No. _____

In The
Supreme Court of the United States

L & F HOMES AND DEVELOPMENT, L.L.C.,
doing business as Hyneman Homes;
LARRY MITRENGA,

Petitioners,

v.

CITY OF GULFPORT, MISSISSIPPI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit In Three Consolidated Cases

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

City officials represented that the City would supply water for plaintiffs' proposed residential subdivision. Plaintiffs invested $2.4 million in reliance on these representations. When the subdivision was near completion, a public controversy arose. Without any prior notice to plaintiffs, the City reversed position and denied water. Plaintiffs asked for an explanation. City officials provided an explanation which subsequently proved to be inaccurate. Plaintiffs asked for a hearing. The City refused to provide a hearing or any appeal process. Plaintiffs sued and the City prevailed on summary judgment.

The questions presented are:

1. Whether plaintiffs possessed a property right worthy of due process protection and, more specifically, whether the Fifth Circuit's decision is inconsistent with *DeBlasio v. ZBA*, 53 F.3d 592, 600-601 (3d Cir. 1995), *revd. o.g.* and other Fourteenth Amendment jurisprudence;

2. Whether the City enforced regulations unequally or arbitrarily, resulting in an equal protection violation under *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) and/or prohibited racial discrimination;

3. Whether the Fifth Circuit erred in making credibility choices and fact findings at the summary judgment stage contrary to Fed.R.Civ.Proc. 56.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. L & F Homes and Development, L.L.C., doing business as Hyneman Homes;
2. Larry Mitrenga
3. City of Gulfport, Mississippi
4. National Association of Home Builders (amicus curiae)

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent companies, subsidiaries, or affiliates that are publicly owned corporations, and there is no publicly held corporation that owns 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners L&F Homes and Development, L.L.C. and Larry Mitrenga respectfully pray that this Honorable Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in three consolidated cases bearing docket numbers 12-60597, 12-60600, and 12-60601 on the docket of the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit opinion appears at ___ Fed.Appx. ___ (5th Cir. 2013); 2013 WL 4017711 and is reproduced at App. 1 (opinion); App. 94 (rehearing denied).

The opinions of the district court appear at 2012 WL 2569212 (July 2, 2012); 2012 WL 2863481 (July 11, 2012); 2012 WL 2994073 (July 20, 2012); and 2012 WL 2994077 (July 20, 2012) and are reproduced at App. 29, 31, 52, 69, 82.

JURISDICTION

The Fifth Circuit issued its opinion on August 7, 2013 and denied rehearing on September 11, 2013. This Honorable Court's jurisdiction is under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

GULFPORT MUNICIPAL ORDINANCE 2501 (excerpted here, complete ordinance at App. 96-101):

An ordinance of the City of Gulfport, MS adopting the 2003 edition of the *International Fire Code*, regulating and governing the safeguarding of life and property from fire and explosion hazards . . . **in the City of Gulfport, MS**. . . .

Section 1. That a certain document being marked and designated as the *International Fire Code*, 2003 edition . . . be and is hereby adopted as the code of the City of Gulfport for regulating and governing the safeguarding of life and property from fire and explosion hazards . . . **in the occupancy of buildings and premises in the (sic) Gulfport**. . . .

Section 5. That nothing in this ordinance or in the *International Fire Code* hereby adopted shall be construed to affect . . . any rights acquired, or liability incurred . . . under any act or ordinance hereby repealed . . . nor shall any just or legal right or remedy of any character be lost, impaired, or affected by this ordinance.

Section 7. That this Ordinance shall be made a part of the official minutes of the Gulfport City Council . . . for the protection, health and safety of people and property **in the City of Gulfport**, this Ordinance shall take effect upon November 1, 2006.

(emphasis added)

Miss. Code Ann. §11-46-9(1)(h):

> (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> (h) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature. . . .

U.S. CONSTITUTION AMENDMENT 14 SECTION 1:

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. §3604:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin. . . .

42 U.S.C. §3602(i)(1):

As used in this subchapter –

(i) "Aggrieved person" includes any person who –

(1) claims to have been injured by a discriminatory housing practice. . . .

42 U.S.C. §3613(a):

(a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

STATEMENT OF THE CASE

Plaintiffs L&F Homes and Larry Mitrenga invested $2.4 million to develop a residential subdivision on the Roundhill property. This property is located outside city limits in an area where defendant City of Gulfport is the exclusive water service provider.[1]

Plaintiffs state that they made their investment in reliance on assurances of city officials that the City would provide water for the subdivision (App. 154-157). At a late stage in the development process, the City abruptly reversed position and notified plaintiffs via an unsigned form letter that the City would not provide water (App. 170).

The letter did not give any reason for the change of position. Plaintiffs asked for an explanation but city officials stated that they could not discuss the situation because it was "in legal" (App. 161-163, 176, 177). However, several weeks after plaintiffs were notified of the decision, the city attorney informed plaintiffs that water service was denied because of a fire flow problem: the city's water system did not have sufficient capacity to supply adequate fire protection for residential development in the area (USCA5 5827).

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[1] Although the area is outside the City's municipal jurisdiction, the City's status as exclusive water provider gives the City *de facto* power to block any development in the area by denying water.

Plaintiffs asked for the opportunity to independently test the water system. City officials refused, stating that the City could not agree to independent testing because the test results would be admissible into evidence in ongoing litigation between the City and another developer, the 781 Group ("781") (USCA5 8529-8532).

Plaintiffs asked for a city council hearing but city officials declined to provide plaintiffs with a hearing (App. 162, 174, 178).

Plaintiffs filed suit in state court. The City moved to dismiss for lack of jurisdiction, arguing that a city council hearing is a precondition for the exercise of state court jurisdiction. The state court accepted this argument and dismissed plaintiffs' lawsuit (App. 93).

In August 2010, plaintiffs filed suit in federal court and sought a preliminary injunction (App. 131). The district court declined to schedule a preliminary injunction hearing, stayed discovery, asked for jurisdictional briefing, and took the case under advisement for eight months in order to evaluate perceived jurisdictional issues (USCA5 626-629). In April 2011, jurisdiction was established. Discovery commenced.

Plaintiffs again sought independent testing. The City opposed independent testing, asserting that city employees had thoroughly tested the lines and additional testing would serve no purpose (USCA5 5915), but the magistrate judge granted plaintiffs' motion to compel (USCA5 8488). Plaintiffs' experts performed tests which indicated an obstruction was artificially

reducing water flow on the Landon Road water main, the primary water line serving the area (App. 195-202).

This prompted a search for the obstruction (USCA5 5590, 5593). The obstruction was eventually located: one of the five gate valves on the Landon Road water main was in a 95% closed position. With the gate valve open, there was fire flow of approximately 2000 gpm, far in excess of any arguably applicable fire flow requirement (App. 201).

What had happened, in a nutshell, was that city officials placed the gate valve in a 95% closed position which substantially reduced water flow on the line, then city officials performed fire flow tests on this reduced water stream, then city officials produced these tests as proof that the line did not have adequate fire flow.

City officials testified that this was an honest mistake: the gate valve had been accidentally closed many years earlier, then its existence had been forgotten because there were no valve controls visible on surface inspection. However, the location of the "lost" gate valve is marked on the plans and diagrams of the city water system (USCA5 8479, 8486).

A review of the history of another development, the 781 development, points to an explanation other than honest mistake. The 781 tract is across the street from Roundhill. In summer 2009, 781 proposed to construct a subsidized cottage development for low income families. This proposal was highly controversial: city officials are vehemently opposed to the

construction of subsidized residential housing in Gulfport and its environs.[2]

In September 2009, the City refused to provide water to 781,[3] explaining that city officials did not view the 781 development as compatible with the area and had decided to make a "policy choice" to "reserve" available water for more suitable developments (USCA5 5014, 7900). 781 sued and sought a preliminary injunction (USCA5 5016). In November 2009, the City retained expert witnesses to bolster the City's position at the preliminary injunction hearing and these experts submitted reports which characterized fire flow in the area as substandard (USCA5 5026, 5029, 5810-5817). No city official had previously believed there was a fire flow problem (App. 187), but the City's witnesses testified, based on these reports, that it would be unsafe to allow new residential development in the area because of the newly-discovered fire flow problem (USCA5 5136-5139).

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[2] The City's opposition to subsidized developments has been expressed through various official actions. The mayor wrote a public letter to the governor setting forth the City's position that no subsidized developments should be constructed in Gulfport (USCA5 5888). The City Council imposed requirements intended to prevent construction of subsidized developments within city limits, *e.g.*, a requirement that developers sign a written agreement not to construct a subsidized development as a precondition for receiving city permits (USCA5 5891 *et seq*., 9527 *et seq*., 11561 *et seq.*).

[3] Because the Roundhill/781 area is outside city limits, permitting is the County's responsibility. The City's only means of blocking a development in this area is to deny water service.

Since the 781 and Roundhill tracts are across the street from one another and served by the same water lines, any fire flow problem which affects 781 necessarily affects Roundhill. It would not be easy for city officials to maintain the claim of a dangerous fire flow problem in the 781 litigation while permitting Roundhill to move forward.

City officials made it clear that City officials were not willing to take any step regarding Roundhill which could limit the City's ability to defend the 781 litigation.

Thus, the fact finder in our case must choose between several possible conclusions as to the motives and good faith of city officials.

However, one point is clear. If the City had allowed plaintiffs to perform independent testing in spring 2010, the 95% closed gate valve would have been discovered in spring 2010. The Roundhill development would have gone forward on schedule. Unfortunately, the City's alleged honest mistake, combined with the City's decision to refuse independent testing, delayed the Roundhill development for fourteen months. Plaintiffs lost their financing and, as a result, lost their $2.4 million investment.

The parties filed cross-motions for summary judgment (USCA5 4878, 5259, 5278, 5310, 5470, 5799, 8024). The federal district court granted summary judgment to the City (App. 29, 31, 52, 69, 82). The Fifth Circuit affirmed (App. 1, 94).

This is a fiercely anti-business decision. Under the holding of the Fifth Circuit, a landowner who invests millions of dollars to complete a long and arduous multi-step development process, authorized and approved by city officials at every step of the way, does not possess or acquire any right worthy of federal protection. The City can reverse position at a late stage of the process, block the development by denying utility service for any reason or no reason, and the developer has no right to elementary due process protections – no right to notice, no right to a hearing, no right to complain of arbitrary and capricious action.

Plaintiffs respectfully ask this Honorable Court to grant certiorari.

The history of development in the area, in more detail, is as follows.

ROUNDHILL

In spring 2006, the then-owner of the Roundhill tract, RLLC, commenced development of a subdivision of single family homes. RLLC obtained a "will serve" letter from the City in March 2006 and installed infrastructure (streets, sidewalks, landscaping, a sewer system, and a water system constructed according to a plan approved by the city engineer). In August 2006, RLLC entered into a wastewater service agreement with the City.

In January 2007, RLLC filed an application for city water service (service verification request 70083). The City did not produce any records relating to this application, but an independent contractor's records indicated that the City responded to this request by issuing a work order for installation of a water meter (App. 203). Roundhill was connected to the city water system in January 2007. Witnesses including city engineer Kris Riemann state that Roundhill continued to receive city water thereafter, up to and including after the inception of the current litigation (USCA5 5825, 5835, 8547). However, the City apparently did not bill for the water. The connection appears to have been an unmetered "courtesy tap."

In March 2007, a city inspector confirmed that the water system had been constructed according to the pre-approved plans, leaving only a few minor punch list items to complete (USCA5 4946).

