailable rental housing to non-white persons”¹³⁸ GNOFHAC also alleged that the blood relative ordinance (as part of a series of ordinances restricting rental of single-family homes in St. Bernard Parish) “perpetuates segregation by preserving the Parish as an overwhelmingly all-white enclave.”¹³⁹ GNOFHAC also challenged the 2005 multi-family housing moratorium on the same grounds, alleging both intentional discrimination and the “effect of denying and making unavailable rental housing disproportionately needed by African American and Hispanic persons.”¹⁴⁰

¹³¹ *Id.*

¹³² The St. Bernard Parish Council (SBPC) had previously passed two ordinances restricting the rental of single family homes. On March 7, 2006, the SBPC passed Ordinance SBPC #643-03-06, which placed a moratorium on the rental of single-family homes “until such time the post Katrina real estate market in St. Bernard Parish stabilizes.” The stated purpose of the ordinance was “to preserve the integrity of single-family neighborhoods.” The SBPC subsequently on July 6, 2006 enacted Ordinance SBPC #661-07-06, which required that all single family dwellings to be used as rental properties obtain a Conditional Use permit from the Office of Community Development. These ordinances may be found at Civ. Action No. 2:06-cv-07185, Rec. Doc. 167-4 and 167-5.

¹³³ Ordinance SBPC #670-09-06, Section I.A., September 19, 2006, found at Civ. Action No. 2:06-cv-07185 (E.D. La.), Rec. Doc. 167-2.

¹³⁴ *Id.*

¹³⁵ *Id.* at Section I.

¹³⁶ *Id.* at Sections I.F., I.G., I.H., & I.I.

¹³⁷ *Id.* at Section I.K.

¹³⁸ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 3, at para. 3.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at para. 4.

GNOFHAC cited evidence that the SBPC's purpose was to maintain the racial homogeneity of the Parish. There are contemporaneous statements, such as that of one Councilman: "We're not changing the demographics, all we're doing is saying we want to maintain the demographics"¹⁴¹ Council Chair Lynn Dean, who voted against the ordinance, put it more bluntly, stating that the ordinance was passed to "block the blacks from living in these areas."¹⁴² The demographics are revealing. As of 2000, white families, who made up 88.3% of St. Bernard's population, owned 93% of all owner-occupied houses in the Parish.¹⁴³ Thus, regardless of the intent of the blood relative ordinance, its effect would have been to make single family rentals unavailable to non-white persons. Further, GNOFHAC alleged that all of the St. Bernard Parish ordinances were designed to make rental housing unavailable in St. Bernard Parish, which is disproportionately needed by African Americans and Hispanics in the New Orleans metropolitan area.¹⁴⁴

The Parish sought to justify the blood-relative ordinance as necessary to preserve the Parish's history of mostly owner-occupied neighborhoods.¹⁴⁵ GNOFHAC countered that the justification lacked any rational relationship to the actual effect of the ordinance – "permitting some rentals to a virtually all-white class of persons while denying rentals to virtually all minorities."¹⁴⁶

The parties resolved the litigation through consent decree, signed by the district court in February 2008 and granting the court continuing jurisdiction for a three year period.¹⁴⁷ The Parish agreed to drop the blood-relative ordinance and substitute an alternative procedure for approving certain rental transactions in the Parish. The Parish also agreed to refrain from future discrimination on the basis of race or national origin.

Despite the consent decree it had entered earlier in the year, the Parish in September 2008 resuscitated its multi-family housing ban, placing a moratorium on "any housing developments with five (5) or more units" for twelve months.¹⁴⁸ The ban prompted GNOFHAC and a housing

¹⁴¹ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 13) (citing New Law in St. Bernard Parish Stirs Controversy, *available at* <http://www.wvlv.com/local/stories/wwl092806jblaw.27895d18.html>). Another Councilman stated: "[w]e don't want to change the aesthetics of a neighborhood." *Id.* (citing Michelle Chen, Housing Watchdogs Call Post-Katrina Ordinance 'Racist,' THE NEW STANDARD (Oct. 6, 2006)). Still another councilman who voted against the ordinance acknowledged that fear of greater racial integration could be the driving force behind community support for the ordinances. *See id.*

¹⁴² Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 14) (citing Michelle Chen, *Housing Watchdogs*).

¹⁴³ *Id.* (Rec. Doc. 6-3, at 4-5) (citing C. Bradford Aff. 5-6 & n.8).