The following points should be noted:

(1) The March 2006 "will serve" letter states that the city water system has capacity to supply a residential subdivision on the Roundhill tract and the City will supply water provided the developer completes certain city requirements (App. 124);

(2) In August 2006, the City Council passed a resolution authorizing the mayor to enter into a wastewater service agreement with RLLC. The resolution identifies certain documents as exhibits attached to the resolution. The resolution and exhibits appear in

> the following sequence in the city council minutes: resolution, wastewater service agreement, March 2006 "will serve" letter, application for interceptor service. The position of the "will serve" letter implies that it is an attachment to the wastewater service agreement (App. 105, 111, 124, 127; USCA5 4893, 6717).
>
> (3) RLLC completed the requirements for water service identified in the March 2006 "will serve" letter.

With respect to this last point, the requirements of the "will serve" letter are construction of a water system pursuant to plans approved by the city; a wastewater service agreement; and an application for connection to the county interceptor (sewer) service. The city engineer approved RLLC's plans (USCA5 10040). The March 2007 inspection confirms that the system had been completed according to plan except for a few minor punch list items. The wastewater service agreement and application for connection appear in the city council minutes as described above. And, in fact, Roundhill was connected to the city water system and began receiving city water as described above.

In March 2007, RLLC sold the property to an investment group which held the property for two years, then placed it on the market.

781

The 781 Group's original plan was to construct a subdivision of more than one hundred owner occupied town homes. In February 2008, the City provided a "will serve" letter stating the city water system had capacity to serve this development (USCA5 5822).

In summer 2009, 781 changed plans and proposed to construct a subdivision of 77 small cottage homes to be rented at subsidized rates to families of low and moderate income (USCA5 4496-7, 5001). This triggered a public controversy with the results already described above. It should be emphasized that:

> (1) The City denied water to 781 in September 2009 and the City's initial explanation was that the development was "incompatible" with the area.
>
> (2) The City's claim of a "fire flow" problem was developed in November 2009 by the City's retained experts for the purpose of bolstering the City's defense after 781 filed suit.

Prior to November 2009, no city representative thought there was a fire flow problem (App. 187).

The state court denied the preliminary injunction. The legal battle between the City and 781 continued and, in subsequent hearings, city officials offered an expanded list of reasons for the City's opposition to the 781 development. Several city representatives stated that the City opposed the development because city officials believed the 781 tenants

would include many undesirable persons with criminal propensities. City officials did not explicitly mention race, but several city representatives explained the City's opposition in terms which can reasonably be interpreted as proxies for racial concerns, *e.g.*, the 781 development would resemble the Williamsburg FEMA park (implying the majority of the tenants would be poor and black) (USCA5 7456-58, 9522); the development would attract large families with many children, creating a traffic hazard; the development would cause a decline in property values.

With regard to the alleged fire flow problem, 781 consulted civil engineer James Elliott, who performed preliminary tests under the auspices of county officials and opined that fire flow on the Landon Road line was being artificially reduced by a partly closed valve and/or other obstruction(s). An artificial impediment to fire flow is a public safety hazard so, on January 29, 2010, Mr. Elliott notified city engineer Kris Riemann of his findings (App. 189-191).

Mr. Elliott recommended that the line be fully tested (App. 191).

City officials responded that city employees had thoroughly tested the line and there was no obstruction or partly closed valve (App. 193).

ROUNDHILL

In fall 2009, plaintiffs wished to purchase a "fully entitled" property (a property for which all necessary

government approvals had already been secured so that construction could begin immediately) because plaintiffs wanted to take advantage of the temporary boost in home sales resulting from the New Homebuyers' Tax Credit.

In October 2009, L&F entered into a contract to purchase Roundhill conditioned on confirmation that the property was "fully entitled" (USCA5 4968). Plaintiffs' representatives consulted city representatives and received the following assurances regarding water service.

In November 2009, Mr. Riemann informed Mr. Mitrenga that the March 2006 "will serve" letter remained valid and effective (App. 154).

In November 2009, public works employee Melvin Bullock informed Steve Elrod that the March 2006 "will serve" letter remained valid and effective (App. 155). Mr. Bullock states that, before conveying this assurance to Mr. Elrod, he asked city engineer Kris Riemann for instructions. Mr. Riemann told Mr. Bullock that the City should treat the March 2006 "will serve" letter as valid because issuance of a new letter could injure the City's position in (unspecified) litigation (USCA5 5546-5548, 5071-5072).

In December 2009, Mr. Mitrenga and Mr. Riemann had a final conversation (App. 156-7):

> Mr. Mitrenga explained to Mr. Riemann that the seller was pressing to close and L & F had the option of moving forward or withdrawing from the deal. Mr. Mitrenga

> explained to Mr. Riemann that, due to the recession, he personally would have to go out on a limb by committing his personal assets to finance the project . . . Mr. Mitrenga wanted to make absolutely sure that there was no legal impediment to moving forward with the development because L&F, and Mr. Mitrenga personally, would be at risk of serious financial difficulties if the project got bogged down.
>
> After telling Mr. Riemann this, Mr. Mitrenga asked Mr. Riemann to state whether there was any impediment of any kind which might prevent building the houses. Mr. Mitrenga said if there was any possibility of an impediment, would Mr. Riemann please let him know while he could still walk away from the deal.
>
> Mr. Riemann responded by affirming to Mr. Mitrenga that there was no impediment of any kind and, to the contrary, the project was "good to go."

Mr. Mitrenga avers that, in reliance on these assurances, L&F purchased Roundhill and Mr. Mitrenga personally guaranteed the loan, pledging his own assets as security (App. 157).

In January 2010, L&F filed service verification request 117,158 asking the City to approve installation of individual water meters for individual lots. City officials responded that the City would approve the request as soon as plaintiffs completed two punch lists of minor items. Mr. Mitrenga avers that, in reliance on these assurances of city officials, L&F

spent approximately $20,000 to complete the punch lists (App. 158-159).

In mid-February 2010, city officials performed the final inspection, stated that all city requirements had been satisfied, and plaintiffs would receive approval shortly (App. 160, 186; USCA5 6900-6902, 6405).

On February 22, 2010, plaintiffs received an unsigned form letter stating that the City had denied service verification request 117,158. No reason was given (App. 170). The sequence of events from this point forward has already been described above: the delay in explaining, the refusal to give plaintiffs a city council hearing, the obstruction of plaintiffs' attempt to obtain judicial review in state court. Plaintiffs requested the opportunity to independently test the water system and city officials refused, explaining that the City was not willing to permit independent testing because the results of independent testing by plaintiffs could be admitted into evidence in the 781 litigation.

This explanation for the decision to deny independent testing is remarkably cynical. The test results could only be disadvantageous to the City if the test results cast doubt on the City's fire flow claim. What City officials were saying was: (1) it was more important to prevail against 781 than to identify and eliminate a possible public safety hazard; and (2) in order to successfully defend the 781 litigation, the City was prepared to conceal relevant information.

In August 2010, plaintiffs filed suit in federal court, asked for a preliminary injunction, and served discovery requests (App. 131). The district court stayed the litigation for nine months citing jurisdictional concerns.

In March 2011, 781 lost its funding (USCA5 7444).

In March 2011, the City informed plaintiffs that the Roundhill development could proceed. Unfortunately, it was too late to save Roundhill. Plaintiffs' financing had collapsed.

In April 2011, the district court lifted the stay. Discovery commenced and the evidence developed through discovery included the following.

What was the applicable fire flow standard?

County officials tested the Landon Road water line in spring 2010 and concluded that fire flow was adequate (USCA5 6856-6857).

At the 781 injunction hearing, city officials cited 1500 gpm as the minimum requirement (USCA5 5027).

After plaintiffs filed the current lawsuit, city officials cited 1000 gpm as the minimum, identifying Ordinance 2501 as the source of this requirement. Ordinance 2501 by its express terms applies inside city limits (Roundhill and 781 are outside city limits) and contains a grandfather provision. City officials assert, however, that they interpreted Ordinance

2501 as applicable outside city limits and as not grandfathering Roundhill.

Thus, in order to find that the minimum required fire flow is 1000 gpm, it is necessary to credit the testimony of city officials that they interpreted Ordinance 2501 as applicable to Roundhill, discounting evidence to the contrary.

When did city officials learn of the alleged fire flow problem?

In July 2005, city officials performed fire flow tests at the juncture of the Landon Road water main and a feeder line, in close proximity to Roundhill, and these tests showed 567 gpm fire flow (USCA5 5863). If fire flow below 1000 gpm represents a fire flow problem under Ordinance 2501, then the City was on notice of the problem from July 2005 forward.

However, city officials continued to permit residential development in the area after the effective date of Ordinance 2501 in November 2006. For example, city officials issued a "will serve" letter for 781's proposed town home development in February 2008.

City witnesses temporized, then explained the willingness to permit development in the area after the effective date of Ordinance 2501 by stating that the City did not learn of the alleged fire flow problem until November 2009 (App. 184-185, 187).

In order to conclude that the alleged fire flow problem was "newly discovered" in November 2009, it is necessary to disregard the July 2005 fire flow tests.

Did city officials have a good faith belief that there was a fire flow problem?

The City's fallback position, once the 95% closed gate valve had been discovered, was that the city officials who denied water service to Roundhill in February 2010 had made a reasonable good faith mistake.

If the testimony of Mr. Mitrenga and Mr. Elrod concerning the December 2009 conversation with Mr. Riemann is accepted, then Mr. Riemann's representations during this conversation constitute direct evidence of lack of good faith. In November 2009, Mr. Riemann, the city engineer, testified at the 781 preliminary injunction hearing that it would be dangerous to permit new residential development in the area because of the alleged fire flow problem. In December 2009, Mr. Riemann told Mr. Mitrenga there was no impediment to immediate development. If Mr. Riemann had a good faith belief that there was a fire flow problem as of November 2009, he could not have assured Mr. Mitrenga, in December 2009, that there was no impediment to development.

Mr. Riemann's December 2009 statements are direct evidence that city officials did not believe there was a serious fire flow problem.

Who made the decision to deny water service to Roundhill and why?

Between November 2009 and February 2010, city officials repeatedly assured plaintiffs that the City

stood ready to supply water for the Roundhill development.

Why did city officials abruptly change position on February 22, 2010? City witnesses, including the City's 30(b)(6) witness, were unable or unwilling to identify the persons who made the decision to deny water service (USCA5 6496, 6998, 7000-7002). Because the decision makers remain anonymous, there is no direct evidence as to why the City changed position. Plaintiffs infer that the change resulted from officials' perception that it would not be possible to simultaneously block 781 and permit Roundhill.

Developments other than Roundhill and 781

During the time period between the effective date of Ordinance 2501 (November 1, 2006) and the close of discovery in the current litigation (spring 2012), the City agreed to provide water for seventeen residential subdivisions and several large commercial developments.

Fire flow tests for the seventeen residential developments were as follows: city officials testified that one subdivision had fire flow above 1000 gpm but the City was not able to locate any test results to document this claim; one subdivision had fire flow below 1000 gpm but was approved anyway; for fifteen subdivisions, there was no fire flow testing and it was not and is not known whether the fire flow for these subdivisions is above or below 1000 gpm (USCA5 8042 *et seq.*).

Fire flow tests for the commercial developments showed fire flow below the Ordinance 2501/2003 IFC minimum requirements (USCA5 5881).

The only developments rejected for alleged failure to meet fire flow requirements were Roundhill and 781.

City officials offered various explanations for the City's decision to provide water to the other developers while rejecting Roundhill and 781. These explanations were not independently corroborated.

The parties filed cross-motions for summary judgment (USCA5 4878, 5259, 5278, 5310, 5470, 5799, 8024).[4]

The district court granted summary judgment to the City. The Fifth Circuit affirmed. The core of the Fifth Circuit's analysis is a series of fact findings as to the motives and state of mind of city officials. In sum, the Fifth Circuit chose to credit the City's claim of good faith mistake, discounting evidence which

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[4] Because there were seven cross-motions for partial summary judgment, plaintiffs' position was presented in multiple memoranda: three original and three rebuttal memoranda (due process USCA5 7997, 10028; pretext/accuracy USCA5 5475, 10092; equal protection USCA5 8026, 10496) and four opposition memoranda (state law USCA5 8399; 1983 claims USCA5 9483; FHA/race discrimination claims USCA5 9562; and Larry Mitrenga's individual claims USCA5 8360).

During the course of this certiorari petition, plaintiffs will footnote the page numbers at which key arguments were presented to the district court.

contradicts or impeaches the City's version of events. *See, e.g.*, Fifth Circuit's analysis of plaintiffs' equal protection arguments (App. 14).

> It was not until November 2009 that ***Gulfport became aware of*** . . . the inadequacy of fire flow. . . .

and analysis of plaintiffs' state law and due process claims (App. 17):

> As of February 22, 2010, ***Gulfport understood*** that inadequate fire flow was then reaching Roundhill, and ***Gulfport did not yet know*** of the closed valve . . . Gulfport's denial was not arbitrary ***based on what the city knew*** about water flow. . . . *(emphasis added)*

Remarkably, the Fifth Circuit did not see anything objectionable in the City's decision to refuse independent testing in spring 2010 because of concern that testing could have an "adverse impact" on the City's position in the 781 litigation (App. 10). "Adverse impact", in this context, means, if plaintiffs' experts had been allowed to test the water system in spring 2010, the 95% closed valve would have been located in spring 2010 and the City would not have been able to defend the 781 litigation by advancing inaccurate claims of a non-existent fire flow problem. In the view of the Fifth Circuit, it was acceptable for the City to delay discovery of the truth – and deny water service to Roundhill – in order to avoid this "adverse impact."

JURISDICTION IN COURT OF FIRST INSTANCE:

Plaintiffs filed suit in federal district court asserting claims under 42 U.S.C. §1983, 42 U.S.C. §1982, 42 U.S.C. §3613, and state law. The district court exercised original jurisdiction under 28 U.S.C. §1331 with supplemental jurisdiction of state law claims under 28 U.S.C. §1367.

REASONS FOR GRANTING THE PETITION:

THE FIFTH CIRCUIT ERRED IN MAKING PREMATURE FACT FINDINGS AT THE SUMMARY JUDGMENT STAGE CONTRARY TO FED.R.CIV.PROC. 56.[5]

Under the traditional interpretation of Fed.R.Civ.Proc. 56, courts do not resolve disputed fact issues, especially issues of intent and state of mind, by summary judgment. *Gelb v. Board of Elections of City of New York,* 224 F.3d 149, 157 (2d Cir. 2000). In our case, the Fifth Circuit has departed from this

[5] Numerous disputed issues were briefed at the trial level, *e.g.*, doubtful applicability of Ordinance 2501 (USCA5 8011-8013); significance of July 2005 fire flow test as notice to City (USCA5 10509); significance of 95% closed gate valve appearing on city diagrams as notice to City (USCA5 10029-10031); City's false claim to have thoroughly tested the water line (USCA5 10035-10038, 5478, 5481); City's determined opposition to independent testing (USCA5 5479-5480); multiple inconsistencies in testimony of city witnesses (USCA5 5475 *et seq*.).

traditional interpretation by choosing to credit the City's claim of "good faith mistake" at the summary judgment stage, even though this necessarily involves making credibility choices and reaching conclusions concerning motive, intent, and knowledge.

The Fifth Circuit's decision to make this departure is deliberate, not inadvertent. The deliberate nature of the departure is apparent because the Fifth Circuit expresses its conclusions about state of mind in clear and unequivocal language including the passages quoted above ("became aware of", "understood", etc.). The Fifth Circuit's opinion implicitly or explicitly makes all subsidiary fact findings necessary to underpin the ultimate conclusion that city officials made a good faith error.

The Fifth Circuit has adopted an interpretation of Fed.R.Civ.Proc. 56 pursuant to which it is permissible – at the summary judgment stage – to credit the testimony of government officials and reject disfavored evidence which calls official credibility into question. The effect of this interpretation is to establish, *de facto*, an unwritten but dispositive principle that one who seeks to challenge the actions of government officials in federal court must carry a heightened burden of proof.

This is a fundamental change in the way federal jurisdiction is exercised.

In this connection, it may be worth reviewing the procedural history of our case. Plaintiffs filed suit in August 2010 and asked for a preliminary injunction

hearing. The district court responded by staying the matter until April 2011 in order to study perceived jurisdictional issues. This cautious delay evidences a reluctance to exercise federal jurisdiction which is greater than that historically shown by federal courts.

The history of our case illustrates a new and restrictive view of the role of the federal judiciary. The doors of the federal courthouses within the jurisdiction of the Fifth Circuit have become very narrow.

THE FIFTH CIRCUIT'S CONCLUSION THAT PLAINTIFFS DID NOT HAVE ANY PROPERTY RIGHT PROTECTED UNDER THE FOURTEENTH AMENDMENT IS INCONSISTENT WITH *DEBLASIO v. ZBA*, 53 F.3d 592, 600-601 (3d CIR. 1995), *REVD. O.G.* AND OTHER FOURTEENTH AMENDMENT JURISPRUDENCE.

One of the remarkable features of this case is that, even though the City's abrupt change of position was the direct cause of catastrophic economic loss to plaintiffs, city officials felt no obligation to explain the change of position and no obligation to provide a hearing at which plaintiffs could ask for reconsideration.

The City's position is that plaintiffs were not entitled to notice or hearing, and not entitled to challenge the City's actions as arbitrary and capricious, because the City's actions did not deprive

plaintiffs of any property right worthy of protection under the Fourteenth Amendment.

This position, which was sustained by the Fifth Circuit, is fiercely anti-business.

Furthermore, this position is inconsistent with Fourteenth Amendment jurisprudence from this Honorable Court and federal circuit courts other than the Fifth Circuit. Courts have recognized that a "property right" worthy of Fourteenth Amendment protection may be derived from fee simple ownership; state law (contract, estoppel); and/or reasonable expectations based on the course of dealing between the citizen and the government; and plaintiffs claim property rights under any or all of these principles.

2(A) Fee simple ownership as a property right[6]

Plaintiff L&F was the fee simple owner of the Roundhill property. The Third and Seventh federal circuit courts of appeals have held that the fee simple owner of real property is entitled to Fourteenth Amendment protection against government action which arbitrarily and capriciously interferes with use and enjoyment of the property. *DeBlasio v. Zoning Board of Adjustment,* 53 F.3d 592, 600-601 (3d Cir.

[6] Issue presented to district court: fee simple owner's right to be free of arbitrary and capricious action as property right (USCA5 8014-8015); citation to *Maryland Manor, supra* (USCA5 7999).

1995), *revd. o.g. United Artists Theatre Circuit, Inc. v. Township of Warrington, PA*, 316 F.3d 392 (3d Cir. 2003); *Polenz v. Parrott,* 883 F.2d 551, 556-557 (7th Cir. 1989). Several district courts, including one district court within the jurisdiction of the Fifth Circuit have found *DeBlasio* persuasive. *Maryland Manor Associates v. City of Houston*, 816 F.Supp.2d 394, 406 (S.D. Tex. 2011); *Acierno v. New Castle County*, 93-579 (D. Del. Nov. 1, 1995), 1995 WL 704976 at 16-18.

The Fifth Circuit in our case has tacitly rejected the *DeBlasio* analysis and the Tenth Circuit has done so explicitly. *Yalowizer v. Town of Ranchester*, 2001 WL 1012206 (10th Cir. 2001).

The result is that four federal courts of appeals have addressed the issue, resulting in an even split.

Plaintiffs would submit that *DeBlasio* is correct. Fee simple ownership has historically been the most closely protected of all property rights. In accordance with this history, it has long been recognized that municipal regulations which impose a substantial restriction on property use may deprive the property owner of a protected property right, entitling the property owner to due process protection. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-618, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). There is no logical reason to view loss of property use resulting from the imposition of municipal restrictions as property, such that due process protections are applicable and compensation must be paid; while viewing loss of property use

resulting from a decision to deny municipal utility service as not property; especially since, for obvious reasons, a denial of utility service renders all non-agricultural use of real property impractical. The Fourteenth Amendment should be interpreted as protecting against any municipal act which arbitrarily and capriciously imposes an excessive burden on property use, irrespective of the precise nature of the act.

2(B) Property rights derived from state law (contract, estoppel)[7]

It is often said that property rights have their origin in state law or in mutual agreement rather than in federal law. *See, e.g., Blackburn v. City of Marshall,* 42 F.3d 925, 936-937 (5th Cir. 1995):

> Property interests are not created by the Constitution; rather, they stem from independent sources such as state statutes, local ordinances, existing rules, contractual provisions, or mutually explicit understandings.

The Fifth Circuit dealt with plaintiffs' claims of property rights by starting with the premise (App. 23) that if a plaintiff cannot prevail in a claim brought under state law and asserted in state court, then the plaintiff has no property right protected under the

[7] Issue presented to district court: property rights derived from state law (USCA5 8015); property rights derived from state law of express contract, implied contract, estoppel (USCA5 10028).

Fourteenth Amendment (a premise which is incorrect, *see infra*.) The Fifth Circuit proceeded to analyze plaintiffs' state law claims and concluded that plaintiffs would not be able to prevail in a claim brought under state law and asserted in state court, therefore plaintiffs had not proved the existence of any property right worthy of due process protection.

This analysis is wrong from beginning to end. To begin with, plaintiffs presented a prima facie case of a right to recover under state law.

Implied contract

Under Mississippi state law, conduct from which one party reasonably draws the inference of a promise by another results in an enforceable implied contract. *Cooke v. Adams*, 183 So.2d 925, 927 (Miss. 1966). The City, in moving for summary judgment, tacitly conceded that plaintiffs had presented a prima facie case of implied contract; however, the City claimed immunity under Miss. Code Ann. §11-46-9(h)(1), which shields a municipality from liability under the theory of implied contract where the municipality's actions are not arbitrary and capricious or malicious.

The Fifth Circuit accepted this argument. However, immunity under Miss. Code Ann. §11-46-9(h)(1) is an affirmative defense. *Kimball v. Shanks*, 64 So.3d 941, 945-946 (Miss. 2011). Plaintiffs do not have to offer evidence of arbitrariness or malice. Instead, the burden of proof is on the City to establish

that municipal officials acted reasonably and in good faith; and in order to prevail on summary judgment, the City, as the party with the burden of proof at trial, must establish reasonable good faith by evidence sufficiently conclusive to warrant directed verdict at trial. *International Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1264-1265 (5th Cir. 1991), *cert. denied,* 502 U.S. 1059 (1992). But the City has been unable or unwilling to identify the persons who made the decision to deny water service to Roundhill. The basis for their decision remains unknown except insofar as it can be inferred from circumstantial evidence. More generally, the issue of the motives of city officials throughout the entire sequence of events remains open to question. The City cannot establish the affirmative defense of immunity at the summary judgment stage.