¹⁴⁴ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 3, at para. 14.

¹⁴⁵ *Id.* at para. 19.

¹⁴⁶ *Id.* at para. 21.

¹⁴⁷ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 114. The Parish had previously agreed through a stipulation entered in November 2006 to refrain from enforcing the blood relative ordinance. *Id.* at Rec. Doc. 19. The Parish rescinded the blood relative ordinance in January 2007. Consent Judgment, at 4 (Rec. Doc. 114).

¹⁴⁸ Ordinance SBPC #905-09-08, September 16, 2008, found at Civ. Action No. 2:06-cv-07185 (E.D. La.) Rec. Doc. 167-6.

developer to file a motion to enforce the consent decree.¹⁴⁹ The Dallas-based developer, Provident Realty Advisors, Inc., met with Parish government officials about its proposed 288-unit development¹⁵⁰ and received preliminary assurances that the properties were properly zoned until an editorial blasting the development sparked a public outcry.¹⁵¹ The outcry prompted the Parish government to withdraw its support and impose the moratorium.¹⁵² Although the Parish claimed that a development moratorium was an accepted planning practice for a jurisdiction engaged in a comprehensive planning and zoning study, the Parish did not ban commercial development or other residential development during this same time frame.¹⁵³ As noted by the court, “the type of housing restricted or forbidden is disproportionately utilized by African Americans.”¹⁵⁴ Following an evidentiary hearing, the district court found that the September 2008 multi-family housing ban violated the Fair Housing Act as well as the February 2008 consent order.¹⁵⁵ In particular, the Court held that the multi-family housing ban was adopted with discriminatory intent and had a racially discriminatory impact.¹⁵⁶ The Court later ruled St. Bernard Parish in contempt for this violation of the February 2008 consent order.¹⁵⁷

Even after a federal judge found St. Bernard Parish to have engaged in intentional race discrimination in enacting its multi-family housing ban, the Parish and its residents continued to wage a public relations war against multi-family housing. The Parish held a series of hearings on the 288-unit development proposed for the Parish.¹⁵⁸ Along with the ongoing statements of concern about ghetto living, gang-banging, drug-dealing, and drive-by shooting,¹⁵⁹ the opposition increasingly emphasized that there was a sufficient supply of affordable rental housing, and that allowing low income tax credit housing to be built in the Parish would result in an over-supply of such housing and a decline in property values.¹⁶⁰ The Parish asked the state

¹⁴⁹ GNOFHAC v. St. Bernard Parish, Civ. Action No. 2:06-CV-07185 (E.D. La.) Rec. Doc. 126.

¹⁵⁰ The Provident development proposed for St. Bernard Parish consists of four mixed-income rental apartment complexes of 72 units each. Thirty percent of the units would rent at fair market rates, fifty percent would be rented to those at 60% of Area Median Income (AMI), and twenty percent would be rented to those at 30% of AMI. GNOFHAC v. St. Bernard Parish, 641 F.Supp.2d 563, 566 (E.D.La. 2009).

¹⁵¹ GNOFHAC, 641 F.Supp.2d at 570-72.

¹⁵² *Id.* at 572-73.

¹⁵³ Dr. Wade Ragas, Opinion Regarding Multi-Family Discrimination Claim for St. Bernard Parish Government, at 8 & 10 (February 2009), found at Civ. Action No. 2:06-cv-07185 (E.D. La.) Rec. Doc. 201.

¹⁵⁴ GNOFHAC v. St. Bernard Parish, 641 F.Supp.2d at 570 (citing the testimony of plaintiff’s expert, Dr. Calvin Bradford).

¹⁵⁵ *Id.* at 577 & 588.

¹⁵⁶ *Id.*

¹⁵⁷ GNOFHAC v. St. Bernard Parish, Slip Copy, 2009 WL 2177241 (E.D.La., July 22, 2009).

¹⁵⁸ Chris Kirkham, Housing debate in St. Bernard reflects post-Katrina landscape, TIMES-PICAYUNE, at A1, July 19, 2009 (“For nearly three months, the meetings about the mixed-income apartment complexes slated for Chalmette have drawn standing –room-only crowds to the St. Bernard Parish government complex . . . [with residents] voicing unbending opposition to the complexes they say will send the parish’s real estate market into a tailspin . . .”).

¹⁵⁹ GNOFHAC v. St. Bernard Parish, Slip Copy, 2009 WL 2969502, *4 (E.D.La., September 11, 2009).

¹⁶⁰ Chris Kirkham, Housing debate in St. Bernard reflects post-Katrina landscape, TIMES-PICAYUNE, at A1, July 19, 2009. See also, Chris Kirkham, Housing ban lands St. Bernard Parish in court again, TIMES-PICAYUNE, at B-2, December 27, 2008 (quoting Councilman Wayne J. Landry, “It’s going to create the density of rental spaces too close, which is exactly the opposite of what the rental ordinance is trying to do. We didn’t want to have that concentrated density, and now we’re going to go and put 280 units in four locations?”).

agency that awarded the low income housing tax credits, vital to the development, to withdraw the tax credit award.¹⁶¹

In addition to the scheduling of public hearings about the development, St. Bernard Parish engaged in a variety of overt and covert measures designed to block the development, leading to two subsequent contempt orders by the district court. The Parish denied Provident's application to re-subdivide the plats for the development, prompting Provident to file a motion seeking to hold the Parish in contempt of the court's prior orders.¹⁶² After an evidentiary hearing, the Court granted that motion in August 2008, requiring the Parish to consider the re-subdivision applications at the next Planning Commission hearing.¹⁶³

Eight days later, the Parish persisted in its refusal to re-subdivide the plats, with the Planning Commission essentially refusing to consider the Court's August 2009 order, stating "the Judge doesn't say what's a major or a minor subdivision in St. Bernard Parish."¹⁶⁴ Provident filed a second motion for contempt. Again following an evidentiary hearing, the Court partially granted the motion, deeming the re-subdivision applications approved, and setting deadlines for other building permit-related decisions, communications, and approvals on parking, landscaping, drainage, and fire.¹⁶⁵ In its third finding of contempt, the Court noted: "Defendants may disagree with this Court's prior orders, but under our system of laws, they must abide by those prior orders unless and until the Court of Appeals takes a different view. Defendants are not free to defy this Court simply because they think they know better."¹⁶⁶ Regarding the Parish's dilatory efforts, the Court stated: "This Court has repeatedly found the stated justifications given by these officials to be unsound, contrived, pretextual and racially discriminatory."¹⁶⁷ As of the time of this writing, it appears that construction has finally proceeded on Provident's multi-family housing development in St. Bernard Parish.¹⁶⁸

As of 2000, about 25% of all occupied units in St. Bernard Parish were renter-occupied, which is half the amount of rental units that exist in neighboring Orleans. The barriers to entry erected by St. Bernard Parish Council seem not merely designed to preserve the racial and socioeconomic homogeneity that pre-existed Katrina, but rather to reduce the number of ethnic minorities in St. Bernard Parish. This is so because the African American population before Katrina was heavily

¹⁶¹ Chris Kirkham, Housing debate in St. Bernard reflects post-Katrina landscape, *TIMES-PICAYUNE*, at A1, July 19, 2009.

¹⁶² *GNOFHAC v. St. Bernard Parish*, Civ. Action No. 2:06-cv-07185 (E.D. La.) Rec. Doc. 241.

¹⁶³ *GNOFHAC v. St. Bernard Parish*, 648 F.Supp.2d 805, 810-13 (E.D.La.2009) (in a detailed opinion finding the Parish in contempt, the court noted that although the planning commission staff had initially recommended approval of the re-subdividing of the plats as a minor subdivision, the planning commission abruptly recast the application as one for a major re-subdivision, was influenced by a racially-charged public hearing, and engaged in procedural delays and referrals between the parish council and planning commission).

¹⁶⁴ *GNOFHAC v. St. Bernard Parish*, Civ. Action No. 2:06-cv-07185 (E.D. La.) Rec. Doc. 303.

¹⁶⁵ *GNOFHAC v. St. Bernard Parish*, Slip Copy, 2009 WL 2969502, at *4-7 (E.D.La., September 11, 2009).

¹⁶⁶ *Id.* at *2.

¹⁶⁷ *Id.* at *4.