Estoppel – L&F[8]

In *City of Clinton v. Welch*, 888 So.2d 416, 424 (Miss. 2004) and in *Trosclair v. Mississippi Department of Transportation,* 757 So.2d 178 (Miss. 2000), *revd. o.g.,* the Mississippi Supreme Court held that a citizen may rely on oral assurances given by a state or local government employee and, where there has been detrimental reliance, the government is

[8] Issue presented to district court: pre- and post-purchase representations (App. 155-160); representations of Mr. Bullock and Mr. Riemann as giving rise to property right for due process purposes (USCA5 8004-8006); estoppel as a state law claim (USCA5 8405).

estopped from changing position. Plaintiffs point out that, throughout fall 2009, city officials repeatedly represented that the March 2006 "will serve" letter remained valid and there was no impediment to immediate development.

The Fifth Circuit focused on Mr. Riemann's representations during the December 2009 conversation and concluded that Mr. Riemann's statements could not estop the City "because there is no evidence that (Mr. Riemann) had the power to authorize exemptions from the ordinance. . . . " (App. 19). However, this is incorrect. The issue in *City of Clinton* was whether the plaintiff could rely on a building inspector's interpretation of a zoning ordinance. The Mississippi Supreme Court held that the plaintiff had a legal right to so rely because interpretation of zoning ordinances was within the scope of the inspector's assigned job duties.

Plaintiffs in the current litigation could, similarly, rely on city officials' interpretation of municipal requirements including any interpretation implicit in Mr. Riemann's representations during the December 2009 conversation. With respect to Mr. Riemann's authority, it should be noted that Mr. Riemann, as city engineer, is the person who signed the March 2006 "will serve" letter. In November 2009, when plaintiffs asked whether a new "will serve" letter was required, public works employee Melvin Bullock referred this question to Mr. Riemann, who instructed Mr. Bullock to respond that the original "will serve" letter remained valid (USCA5 5071-5072, 5546-5548).

When Mr. Bullock turned to Mr. Riemann for guidance, Mr. Bullock implicitly identified Mr. Riemann as the person who had the authority to make this decision. In addition, then-public works director Ron Wolfe testified that he assigned Mr. Bullock to address issues relating to Roundhill (USCA5 6699), so Mr. Bullock himself had authority to present the City's position.

Estoppel – Larry Mitrenga[9]

In December 2009, Mr. Riemann made assurances directly to Mr. Mitrenga knowing that Mr. Mitrenga would invest his personal funds in reliance on these assurances. Thus, Mr. Riemann breached a duty owed directly to Mr. Mitrenga. Mr. Mitrenga has a cause of action for loss of his personal investment separate from that of L&F. 18 C.J.S. *Corporations* Section 485; *Nathanson v. Murphy*, 282 P.2d 174 (Ca.App. 1955); *Photo Arts Imaging Professionals, LLC v. Best Buy Co., Inc.*, 10-284 (S.D. Miss. Nov. 22, 2011), 2011 WL 5860701.

Express contract[10]

As noted in the Statement of the Case, the March 2006 "will serve" letter was placed in the city minutes

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[9] Issue presented to district court: USCA5 8360.

[10] Issue presented to district court: USCA5 8400-8401, 12424.

pursuant to the August 2006 city council resolution in a location which implies that this letter is an attachment to, and forms part of, the wastewater service agreement. The "will serve" letter represents that the city water system has capacity to serve the Roundhill development and the City will provide water service provided the developer meets certain requirements set forth in the letter. The "will serve" letter provides that, once the developer has completed the requirements,"the Gulfport Engineering Department **shall inspect and approve the system**" *(emphasis added)*.

City officials have acknowledged twice over that Roundhill met the requirements for approval.

As described in the Statement of the Case, then-owner RLLC met the requirements in the 2006-2007 time period as documented by contemporaneous city records.

In spring 2010, city officials again acknowledged that the requirements had been met. As described in the Statement of the Case, in January 2010, city officials told plaintiffs that service verification request 117,158 would be approved as soon as plaintiffs completed two punch lists supplied by the City. Plaintiffs spent $20,000 to complete the two punch lists, after which city officials confirmed that all requirements for water service had been met and informed plaintiffs that they could expect to receive written approval within a matter of days.

This sequence of events meets all the criteria for formation of a traditional common law contract with a municipality: offer, acceptance, approval by official act of the city council.

The Fifth Circuit reasoned that there could be no express contract due to a perceived lack of "definiteness." The authority cited by the Fifth Circuit, however, is a Mississippi decision which sets forth the requirements for an enforceable contract in traditional common law terms and this decision supports plaintiffs' position. *Rotenberry v. Hooker*, 864 So.2d 266 (Miss. 2003).

Plaintiffs established a right to recover under state law contract and estoppel theories and, if this is a prerequisite for claiming due process protection (which it is not), then plaintiffs met this prerequisite.

2(C) Property Rights – Reasonable Expectations[11]

The Fifth Circuit's property rights analysis begins with the premise that if a plaintiff cannot prevail in a claim brought under state law and asserted in state court, then the plaintiff has no property right protected by the Fourteenth Amendment. This premise is incorrect.

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[11] Issue presented to district court: USCA5 10028-10029, 9496.

To begin with, under the Fifth Circuit's analysis, the Fourteenth Amendment and the federal courts are superfluous, because if the plaintiff can prevail in a claim brought under state law and asserted in state court, federal protection is unnecessary.

In fact, federal courts have consistently recognized that there are situations in which the plaintiff has no cause of action enforceable under state law yet may still have a property right protected under the Fourteenth Amendment. There are numerous cases which recognize that the Fourteenth Amendment protects "reasonable expectations" (sometimes phrased as "reasonable investment backed expectations") arising from sources such as "mutually explicit understandings." *See*, *e.g.*, *Palazzolo, supra*, 533 U.S. at 616 ("reasonable investment backed expectations"); *Shawgo v. Spradlin*, 701 F.2d 470, 475 (5th Cir. 1983):

> The underlying conception of a "property interest" is "to protect those claims upon which people rely in their daily lives, reliance that must not be *arbitrarily* undermined."

Blackburn v. City of Marshall, 42 F.3d 925, 936-937 (5th Cir. 1995):

> Property interests are not created by the Constitution; rather, they stem from independent sources such as . . . mutually explicit understandings.

Furthermore, once water service is instituted, the person receiving water service has a property interest in continued service. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978).

A review of the entire history of our case will show that plaintiffs had a "reasonable expectation" of receiving water service sufficiently substantial to warrant Fourteenth Amendment protection. To begin with, on the day that L&F purchased the Roundhill property, Roundhill was already connected to the city water system and was already receiving city water. Thus, Roundhill should be categorized as an existing water recipient with a property right under *Memphis Light*, not a mere applicant for new water service.

However, even if Roundhill is classified as a "new applicant" for the purposes of *Memphis Light,* this does not dispose of the issue because it is necessary to examine the entire course of dealing between the parties in order to determine whether plaintiffs had a "reasonable expectation." *Palazzolo, supra,* 533 U.S. at 617-618. This examination includes the March 2006 "will serve" letter; the August 2006 city council resolution and documents attached thereto; the March

2007 city inspection of the water system which showed only a few minor punch list items remaining for completion; the fact that Roundhill was already connected to the city water system and receiving city water when plaintiffs purchased the property; the assurances given by city officials between November 2009 and mid-February 2010 and plaintiffs' reliance thereon. This course of dealing establishes a "reasonable expectation" derived from a "mutually explicit understanding" and gives rise to a property right.

Under any or all of the above theories, plaintiffs had property rights and plaintiffs were entitled to procedural due process (notice and hearing) and substantive due process (freedom from arbitrary and capricious interference).[12] *Vasquez v. Nueces County, Texas*, 11-45 (S.D. Tex. Feb. 6, 2012), 2012 WL 401056. Plaintiffs would add that, to the extent plaintiffs' claims can be characterized as a taking claim, the claim is ripe because the state court has declined jurisdiction.

[12] Issue presented to district court: procedural and substantive due process (USCA5 7998, 9509-9510, 10028-10039).

THE FIFTH CIRCUIT'S CONCLUSION THAT THE CITY DID NOT VIOLATE EQUAL PROTECTION IS INCONSISTENT WITH *VILLAGE OF WILLOWBROOK V. OLECH*, 528 U.S. 562 (2000).[13]

An equal protection violation occurs when a municipality restricts or denies water service for reasons which are arbitrary and capricious and/or because municipal officials have a negative personal view of the applicant and/or because a municipality selectively enforces its requirements. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 U.S. 1073, 145 L.Ed.2d 1060 (2000); *Mikeska v. City of Galveston*, 451 F.3d 376 (5th Cir. 2006); *Jewish Home of Eastern PA v. Centers for Medicare and Medicaid Services*, 693 F.3d 359, 363 (3d Cir. 2011), *cert. denied,* 132 S.Ct. 837 (2011); *see also Del Marcelle v. Brown County Corp*., 680 F.3d 886 (7th Cir. *en banc* 2012), *cert. denied,* 133 S.Ct. 654 (2012) (attempting to interpret *Olech*, circuits split over nature and extent of animus required for equal protection violation).

In order to determine how these principles apply to our case, it is necessary to consider the case from the perspectives of negative viewpoint, arbitrary and capricious denial, and selective enforcement.

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[13] Issues presented to district court: *Village of Willowbrook* (USCA5 8026); City's behavior arbitrary and capricious (USCA5 8028-8031, 9496-9509, 10506-10521).

City officials were candid in stating that a primary reason for denying water service to 781 was that city officials had a negative view of the prospective tenants of 781. This testimony, on its face, verges on a confession that city officials denied equal protection to 781. City officials were equally candid in stating, in spring 2010, that the City refused plaintiffs' request to independently test the water system because the results of plaintiffs' testing could be admitted into evidence in the 781 litigation. Independent testing in spring 2010 would have detected the 95% closed gate valve and permitted Roundhill to move forward on schedule. Thus, there is a direct cause and effect relationship between city officials' negative view of the 781 tenants and city officials' decision to deny water service to Roundhill.

Plaintiffs would submit that if it is a violation of equal protection to deny water service because city officials have a negative personal view of the applicant, it is *a fortiori* a violation of equal protection to deny water service because city officials have a negative personal view of the applicant's neighbor. The Fifth Circuit's legal analysis, in failing to recognize this point, is erroneous.

Examining the issue from the perspective of arbitrary and capricious or selective enforcement, city officials' stated reason for denying water service to Roundhill was fire flow. However, the history of development in the area after the effective date of Ordinance 2501, as per the Statement of the Case above, shows that the large majority of residential

and commercial developments were permitted to go forward without compliance with the fire flow requirements of Ordinance 2501, however these requirements were strictly enforced against Roundhill.

Plaintiffs' position is that these developments were similarly situated to Roundhill, and were comparable to Roundhill, in that all were equally subject to the requirements of Ordinance 2501 and there is nothing in either Ordinance 2501 or the 2003 IFC which gives city officials discretion to relax or waive the requirements.

City officials testified that the other developments were not similarly situated and were not comparable for various reasons having to do with the particular characteristics of each development. These explanations were provided by city officials after the inception of the current litigation. There is no independent or contemporaneous corroboration of their testimony. Therefore, the issue of whether Roundhill was or was not treated differently from other similarly situated developments turns on a series of credibility choices. The Fifth Circuit erred in making these credibility choices at the summary judgment stage.