¹⁶⁸ Plaintiffs filed a fourth motion for contempt over the September 15, 2009 passage of Ordinance SBPC #1138-09-09, requiring all multi-family housing developments over 12 units to obtain prior approval of the voters, to be obtained by special election held at the expense of the developer. Before the court could decide that motion, the Parish rescinded the ordinance, purportedly under pressure from the federal government relating to the Parish's continued receipt of community development block grant funding. Rec. Dec. 352.

concentrated in a neighborhood called Village Square, consisting of rental housing that was destroyed by and largely razed after the storm.¹⁶⁹ Village Square is a neighborhood within St. Bernard Parish that was considered blighted prior to Hurricane Katrina.¹⁷⁰ This five-block area of approximately 700 apartments started out as rental housing for working-class families in the 1970s, but then when a local plant closed in the early 1980s, demand fell, the apartments fell into disrepair, and the area became associated with crime and drug activity.¹⁷¹ The Justice Department in 2004 filed a federal fair housing action based on an investigation it conducted of 120 apartments, alleging that property owners steered African Americans towards and whites away from the Village Square neighborhood on the basis of race.¹⁷²

The fact that the SBPC acted within three months of Katrina to prevent the redevelopment of multi-family housing in St. Bernard prevented Village Square residents from returning to Village Square, and thus, the Parish. GNOFHAC alleged that while the St. Bernard Parish officials issued permits for the redevelopment of existing multi-family units in other areas of the Parish, the Parish did not issue permits to allow for the redevelopment of any multi-family units in Village Square.¹⁷³ In September 2006, the SBPC formally designated Village Square as a mitigation area, which would result in it being converted to green space.¹⁷⁴ Further, the 2006 St. Bernard Parish ordinances restricting rentals of single family dwellings would have prevented Village Square residents from renting single family homes as an alternative to multi-family housing in the Parish. It is difficult to imagine a more effective strategy for preventing the return

¹⁶⁹ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 4) (citing C. Bradford Aff. 4-5).

¹⁷⁰ Richard Slawsky, St. Bernard Parish housing authority would work to clean up slums, NEW ORLEANS CITYBUSINESS, June 20, 2005; Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 6) (citing Amy Blakely, Plan to Bulldoze Slum Raises Questions, TIMES-PICAYUNE, at 7 (Feb. 5, 2005) (reporting that the SBPC created a committee in February 2005 "to explore ways to expropriate Village Square, bulldoze the buildings, and expel residents").

¹⁷¹ Richard Slawsky, St. Bernard Parish housing authority would work to clean up slums, NEW ORLEANS CITYBUSINESS, June 20, 2005.

¹⁷² See Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 4 & n.1) (citing United States v. B & S Properties of St. Bernard, L.L.C., Civ. Action No. 04-1063 (E.D. La. 2005)).

¹⁷³ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 3, at para. 27-33. See also *id.* at para. 35 (stating that the SBPC denied plaintiff Wallace Rodrigue's formal application to renovate his own property in September 2006 – 9 months after he submitted his application – citing the SBPC moratorium and the Parish's plans to "mitigate" the Village Square area); Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 14-15) (discussing evidence that race of neighborhood residents prior to storm influenced SBPC decisions on permit applications for multi-family housing).

¹⁷⁴ Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Rec. Doc. 3, at para. 32. Given that the purpose of the mitigation program is to limit the redevelopment of flood-prone areas, it is notable that the most flood-prone areas of St. Bernard were located outside of Village Square in more predominantly white neighborhoods. Greater New Orleans Fair Housing Action Center, et al. v. St. Bernard Parish, et al., Civ. Action No. 2:06-CV-07185 (E.D. La.), Memorandum of Points and Authority in Support of Plaintiffs' Application for a Preliminary Injunction (Rec. Doc. 6-3, at 15) (citing Logan Report at 8).

of African Americans who had rented housing in St. Bernard Parish pre-Katrina, while ensuring that no new African American renters would be able to migrate there.

Indeed, the fact that the Village Square site is designated as a low-income census tract paved the way for the parish to obtain six million dollars in community development block grant money to use for redevelopment.¹⁷⁵ This availability of federal money to counteract blight in Village Square makes an ironic statement about the way in which the Parish can use the low incomes of former residents to obtain federal dollars for redevelopment activity, even as the Parish takes extraordinary measures to close off all points of re-entry for its former low income residents of color.

To the extent that St. Bernard Parish, would be considered the next rung on the “housing ladder” for low income African Americans looking for better housing conditions and neighborhoods in which to raise their families, given its affordable median housing prices, it is troubling that the Parish – clearly eager to grow its population -- is directing so much energy to deny entry to those in arguably the same circumstances as those entering the parish decades ago. Indeed, between 1960 and the 1980s, whites who had occupied legally segregated housing projects sought to escape desegregation in favor of “affordable-living alternatives in working-class suburbs” such as St. Bernard Parish.¹⁷⁶ These white families, in search of “better school districts, safety, suburban life-styles, less congestion, and lower costs of living”¹⁷⁷ presumably were able to exercise housing mobility to improve the socio-economic position of their families, and thus future generations. Did these white residents, some of them former public-housing residents, face the same barriers currently in place for former public housing residents of color?

New Orleans East

New Orleans East is a suburb located within Orleans Parish, which has experienced substantial racial and demographic shifts since 1980. Most of the neighborhoods within New Orleans East were developed in the 1960s and 1970s. The area was occupied mostly by whites in 1980 and had significant commercial and retail investment, including the largest shopping mall in the region called The Plaza at Lake Forest. After 1986, the Oil Bust severely reduced demand for apartment units in the area, which paved the way for lower-income families to move into previously middle-class apartment complexes. The increasing number of low-income families, most of them African American, moving into the area sparked a massive white exodus in the 1980s and 1990s. By 2005, New Orleans East was a predominantly African American suburb, with some exclusive neighborhoods occupied by upper-income African American families.

¹⁷⁵Chris Kirkham, St. Bernard is back to square one on complex, *TIMES-PICAYUNE*, May 25, 2009 (“Because the area is designated as a low-income census tract, a \$58 million hospital investment in the area could generate more than \$6 million in additional revenue to use for construction of a medical office building on the site . . .”). Various plans have been proposed for the use of the \$6 million in Community Development Block Grant (CDBG) money made available because of the low incomes of displaced Village Square residents. In addition to the hospital plan, the Parish also had negotiated with a private developer who would purchase individual tracts within Village Square from property owners; the Parish would use FEMA hazard mitigation funds and CDBG funds to assist with acquisition costs.

¹⁷⁶Richard Campanella, An Ethnic Geography of New Orleans, *JOURNAL OF AMERICAN HISTORY*, 94 (Dec. 2007), 704.

¹⁷⁷*Id.*

Since the storm, New Orleans East has failed to recover a hospital or significant commercial and retail services.

Prior to Katrina, residents in New Orleans East had organized to oppose the development of new affordable apartments in the area, so it was perhaps not surprising that proposals for affordable housing after Katrina would spark the same kind of opposition. For example, residents opposed the development of 38 single-family homes designed to provide affordable “work force” housing under a lease-purchase arrangement near the upscale Lake Carmel subdivision.¹⁷⁸

Consequences of Exclusionary Zoning: Tax credit market freeze

Given the fact that a significant portion of hurricane recovery assistance has come in the form of low income tax credit housing,¹⁷⁹ the rejection of this assistance on the part of local officials throughout the region has certainly obstructed hurricane recovery in metro New Orleans.¹⁸⁰ The fact that the bottom dropped out of the tax credit market in the fall of 2008 also jeopardized the use of tax credits that had not yet been placed in service.¹⁸¹ Of course, local governments in metro New Orleans cannot be blamed for the tax credit market freeze, but the delays occasioned by their rejection of tax credit projects certainly compounded the negative impact of the freeze.

Highest opportunity neighborhoods in the region: Open and Affordable?

Despite the region’s challenges in attempting to recover from Hurricane Katrina, two metropolitan New Orleans area cities have recently managed to make a “top 100” list of best places to live in the United States. Relocate America, an online marketing service for real estate professionals, conducts an annual review of data concerning education, employment, economy,

¹⁷⁸ Bruce Egger, Affordable housing plan draws opponents from gated Lake Carmel in east New Orleans, TIMES-PICAYUNE, March 25 2009, available at http://www.nola.com/news/index.ssf/2009/03/affordable_housing_plan_draws.html (“residents fear the development would threaten their property values and quality of life”).

¹⁷⁹ See Meghan Gordon, Terrytowners resist low-income housing; Group seeks homes for senior citizens, TIMES-PICAYUNE, November 2, 2006 (referring to comments by Francine Friedman, legislative counsel for the Affordable Housing Tax Credit Coalition, who noted that, under the Gulf Opportunity Zone Act, Congress approved assistance in the form of \$57 million per year for three years in tax credits awarded to private developers who restock Louisiana’s hurricane-ravaged housing supply).