The Fifth Circuit's equal protection analysis is inconsistent with *Village of Willowbrook* and contrary to Fed.R.Civ.Proc. 56.

THE FIFTH CIRCUIT ERRED IN REJECTING PLAINTIFFS' CLAIMS UNDER THE FAIR HOUSING ACT, 42 U.S.C. §1982, AND THE EQUAL PROTECTION CLAUSE.[14]

Plaintiffs have proved a prima facie case of race discrimination under disparate impact or disparate treatment theories.

The Roundhill area is white majority (App. 218, 221; USCA5 9530). Larry Mitrenga, a developer with detailed knowledge of the Gulfport real estate market, avers that 781 was targeted at a predominantly black demographic and would have been at least 60% black (App. 212, 216-219). The City complains that Mr. Mitrenga is not qualified as a demographics expert. However, city officials were confident in making predictions about the demographic characteristics of the 781 tenants as a justification for the City's opposition to the development (*e.g.*, the likelihood that these tenants would have criminal propensities), and courts have routinely accepted lay witness opinion founded on personal knowledge and observation. Fed.R.Ev. 701; *U.S. v. Ebron*, 683 F.3d 105, 137-138 (5th Cir. 2012).

Thus, plaintiffs have presented enough evidence to support the conclusion that 781 would have been a black majority development in a white majority area.

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[14] Issue presented to district court: USCA5 9570.

The practical effect of excluding this development, whatever the intent, was to maintain a segregated housing pattern. *Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 13 S.Ct. 2824 (2013) (disparate impact).

Furthermore, there is evidence of discriminatory intent: although no city official explicitly mentioned race, several city officials condemned the 781 development in terms which can serve as proxies for racial concerns.[15] In addition, the City offered a series of ever-evolving and internally inconsistent explanations for denying water service for 781 and Roundhill.[16] The City's primary explanation – "fire flow" problem – was eventually proved to be inaccurate, arguably pretextual. *Compare Valley Housing, LP v. City of Derby*, 802 F.Supp.2d 359, 387-388 (D. Conn. 2011).

Finally, there is evidence that the City permitted numerous developments to move forward without regard to fire flow.[17] The City was willing to supply water for a townhome development on the 781 tract in 2008, but unwilling to provide water for a smaller

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[15] Issue presented to district court: analysis of why statements of city officials should be interpreted as proxies for racial concerns (USCA5 10109-10112).

[16] Issue presented to district court: inconsistencies, pretext (USCA5 5475, 10092).

[17] Issue presented to district court: unequal enforcement (USCA5 8028-8031).

subsidized cottage development in 2009. The City blocked 781 (black majority) during the time period from November 2009 through February 2010 while greenlighting Roundhill (white majority) during the same time period.

A prima facie case of disparate treatment exists when there is evidence of discriminatory intent, including proof that the plaintiff applied for a benefit, was denied the benefit, and the benefit was granted to a person of a different race. In addition, when a race neutral reason for disparate treatment is offered and is then proved to be a pretext, this gives rise to an inference that racial animosity played a role in the disparate treatment. *The Inclusive Communities Project, Inc. v. Texas Dept. of Housing and Community Affairs,* 860 F.Supp.2d 312, 318 (N.D. Tex. 2012).

Plaintiffs would submit that there is a prima facie case of racial discrimination targeting 781.

But what does all this have to do with Roundhill? The owners of L&F are white and Roundhill would have been a white majority development.

What this has to do with Roundhill is, the City denied water service to the Roundhill development because this was a necessary step in blocking the 781 development. The laws prohibit use of race as a significant factor in making decisions. *Artisan American Corp. v. City of Alvin*, 588 F.3d 291 (5th Cir. 2009); 42 U.S.C. §3604 (FHA prohibits discrimination "because of race"). If denying a benefit based on the applicant's

race is discriminatory, then denying a benefit based on the race of the applicant's neighbor is also discriminatory because in either situation, race is a significant factor. This is why plaintiffs are entitled to the protections of the laws prohibiting racial discrimination.

The Fifth Circuit erred in finding plaintiffs did not present a prima facie case of racial discrimination.

The Fifth Circuit further erred in finding that plaintiffs lack standing under 42 U.S.C. §1982 because plaintiffs did not have a personal association with 781 or with 781's prospective tenants.[18] It is well settled that white plaintiffs may sue under 42 U.S.C. §1982. *Tillman v. Wheaton-Haven Recreation Association,* 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969). The Seventh Circuit has allowed the protection of 42 U.S.C. §1982 to white persons who do not have a personal association with black persons. *United Farm Bureau Mutual Insurance Company, Inc. v. Metropolitan Human Relations Commission,* 24 F.3d 1008, 1015-1016 (7th Cir. 1994).

[18] Issue presented to district court: USCA5 9576.

CONCLUSION

For all the above and foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX – Continued

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APPENDIX – Continued

APPENDIX – Continued

APPENDIX – Continued

APPENDIX – Continued

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-60597, Cons. w/ 12-60600

L&F HOMES AND DEVELOPMENT, L.L.C., doing business as Hyneman Homes; LARRY MITRENGA,

Plaintiffs-Appellants

v.

CITY OF GULFPORT, MISSISSIPPI,

Defendant-Appellee

- -

Const. w/ 12-60601

LARRY MITRENGA,

Plaintiff-Appellant

v.

CITY OF GULFPORT, MISSISSIPPI,

Defendant-Appellee

Appeals from the United States District Court
for the Southern District of Mississippi
USDC No. 1:10-CV-387

(Filed Aug. 7, 2013)

Before GARZA, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:*

L&F Homes and Development, LLC and Larry Mitrenga were denied water service from the City of Gulfport for a planned residential development called "Roundhill." L&F and Mitrenga sued Gulfport for discrimination under 42 U.S.C. § 1982, the Fair Housing Act ("FHA"), and the Equal Protection Clause; for violations of the Takings Clause and substantive due process; for procedural due process deprivation; and on state law claims related to breach of contract. The district court granted summary judgment to Gulfport on all claims. We AFFIRM.

FACTUAL BACKGROUND

The relevant background of this case falls into three broad categories: approvals granted to L&F's Roundhill development, treatment of a neighboring development tract referred to as "781," and Gulfport's fire flow requirements.

In March 2006, Gulfport issued what is called a "will serve letter" to the predecessor in interest of Roundhill, which confirmed there was water and

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* Pursuant to 5TH CIR R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sewer service available to the property. In August 2006, Gulfport entered into a Wastewater Service Agreement with the then-owner of Roundhill. Subsequently, Mississippi officials approved the sewer plan; Gulfport then inspected the Roundhill property and prepared a list of items the developer had to complete. In January 2007, a work order was issued for installation of a City water meter on Roundhill. After 2007 there is some evidence that the water system at Roundhill was at least partially active, but L&F never paid for water service, and there is no evidence of payment by any other entity.

In 2008, Gulfport issued a will serve letter to the 781 development, which was on land neighboring Roundhill and on the same Landon Road water line. At that time, the 781 project was a townhouse complex. Gulfport refused to issue a new will serve letter in the fall of 2009, after 781's development plan shifted to a cottage complex. Later, at a June 2010 hearing before a governing board for the county, 781 was further denied a conditional use permit on the basis that "the development is incompatible with the neighborhood." At this hearing, various Gulfport representatives offered reasons why 781 would be incompatible. These included problems regarding traffic and parking, light and noise, danger to children posed by vehicles, fire protection, crime, and consistency with other city development plans. One Gulfport representative made references to crime problems at a Federal Emergency Management Agency park in Gulfport, a park with predominantly black residents

located in an area that otherwise had primarily white residents.

In November 2006, City Ordinance 2501 increased the fire flow requirements for residential developments such as Roundhill and 781 from 500 gallons per minute ("gpm") to 1000 gpm. This measure identified the amount of water available at a given location by connection to water sources for firefighting needs. In November 2009, Gulfport received a hydraulic analysis by the Garner Russell firm that stated the fire flow capacity for the water line servicing Roundhill and 781 was only 600 gpm, not the required 1000 gpm. Subsequent testing confirmed this deficiency.

In February 2010, Gulfport denied final approval of water service to Roundhill. In March 2011, after this present lawsuit had been filed, Gulfport began supplying water service to Roundhill from a new water line constructed by the county. In March 2012, Gulfport excavated a portion of the Landon Road line that had earlier been found insufficient to service Roundhill. A nearly-closed water valve was discovered. After the valve was opened, it appears that the Landon Road water line could supply the Roundhill property.

The district court granted summary judgment in favor of Gulfport on all claims arising from Gulfport's denial of water service to Roundhill. Both L&F and Mitrenga appeal.

DISCUSSION

We review a district court's grant of summary judgment *de novo. Onoh v. Nw. Airlines, Inc.,* 613 F.3d 596, 599 (5th Cir. 2010). We view all evidence in the light most favorable to the non-moving party. *Id.* Summary judgment should be granted only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Summary judgment is appropriate if the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

"We review questions of jurisdiction, and specifically standing, *de novo.*" *Bonds v. Tandy,* 457 F.3d 409, 411 (5th Cir. 2006).

I. Section 1982

Section 1982 states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. A discrimination claim typically requires a showing that the plaintiff is "a member of a racial minority." *See Bellows v. Amoco Oil Co.,* 118 F.3d 268, 274 (5th Cir. 1997). Yet "whites have a cause of action under Section 1982 when

discriminatory actions are taken against them because of their association with blacks." *Woods-Drake v. Lundy,* 667 F.2d 1198, 1201 (5th Cir. 1982). The "association" in *Woods-Drake* was white resident-plaintiffs who were threatened with eviction "if they continued to have black guests." *Id.*

L&F does not claim status as a racial minority. Instead, it asserts that Roundhill was denied water service because of the development's temporal and physical proximity to 781, which was a housing development allegedly likely to be occupied by a majority of black residents. Roundhill and 781, on adjacent tracts, both applied for water service that would need to come from the same Landon Road line. The properties are subject to different development plans and owned by distinct corporate entities. In effect, L&F asserts Roundhill was denied water service so that Gulfport's denial of service to 781 would not appear to be motivated by race. *Woods-Drake* protects whites who are punished for their support of or interaction with minorities. *Id.* (summarizing cases). We do not accept that the discrimination prohibited by the *Woods-Drake* reasoning reaches situations where a non-minority alleges it was part of the collateral damage resulting from its coincidental presence in the queue for a governmental benefit at the same time and location as a minority.

L&F lacks standing to bring a Section 1982 claim.

II. Fair Housing Act

The FHA applies to "any person who . . . claims to have been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i)(1). The "sole requirement for standing under the FHA is the Article III minima." *Lincoln v. Case,* 340 F.3d 283, 289 (5th Cir. 2003) (citation omitted). We analyze FHA claims under a burden-shifting framework. *See Simms v. First Gibraltar Bank,* 83 F.3d 1546, 1556-57 (5th Cir. 1996).

Standing for an FHA claim does not require association with minorities. It is enough that L&F claims that Gulfport's supposed discrimination against the other development led to its own damage. For example, the Supreme Court noted that the distinction between standing for first-party test purchasers and for third-party neighborhood residents was "of little significance [under the FHA;] . . . the only requirement for standing to sue" was distinct and palpable injury fairly traceable to the challenged action (i.e., injury in fact). *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 375-76 (1982).

L&F has standing to claim that Gulfport discriminated for racial reasons against another development and that discrimination injured L&F as well. It must "show that race was a consideration and played some role in a real estate transaction" to establish a *prima facie* case. *Hanson v. Veterans Admin.,* 800 F.2d 1381, 1386 (5th Cir. 1986). Discriminatory consideration of race under the FHA can be demonstrated by either "a showing of a significant discriminatory effect" or

"proof of discriminatory intent," that is disparate impact or discriminatory treatment. *Id.* L&F claims discrimination on both theories.

A. Disparate Impact

"[D]isparate-impact claims 'involve [policies or] practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.'" *Raytheon Co. v. Hernandez,* 540 U.S. 44, 52 (2003) (discussing claims under the Americans with Disabilities Act). The Supreme Court has not previously answered and has just granted a writ of certiorari on this question: "Are disparate impact claims cognizable under the Fair Housing Act?" *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly,* 658 F.3d 375 (3d Cir. 2011), *cert. granted,* 133 S.Ct. 2824 (2013).

We need not await the Supreme Court's decision because the plaintiffs' claim fails regardless of the answer. Beyond just alleging the existence of a disparate impact, L&F would have to identify a "specific test, requirement, or practice" that is responsible for the disparity. *Smith v. City of Jackson,* 544 U.S. 228, 241 (2005) (discussing claim under the Age Discrimination in Employment Act). L&F asserts that the likely racial composition of the hypothetical 781 development would be at least 60% black and that denying 781 the ability to develop creates a disparate impact. Even if that is true, L&F has failed to describe a

specific neutral practice or policy that "falls more harshly" on a protected group than on others; that failure means the disparate-impact theory is inapplicable. *Cf. Pacheco v. Mineta,* 448 F.3d 783, 792 (5th Cir. 2006) (dismissing disparate-impact claims where an administrative charge complained only of disparate treatment).

If there is a claim under the FHA, it is for disparate treatment.

B. Disparate Treatment

"Disparate treatment" is "deliberate discrimination." *Munoz v. Orr,* 200 F.3d 291, 299 (5th Cir. 2000). Such discrimination is shown by evidence of discriminatory action or by inferences from the "fact of differences in treatment." *See Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977).

Turning first to direct evidence of discrimination, L&F points to statements made by Gulfport representatives at a June 2010 public hearing conducted by the county on the subject of 781's conditional use permit. L&F highlights the testimony of a police officer who stated: "What I see is this is a footprint the same as a FEMA park. If you know of anything that we dealt with in a FEMA park, we were constantly having drug problems, shootings, rapes, and stuff like that. Now I feel we are going to have the same issues here. . . . You may have someone there that is a [pedophile] that is going to be watching kids over there." Other concerns included problems with traffic and

parking, light and noise, danger to children posed by vehicles, fire protection issues, and consistency with other city development plans. One city resident also mentioned concern over the depression of property values. No speaker at the hearing mentioned race.

This evidence does not support that any City official acted with racial motivations. L&F also points to evidence that when it requested testing of the Landon Road line in April 2010, Gulfport expressed concerns that testing on behalf of L&F could adversely impact settlement negotiations in Gulfport's litigation with 781. Without more, the stated concerns about a lawsuit being at a delicate stage of settlement do not equate to evidence of discrimination.

L&F also attempts to show that the Roundhill development was qualified for water service but had the service denied, whereas similarly situated residents were treated differently. *See Munoz,* 200 F.3d at 299. As a threshold matter, L&F does not claim that prior to the excavation of the Landon Road line in March 2012, Roundhill or 781 satisfied the fire flow requirements of the 2006 ordinance. Rather, L&F asserts that the Landon Road line "had the capacity to provide ample fire flow" such that *if* the closed valve had been open in 2010, Roundhill would have been qualified. What might have occurred had all the facts been known does not matter. On February 22, 2010, the Landon Road line as then-operational could not supply fire flow of 1000 gpm to Roundhill. There is no evidence Gulfport knew of the closed valve,

which might make the denial pretextual. Roundhill was, therefore, not qualified.

Even though Roundhill was not qualified, L&F attempts to show "that race was a significant factor in the refusal" because other similarly situated developments were approved notwithstanding a lack of verification of compliance with the ordinance. *See Artisan/Am. Corp. v. City of Alvin, Tex.,* 588 F.3d 291, 295 (5th Cir. 2009). A proper point of comparison is a "nearly identical, similarly situated individual[ ]." *Bryant v. Compass Group USA Inc.,* 413 F.3d 471, 478 (5th Cir. 2005).

The most relevant comparator to which L&F points is Holliman Place, a residential development within Gulfport city limits, which received a will serve letter in 2008. Holliman did not receive final approval until 2011 after satisfactory fire flow testing. Although testing demonstrated inadequate fire flow on December 8, 2011, uncontradicted evidence suggests that a "looping" modification rendered the fire flow adequate on December 9, 2011. This looping modification means Holliman was not a nearly identical comparator.

L&F also identifies Sam's Club, Rooms to Go, and the English Manor residential development, as comparators. L&F does not point to inadequate fire flow testing on these sites in a contemporary time period, prior to final approval. Further, Gulfport testified that Sam's Club and Rooms to Go had internal sprinkler systems that would justify a variance from the

ordinance, and that looping of water lines and the placement of fire hydrants were also considerations. English Manor received final approval before the effective date of the ordinance.[1]

Gulfport's determination of compliance with the ordinance primarily relied on a developer's engineers. In November 2009, Gulfport received a report indicating that the Landon Road line produced a fire flow below 1000 gpm, putting Gulfport on notice that the general fire flow capacity of the Landon Road line was inadequate. We have been pointed to no evidence that Gulfport approved a residential development for water service after this date without verifying compliance with the 1000 gpm requirement.

"The burden of establishing a prima facie case of disparate treatment is not onerous." *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981). Nonetheless, L&F has failed to carry it. The district court properly dismissed the disparate treatment and disparate impact claims.

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[1] L&F refers to other residential developments that Gulfport allowed to proceed after the enactment of the ordinance, but discovery did not unearth relevant records of preapproval, inadequate fire flow testing supportive of discrimination. Although here, as in other instances, L&F points to Gulfport's unsatisfying production of records, L&F does not appeal any of the district court's discovery rulings.

III. Equal Protection

An equal protection claim may be "brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000). Similarly, an equal protection plaintiff can prevail under a selective enforcement theory by showing "that the selective enforcement was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Allred's Produce v. U.S. Dep't of Agric.,* 178 F.3d 743, 748 (5th Cir. 1999) (quotation marks omitted).

The ordinance establishes requirements in order to maintain sufficient water pressure to fight fires. There is no evidence or even argument that the ordinance, by utilizing the fire flow requirements of the 2003 International Fire Code, is "irrational" or "arbitrary." *See Olech,* 528 U.S. at 565. The ordinance provides for differential treatment of property depending on the use to which the property is put, and that too is not irrational. *See Mikeska v. City of Galveston,* 451 F.3d 376, 381 (5th Cir. 2006).

L&F does not really argue that the ordinance itself is irrational. Instead, it claims that Gulfport selectively enforced the ordinance against Roundhill and not against other developments. We have already discussed that L&F has not identified in the record a similarly situated comparator against whom the

ordinance was not enforced. It was not until November 2009 that Gulfport became aware of testing that documented the inadequacy of fire flow of the relevant portion of the Landon Road line. Holliman satisfied the requirements of the ordinance and was approved. The commercial buildings, though also covered by the ordinance, qualified for exceptions or reductions in the fire flow requirements. The record arguably does not demonstrate diligent inquiry, enforcement, or record keeping by Gulfport, but there is no evidence of instances in which Gulfport was aware of noncompliance and nonetheless issued a final approval of water service.

For L&F to succeed in a selective enforcement claim, it "must prove that the government [was] motivated by improper considerations, such as race." *Bryan v. City of Madison,* 213 F.3d 267, 277 (5th Cir. 2000). L&F has not shown evidence that, either by its statements or actions, Gulfport's denial of water service to Roundhill was "deliberately based upon an unjustifiable standard such as race." *Allred's Produce,* 178 F.3d at 748.

The district court properly dismissed the Equal Protection claim.

IV. State Law Claims

L&F raises state law claims of breach of express contract, breach of implied contract, and equitable estoppel.

A. Express Contract

In Mississippi, "an enforceable contract must appear in the official minutes of a public board." *Bruner v. Univ. of S. Miss.,* 501 So. 2d 1113, 1115 (Miss. 1987). It is the responsibility of the contracting party to ensure that such contracts are properly recorded in such minutes. *Id.* In a breach of contract suit, the plaintiff must prove the existence of a valid contract by a preponderance of the evidence. *Garner v. Hickman,* 733 So. 2d 191, 195 (Miss. 1999). "The existence of a contract and its terms are questions of fact to be resolved by the fact-finder, whether a jury or a judge in a bench-trial." *Weible v. Univ. of S. Miss.,* 89 So. 3d 51, 59 (Miss. Ct. App. 2011). "Questions concerning the construction of contracts are questions of law that are committed to the court," and which we review *de novo. Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.,* 908 So. 2d 107, 110 (Miss. 2005).

First, L&F argues that in early 2007, Gulfport approved and accepted Roundhill's water system. What we find in the record is a work order in January 2007 for installation of a water meter at Roundhill. There was evidence that after this date Roundhill received water. Gulfport counters that there is no record of the actual installation of a water meter and that no entity ever paid for water at Roundhill. Whatever the meaning of these 2007 events, there is no evidence of a written agreement such as one in which Gulfport agreed to provide water service.

Second, two documents appear in Gulfport's official minutes: a will serve letter and a wastewater service agreement. The will serve letter states that Roundhill was *eligible* for sewer and water service. A notification of eligibility does not constitute an agreement to provide water service. It instead contemplates multiple additional steps and specifically references the need for a future final approval and inspection. Among the requirements for a contract is definiteness, which this letter does not provide. *Rotenberry v. Hooker,* 864 So. 2d 266, 270 (Miss. 2003). The second writing is a "Wastewater Service Agreement" through which Gulfport agreed to treat Roundhill's wastewater; the terms of this agreement plainly only apply to wastewater.

The will serve letter and the wastewater agreement do not establish that Roundhill expressly contracted with Gulfport for water service.

B. Implied Contract

An implied contract arises "from a mutual agreement and intent to promise, but where the agreement and promise have not been fully expressed in words." *Kaiser Invs., Inc. v. Linn Agriprises, Inc.,* 538 So. 2d 409, 413 (Miss. 1989). A contract implied in fact has the same binding legal effect as an express contract. *Franklin v. Franklin ex rel. Phillips,* 858 So. 2d 110, 120 (Miss. 2003).

The district court held that the claim is barred by sovereign immunity. We agree. Mississippi provides

for governmental immunity in breach of implied contract suits involving "the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization. . . ." MISS. CODE ANN. § 11-46-9(1)(h); *see City of Jackson v. Estate of Stewart ex rel. Womack,* 908 So. 2d 703, 711 (Miss. 2005). The governmental unit forfeits this immunity when a decision "is of a malicious or arbitrary and capricious nature." MISS. CODE ANN. § 11-46-9(1)(h).