¹⁸⁰ See Meghan Gordon, Jefferson’s housing restrictions attacked, TIMES-PICAYUNE, February 17, 2007 (referring to statements of Mark Madderra, chairman of the LHFA’s multifamily housing committee, “the actions [of Jefferson Parish Councilman Chris Roberts] block the only major program Congress has made available to restore the region’s multifamily housing . . .”); see also *id.* (referring to statements of Ernest Johnson, president of the Louisiana NAACP, “sees [exclusionary actions in Terrytown] . . . as a deliberate barrier to affordable housing that will choke the region’s housing recovery when Jefferson is otherwise well-situated to step in for more devastated areas.”).

¹⁸¹ Bureau of Governmental Research, THE HOUSE THAT UNCLE SAM BUILT: THE CONTINUED EXPANSION OF SUBSIDIZED HOUSING IN NEW ORLEANS, May 2009, at 5 (“A weakened economy and less demand from traditional purchasers of tax credits are taking a toll on tax credit developments.”) (citing U.S. Department of Housing and Urban Development, *Post-Katrina New Orleans: The State of Affordable Rental Housing*, Impact 200 Key Initiative 8.2, November 2008); PolicyLink, *supra*, at 6 (“The national economic downturn means fewer investors in Low Income Housing Tax Credits, jeopardizing the financing for as many as 4,600 of the planned 13,100 units of multifamily rental housing in southern Louisiana.”).

crime, parks, recreation and housing.¹⁸² They also consider nominations from the cities themselves. In 2009, Relocate America selected Metairie, in Jefferson Parish, and Mandeville,¹⁸³ in St. Tammany Parish as Top 100 Places to Live in the nation.¹⁸⁴ What is most interesting about the selection of Metairie and Mandeville as desirable relocation destinations is that these are not communities that have implemented sweeping housing moratoria post-Katrina relating to multi-family housing or rental housing throughout the jurisdiction.¹⁸⁵ This may be explained by the fact that little to no post-Katrina tax credit development has been proposed in these communities. The question arises: why are the communities that have been designated among the highest opportunity communities in the region not slated for any affordable housing development?¹⁸⁶

Conclusion: What can Post-Katrina New Orleans Teach Us About Affirmatively Furthering Fair Housing?

The post-Katrina rebuilding experience with respect to rental housing has revealed that the path of least resistance principle has been an abysmal failure. This laissez faire approach threatens to reinforce racially segregated housing patterns. The post-Katrina development experience has also helped illustrate the way in which private market forces and government interventions frequently conspire to create, maintain, and/or reinforce entrenched racial residential segregation.

Orleans Parish, which prior to Hurricane Katrina had a majority of its housing units occupied by renters and the second highest rate of poverty concentration in the country, sought to reverse a dynamic whereby the majority of the region's poor people lived in the parish. The HUD-run Housing Authority of New Orleans embarked on a massive public housing redevelopment program that sought to demolish approximately 5000 units of public housing in Orleans Parish and replace them with fewer deeply subsidized rental units as well as a majority of market rate units on site.

¹⁸² <http://top100.relocate-america.com/>.

¹⁸³ According to Mandeville's marketing material posted on the Relocate America website, the city "enjoys a lifestyle that is quite different from New Orleans, its South Shore neighbor. . . . Mandeville residents have a common goal: to work hard, and support their families to the best of their ability. Our unemployment rate is extremely low, and our population continues to grow. Mandeville is the most desired city to live within the fastest growing parish in the State of Louisiana." Mandeville, Louisiana Relocation Guide, <http://www.relocateamerica.com/louisiana/cities/mandeville>.

¹⁸⁴ <http://top100.relocate-america.com/>.

¹⁸⁵ Deon Roberts, Land shortage stifles for large apartment development in New Orleans, NEW ORLEANS CITYBUSINESS, May 15, 2006 ("Mike Sevante, St. Tammany Parish council administrator, said the parish has no moratoriums specifically prohibiting multifamily housing, although other types of construction are on hold due to traffic and drainage concerns."); *but see* Cindy Chang, Updated zoning rules passed; condos banned in parts of Mandeville, TIMES-PICAYUNE, October 26, 2007, at Metro-1, *available at*, 2007 WLNR 21121084 (following a December 2006 moratorium on multifamily housing in one historic district within Mandeville, the council adopted restrictions in October 2007 on multi-family development in certain parts of the district, but would allow mixed- use multi-family development).