A decision is not arbitrary and capricious when it is "fairly debatable" or "supported by substantial evidence," defined as "affording a substantial basis of fact from which the fact in issue can be reasonably inferred." *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid,* 853 So. 2d 1192, 1203 (Miss. 2003). This is a highly deferential standard. *Id.* at 1202-03. As of February 22, 2010, Gulfport understood that inadequate fire flow was then reaching Roundhill, and Gulfport did not yet know of the closed valve. Consequently, Gulfport's decision to deny water service is at least fairly debatable. *See Watkins v. Miss. Bd. of Bar Admissions,* 659 So. 2d 561, 568 (Miss. 1995).

Immunity is also waived when a decision is "malicious." MISS. CODE ANN. § 11-46-9(1)(h). At least two definitions might be attributed to the word malicious in this context. The first is that an act be "[w]ithout just cause or excuse." BLACK'S LAW DICTIONARY (9th ed. 2009). That definition does not differ meaningfully from "arbitrary and capricious." Gulfport's denial was

not arbitrary based on what the city knew about water flow. A second definition is more intent-based: "Substantially certain to cause injury" or with the "intention or desire to harm another usu. seriously through doing something unlawful or otherwise unjustified." BLACK'S LAW DICTIONARY (9th ed. 2009); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1367 (Merriam-Webster 1993). In applying a similar standard, Mississippi has at least suggested that a malicious act may be one violative of the constitutional rights of a party. *See In re Dean,* 972 So. 2d 590, 594 (Miss. 2008) ("this Court will reverse the Board's decision only upon finding that it was 'arbitrary, capricious or malicious' in that it was unsupported by substantial evidence or violated a constitutional right of the party"). We have already explained why the record does not support that Gulfport's denial was based on a constitutionally impermissible basis.

L&F's claim for breach of implied contract is therefore barred by sovereign immunity.

C. Equitable Estoppel

L&F also seeks damages under an estoppel theory. The argument is that after Gulfport assured L&F that its development could proceed, Gulfport was estopped from reversing positions.

Estoppel may arise even though a defendant is a municipality. *Mayor & Bd. of Aldermen, City of Clinton v. Welch,* 888 So. 2d 416, 432 (Miss. 2004). An estoppel claim requires: "(1) belief and reliance on

some representation; (2) change of position, as a result thereof; and (3) detriment or prejudice as a result of the change of position." *Id.*

The relevant representations here are in the will serve letter and the alleged oral statements made by City officials. As to the oral statements, L&F alleges that the Gulfport Director of Public Works told Mitrenga and another L&F representative, Steve Elrod, that there were no impediments to the development of Roundhill, and that the project was "good to go." Accepting as true that these statements were uttered, these statements do not support estoppel as a matter of law. There is no evidence that the Gulfport Director of Public Works who made these statements had the power to authorize exemptions from the ordinance, and "ordinarily the unauthorized acts of one of its officials does not estop a municipality from acting in its governmental capacity." *Suggs v. Town of Caledonia,* 470 So. 2d 1055, 1057 (Miss. 1985).

The district court's opinion did not address the will serve letter as a representation potentially supportive of estoppel. L&F's summary judgment briefing on the issue refers only to "assurances improperly given" and discusses various oral representations. L&F's complaint refers to "Gulfport's representations that the Roundhill subdivision was an existing entitled community as of December 2009." L&F did not urge before the district court that it detrimentally

relied on the will serve letter.[2] Arguments not presented to the district court are waived. *Kirschbaum v. Reliant Energy, Inc.,* 526 F.3d 243, 257 n.15 (5th Cir. 2008).

L&F has failed to establish an equitable estoppel claim that withstands summary judgment.

V. Substantive Due Process

"A violation of substantive due process . . . occurs only when the government deprives someone of liberty or property." *Simi Inv. Co., v. Harris Cnty.,* 236 F.3d 240, 249 (5th Cir. 2000). This claim requires a showing of (1) a constitutionally protected right and (2) an arbitrary, irrational abuse of power that effects that deprivation. *Id.*

Even if L&F had a constitutionally protected right to the relevant water service, a deprivation is unconstitutional only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *FM*

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[2] Estoppel is an equitable remedy appropriate "only when equity clearly requires it" to avoid a result that is unconscionable or the perpetuation of fraud or injustice. *B.C. Rogers Poultry, Inc. v. Wedgeworth,* 911 So. 2d 483, 491 (Miss. 2005); *Kimball Glassco,* 64 So. 3d at 947. Here, the will serve letter was issued in 2006, before the passage of the ordinance, and approximately four years prior to the denial of water service to Roundhill. To the extent that L & F relied on the will serve letter, that reliance was not reasonable. *See Trosclair v. Miss. Dep't of Transp.,* 757 So. 2d 178, 181 (Miss. 2000).

Props. Operating Co. v. City of Austin, 93 F.3d 167, 174 (5th Cir. 1996) (quoting *Vill. of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926)). By contrast, a deprivation will be sustained if "the question is at least debatable" "whether a rational relationship exists between the [policy or decision] and a conceivable legitimate objective." *Simi Inv. Co.,* 236 F.3d at 251.

We do not "insist that a local government be right" or that a regulation be the best means of advancing a given end, only that the ordinance have a rational relationship to a legitimate government interest. *FM Properties,* 93 F.3d at 174. This ordinance has the required rational relationship. We cannot say Gulfport's fire flow ordinance is irrational or arbitrary.

VI. Procedural Due Process

The "guarantee of fair procedure" requires that when the government invades a constitutionally protected interest in "life, liberty, or property," the government must provide due process of law. *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). First, we ask whether a given interest "qualif[ies] as property interests for purposes of procedural due process." *See Bowlby v. City of Aberdeen,* 681 F.3d 215, 220 (5th Cir. 2012). Second, we ask "what process the State provided, and whether it was constitutionally adequate." *Id.* Because we find no recognized property right under state law, we do not discuss the procedure.

L&F argues that it has a property interest in water service and "should be treated as an existing water recipient . . . [,] not a mere applicant for new service." Evidence allegedly supporting the claim is that Gulfport issued a will serve letter to Roundhill. L&F also argues that Roundhill was receiving water service as of January 2007 based on evidence that in January 2007, Southwest Water, a utility contractor with Gulfport, verified with the Gulfport Department of Public Works that water service was available for irrigation purposes. Subsequently, Southwest Water issued a work order and installed a yard meter, which would be used for landscaping or irrigation purposes.[3]

Gulfport responds that the will serve letter indicated by its own terms that Roundhill was merely eligible for water service. The letter identified multiple additional steps prior to final approval. Further, Gulfport argues that no yard meter was ever installed by Gulfport, L&F was never billed for any water, and even if a yard meter had been installed and irrigation water flowing, this water "would not qualify for potable use as water to a residence."

The district court determined that L&F was seeking "new, as opposed to continued, water service." We agree that the evidence did not create a dispute of material fact that L&F's project had ever been

[3] As noted above, although L&F discusses Gulfport's unsatisfying production of records on this point, L&F does not appeal any of the district court's discovery rulings.

approved for or received the relevant water service. As noted, the will serve letter was a declaration of eligibility for service and not an indication that water service was being provided. Even if Roundhill had been connected to an irrigation water source, this does not establish that L&F was a recipient of the water service to which the fire flow requirements applied.

Protected property interests are those "that rise to the level of a 'legitimate claim of entitlement'" and not "mere expectations." *Walsh v. La. High Sch. Athletic Ass'n,* 616 F.2d 152, 159 (5th Cir. 1980). Property interests are matters of state law, and they "stem from independent sources such as state statutes, local ordinances, existing rules, contractual provisions, or mutually explicit understandings." *Blackburn v. City of Marshall,* 42 F.3d 925, 936-37 (5th Cir. 1995). L&F has not pointed to Mississippi caselaw, statutes, or a local ordinance that creates a right to obtain water service. The district court also noted L&F's failure to identify any state authority on the question and relied on that omission to reject the existence of a right.

When determining state law in the absence of any controlling authority, "it is the duty of the federal court to determine as best it can, what the highest court of the state would decide." *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.,* 953 F.2d 985, 988 (5th Cir. 1992). Mississippi has recognized a property interest in the continuation of existing electrical service. *Tucker v. Hinds Cnty.,* 558 So. 2d 869, 874 (Miss. 1990). The court relied on the fact that an

"overwhelming majority of courts which have considered this question have found that continuance of electrical power is a property interest worthy of protection under the due process clause of the Fourteenth Amendment." *Id.* at 873. If there is similar substantial agreement that a property right exists in obtaining water service, not just continuing service in place, the agreement is a stranger to the parties' briefing. We will not brief the possibility for them. In fact, L&F has not argued that such a right exists, as it has understandably insisted that it has been denied a more recognizable right to maintain existing water service. We have already shown why we agree with the district court that there is no evidence of prior service.

We will not take Mississippi caselaw further than it has gone on the issue of property rights in utility service, as we do not see a basis to predict the state's highest court would recognize the right relevant here.

L&F has similarly failed to show that there was a mutually explicit understanding that Gulfport would provide water service based on either the will serve letter or the installation of the yard meter. Although L&F argues it expected ultimately to receive approval for water service and expended financial resources in reliance on this expectation, "a unilateral expectation" is not enough to create a protected property interest. *Blackburn,* 42 F.3d at 936.

The failure to identify a protected property interest is fatal to L&F's procedural due process claim.

See Baldwin v. Daniels, 250 F.3d 943, 946-47 (5th Cir. 2001).

VII. Takings

The Takings Clause of the Fifth Amendment, made applicable to states through the Fourteenth Amendment, is relevant when private property is taken either for private use or without just compensation. *Urban Developers LLC v. City of Jackson,* 468 F.3d 281, 292 (5th Cir. 2006). With respect to claims based on insufficient compensation, "no constitutional violation occurs until just compensation has been denied." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194 n.13 (1985). Only when "the relevant governmental unit has reached a final decision" and "the plaintiff has sought compensation for the alleged taking" through applicable procedures is the claim ripe. *Urban Developers,* 468 F.3d at 292-93.

L&F acknowledges that Mississippi provides relief for inverse condemnation. *See* MISS. CONST. art. 3, § 17. L&F appealed the denial of service to the Harrison County Circuit Court, but the appeal was dismissed without prejudice because L&F had not exhausted its remedies. The record does not reflect further action by L&F with respect to exhaustion of municipal and state procedures. Therefore, "the relevant governmental unit" has not "reached a final decision," and L&F's appeal to this court is not ripe

for adjudication. *See Urban Developers,* 468 F.3d at 292-93.

VIII. Larry Mitrenga's Individual Claims

Both L&F and Mitrenga individually filed claims in this suit. Mitrenga appeals the grant of summary judgment on his claims.

A. Mitrenga's Federal Law Claims

The "irreducible constitutional minimum of standing" requires injury in fact, a causal connection between that injury and the complained of conduct, and a likelihood that the injury can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Mitrenga asserts two injuries: economic and psychological.

Mitrenga's alleged economic injury stems from his personal guarantee of a loan to L&F. Although the bank has not seized Mitrenga's collateral for the loan, his assets remain encumbered by the personal guarantee. A stockholder in a corporation does not have standing to bring suit in his own name for injuries sustained by the corporation. *Bellows v. Amoco Oil Co.,* 118 F.3d 268, 277 (5th Cir. 1997). This is true even where that individual is the sole shareholder of a corporation. *Id.* at 276-77. As an individual, Mitrenga has not been injured by Gulfport; rather Gulfport's actions have affected L&F as an LLC,

which in turn has been unable to distribute funds to its creditors and shareholders, namely Mitrenga.