¹⁸⁶ Seventy-five percent of the housing stock in Mandeville consists of single family homes; the other 25% is a mixture of "condos, newly constructed apartments, and three prestigious retirement communities." Mandeville, Louisiana Relocation Guide, <http://www.relocateamerica.com/louisiana/cities/mandeville>.

At the same time, parishes outside Orleans took concrete action to remove African American renters that had lived in the parish before Hurricane Katrina. Parishes outside Orleans also took concrete action to ban the creation of new rental housing opportunities that might increase the number of African American renters in the parish post-Katrina. Most of the communities imposing bans and other restrictions on the development of rental housing are claiming that they have “enough” rental housing. But in determining whether they have “enough” rental housing to meet the need, they are usually focused on whether the needs of existing residents are being met, not whether they are meeting their fair share of regional need for rental housing.¹⁸⁷

Upon closer examination, the first neighborhoods in which federally assisted housing has been proposed post-Katrina have been those that could be considered the most affordable historically for those seeking to make upward moves. In other words, communities such as Terrytown, St. Bernard, and parts of Kenner and New Orleans East might be considered the next rung on the housing ladder for those wishing to leave high poverty neighborhoods and locate in more working- or middle-class communities. Low-income and working class white families exercised these kinds of housing choices when many of these communities were established. U.S. Census data reflect that, at least in Terrytown, Kenner, and New Orleans East, families of all races had begun to make these moves in the 1980s and 1990s prior to Katrina. Despite its affordability, St. Bernard remained overwhelmingly white outside of the Village Square area, which could be attributable to private market discrimination and limited rental housing. Not surprisingly, these “second rung” communities took decisive action to exclude new federally assisted housing after Katrina, and sought to reverse any demographic shifts that were occurring in these neighborhoods prior to Katrina. On the other hand, the more socioeconomically and racially homogeneous communities, nationally recognized for their desirability, and arguably less affordable or accessible to families seeking to escape concentrated poverty and racial segregation, such as neighborhoods in Metairie and Mandeville, have experienced relatively little intervention in the form of any proposed housing subsidies or tax credit projects. Accordingly, the lack of any significant intervention in these more homogeneous communities could explain the deafening silence with respect to exclusionary zoning activity.

Federally assisted housing programs will continue to perpetuate segregation and poverty concentration if the path of least resistance continues to govern location decisions.

The irony is that aside from the initial act of intervening to provide the housing subsidy itself, the federal government yields to a highly decentralized, *laissez faire* scheme relating to where the subsidy will be utilized. This is not to suggest that federal housing programs are not heavily burdened by substantial reporting requirements, myriad and conflicting regulations, and byzantine organizational structures. It is to suggest that none of the bureaucracy seems to have

¹⁸⁷ See *Thompson v. HUD*, 348 F.Supp.2d at 463. (“It is high time that HUD live up to its statutory mandate to consider the effect of its policies on the racial and socio-economic composition of the surrounding area and thus consider regional approaches to promoting fair housing opportunities for African-American public housing residents in the Baltimore Region. This Court finds it no longer appropriate for HUD, as an institution with national jurisdiction, essentially to limit its consideration of desegregative programs for the Baltimore Region to methods of rearranging Baltimore's public housing residents within the Baltimore City limits.”).

ensured that consumers who use federal subsidies have greater access to high quality housing and greater neighborhood choice than those who do not.

HUD has begun to take some positive steps to fulfill its affirmative mandate to further fair housing, which is an encouraging sign.¹⁸⁸ The federal intervention in the housing market must encompass more than merely providing a subsidy. The federal intervention in the housing market should be designed to open neighborhoods not already open, make affordable what is not already affordable, enable housing subsidies to act as gateways to educational and employment opportunity, and inform families historically excluded from housing markets about their choices. Any federal housing interventions that are not so aimed will almost certainly exacerbate existing racial segregation and poverty concentration, as they have done for decades, and -- as post-Katrina New Orleans illustrates -- will continue to do again, and again, and again. . .

¹⁸⁸ HUD's intervention in the St. Bernard exclusionary zoning battle, its settlement in Westchester County, New York, and its 2011 program initiatives such as the Sustainable Communities Initiative and Choice Neighborhoods Initiative are all promising signs that HUD will act more affirmatively to fulfill its fair housing obligations in the future.