Mitrenga also asserts that he has suffered "mental anguish" as a result of Gulfport's discrimination. The only evidence Mitrenga has offered is a two-sentence doctor's letter stating: "Mr. Mitrenga's legal problems have caused a situational reactive disorder" and alluding to medication and more frequent doctor visits. This evidence is rather thin even to establish actual injury, but it is wholly inadequate to establish causation. An injury must be fairly traceable to the challenged actions of the defendant. *Lujan,* 504 U.S. at 560. Mitrenga's allusion to "this whole situation" and the doctor's to "legal problems" fails to establish the requisite nexus between Gulfport's underlying conduct and Mitrenga's mental anguish.

There is insufficient evidence to raise a genuine dispute of material fact that Mitrenga's mental anguish was caused by Gulfport's alleged underlying unlawful conduct, as apart from general litigation fatigue. On a different set of facts evidencing clear and egregious racial discrimination in the context of an eviction, this court "presumed . . . some degree of emotional distress." *Woods-Drake v. Lundy,* 667 F.2d 1198, 1203 (5th Cir. 1982). That atypical presumption does not apply in this case.

B. Mitrenga's State Law Claims

Mississippi law also establishes that an individual shareholder does not have standing to bring suit

in his own name for injuries to a corporation. *Mathis v. ERA Franchise Sys., Inc.,* 25 So. 3d 298, 301 (Miss. 2009). On the express and implied contract claims, any contract to provide water service was between Gulfport and L&F, not Mitrenga individually.

As to the estoppel claim, Mitrenga asserts that he relied, individually, on the oral representations of City officials in making the decision to pledge personal assets in support of a loan to L&F. As discussed above, the equitable estoppel claim does not have merit as the unauthorized statements of an official do "not estop a municipality from acting in its governmental capacity." *Suggs v. Town of Caledonia,* 470 So. 2d 1055, 1057 (Miss. 1985).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

L&F HOMES AND DEVELOPMENT, LLC, d/b/a HYNEMAN HOMES	§	**PLAINTIFF**
	§	**Civil Action No.1:10cv387HSO-JMR**
v.	§	
CITY OF GULFPORT, MISSISSIPPI	§	**DEFENDANT**

FINAL JUDGMENT

(Filed Jul. 20, 2012)

This matter came on to be heard on the Motions for Summary Judgment [581], [591], [593], filed by Defendant City of Gulfport. The Court, after full review and consideration of Defendant's Motions, Plaintiff 's Responses, the Rebuttals, the pleadings on file, and the relevant legal authorities, finds that in accord with the Memorandum Opinions and Orders entered on the aforesaid Motions,

IT IS, THEREFORE ORDERED AND ADJUDGED, that, pursuant to the Court's Memorandum Opinion and Order granting Defendant's Motion for Partial Summary Judgment on § 1983 Claims [591], Plaintiff 's Takings Clause Claim is **DISMISSED WITHOUT PREJUDICE**.

IT IS, FURTHER ORDERED AND ADJUDGED, that Judgment is rendered in favor of

Defendant City of Gulfport pursuant to FED. R. CIV. P. 56 on Plaintiff's remaining claims, and these claims are **DISMISSED WITH PREJUDICE**. This civil action is dismissed with prejudice. All remaining pending motions are rendered moot.

SO ORDERED AND ADJUDGED, this the 20th day of July, 2012.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

L&F HOMES AND DEVELOPMENT, LLC, d/b/a HYNEMAN HOMES AND LARRY MITRENGA	§	**PLAINTIFFS**
	§	**Civil Action No. 1:10cv387HSO-JMR**
v.	§	**DEFENDANT**
CITY OF GULFPORT, MISSISSIPPI	§	

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT CITY OF GULFPORT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S 42 U.S.C. § 1983 CLAIMS

BEFORE THE COURT is Defendant City of Gulfport's Motion for Partial Summary Judgment [591] on Plaintiff's 42 U.S.C. § 1983 claims, filed March 26, 2012. Plaintiff[1] filed a Response [641] on April 5, 2012. The City of Gulfport filed a Rebuttal in

[1] The Court notes that the allegations contained in the Complaint, and the arguments presented in the pleadings associated with the instant Motion, refer to Plaintiffs Larry Mitrenga and L&F Homes and Development, LLC ["L&F"], collectively. In its Memorandum Opinion and Order [746] entered on July 2, 2012, the Court dismissed Plaintiff Larry Mitrenga for lack of standing. Therefore, analysis of these claims is limited to those brought by the remaining Plaintiff, L&F Homes and Development, LLC.

support of the Motion [659] on April 12, 2012. After due consideration of the record, the submissions on file, and the relevant legal authorities, the Court finds that because Plaintiffs' 42 U.S.C. § 1983 claims fail as matter of law, the City of Gulfport's Motion for Partial Summary Judgment [591] should be granted.

I. FACTS AND PROCEDURAL HISTORY

On July 2, 2012, this Court entered a Memorandum Opinion and Order [746] which set forth the relevant facts and procedural history in this case. The Court adopts and incorporates them by reference. With respect to the present Motion, the Complaint asserts that:

> Defendant has violated plaintiffs' rights under the U.S. Constitution, the State Constitution of Mississippi, . . . under 42 U.S.C. § 1983 and other applicable laws, by:
>
> 1. denying procedural due process to plaintiffs through numerous actions . . . ;
>
> 2. denying substantive due process to plaintiffs by acting arbitrarily and capriciously and without any reasonable basis;
>
> 3. denying equal protection to plaintiffs by rejecting plaintiffs' subdivision as part of an illegal scheme to exclude low income Black persons from the area;
>
> 4. taking plaintiffs' property without just compensation and without due process of

> law inasmuch as the Roundhill Subdivision was an existing entitled community, yet defendant has illegally prevented development of the same.

Compl. [1] ¶ D 1-4, at pp. 10-11.

Plaintiff filed an Amended Complaint [61] on March 3, 2011, adding a fifth claim that Defendant deprived:

> 5. plaintiffs of their right of freedom of speech and association under the First Amendment of the U.S. Constitution and under the Mississippi Constitution and applicable laws.

Am. Compl. [61] ¶ D, 5 at p. 1.

The City of Gulfport ["Defendant"] contends that it is entitled to summary judgment on Plaintiff's §1983 claims.

II. DISCUSSION

A. Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). To rebut a properly supported motion for summary judgment, the opposing party must show, with "significant probative evidence," that there exists a genuine issue of material fact." *Hamilton v. Segue Software, Inc.,* 232 F.3d 473, 477 (5th Cir. 2000) (citing *Conkling v. Turner,* 18 F.3d 1285, 1295 (5th Cir. 1994)).

B. Due Process Claims

In order for Plaintiff to succeed on its procedural and substantive due process claims, there must be a showing that Defendant deprived Plaintiff of a protected interest in life, liberty, or property. *Shelton v. City of Coll. Station,* 780 F.2d 475, 479 (5th Cir. 1986).

1. Substantive Due Process

Defendant argues that Plaintiff cannot prevail on this claim because the expectation of provision of new water service to Roundhill is not a constitutionally protected property interest. "Plaintiffs have failed to point to any specific state law or local ordinance to support the argument that L&F had a protected property interest in water service." Def.'s Mem. in Supp. of Mot. for Summ. J. [592], at p. 16. According to Defendant, "Mississippi does not follow a per se rule that every person within the city limits must be provided with water service. . . ." Def.'s Mem. in Supp. of Mot. for Summ. J. [592] at p. 16.

Plaintiff responds that the initial provision of water service is an existing property interest and relies on the following documents: 1) Affidavit of Mr. Patrick Cavanaugh, [641-27]; 2) the City's approval of the design for the Roundhill water system [641-3]; 3) the City's official minute book, allegedly containing the March 16, 2006, "will serve" letter being placed in City's official record [641-61, p. 13]; and 4) a Wastewater Service Agreement [641-61, pp. 9-12].

Plaintiff asserts that based on these documents, there existed a "reasonable expectation" of receiving water service from Defendant. Pls.' Resp. in Opp. to Mot. for Summ. J. [642], at pp. 13-14.

In order to succeed on their substantive due process claims, Plaintiffs must establish (1) the existence of a protected property or liberty interest; and (2) a deprivation of that interest. *Simi Inv. Co. v. Harris County, Tex.,* 236 F.3d 240, 249 (5th Cir. 2000); *Mercado Azteca, L.L.C. v. City of Dallas, Tex.,* 2004 WL 2058791 * 6 (N.D. Tex. Sept. 14, 2004) (citing *Honore v. Douglas,* 833 F.2d 565, 569 (5th Cir. 1987) (deprivation of due process by arbitrary or capricious actions or decisions)).

In *Westbrook v. City of Jackson, Mississippi,* 772 F. Supp. 932 (S.D. Miss. 1991), the district court concluded that plaintiffs there did not possess a property interest in the expectation of receiving basic municipal services, including fire protection and installation of water lines. Thus, no substantive due process violation occurred. *Westbrook* held in part that:

> [i]t has long been recognized that there generally exists no constitutional right to basic governmental services, such as fire and police protection. *See, e.g., Youngberg v. Romeo,* 457 U.S. 307, 309 . . . (1982) ('As a general matter, a State is under no constitutional duty to provide substantive services for those within its border'); . . . 'although the liberty protected by the Due Process Clause affords

> protection against unwarranted *governmental* interference . . . , it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom.' . . .

Westbrook, 772 F. Supp. at 935-36 (citations omitted) (emphasis in original).

> In [*Board of Regents v.*] *Roth,* the Court held that property interests created by state law were protected by the Due Process Clause. Such interests, the Court said, are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . . Therefore, [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Id., at 938-39 (citations omitted)

"[A] duty to provide general governmental services, such as police and fire protection, is owed to the public in general rather than to particular individuals." *Id.* at 940. *Westbrook* found persuasive the reasoning in *Wooters v. Jornlin,* 477 F. Supp. 1140 (D.Del. 1979), which held in part that:

> for any right to exist, there must be some corresponding duty, [and] if one wishes to

> claim a right to a general governmental service, he must show that the provider of the service has a duty to provide that service. If the furnishing of the service is left to the discretion of the provider then there can be no entitlement.

Wooters, 477 F. Supp. at 1144; *see also Ransom v. Marrazzo,* 848 F.2d 398, 411-412 (3rd Cir. 1988) (provision of water and sewer services by a municipality is not a federally protected substantive right).

With the foregoing principles in mind, the Court turns to whether Mississippi law recognizes a property interest in new or prospective water service.

The Mississippi Supreme Court has deemed that the continuance, as opposed to the expectation, of electrical power constitutes "a property interest worthy of protection under the due process clause of the Fourteenth Amendment." *Tucker v. Hinds County, Miss., et al.,* 558 So. 2d 869, 873-74 (Miss. 1990) ("[a]lmost all courts considering this question also take into account the fact that utility service has become . . . necessity for safety and comfort in modern-day life. It is time that Mississippi law recognizes such a property interest."). However, Plaintiff has pointed to no Mississippi authority which holds that, on the particular facts presented here, Plaintiff enjoyed an individual entitlement to new, as opposed to continued, water service at the time in question. Based upon the record and the authorities discussed above, the Court is not persuaded that, under the circumstances of this case, Plaintiff had a protected

property interest in the extension of new water service to Roundhill.

Even if Plaintiff enjoyed a protected property interest in Defendant furnishing new water service to Roundhill, Plaintiff would still have to establish that Defendant arbitrarily or capriciously deprived Plaintiff of the protected property interest. "The essence of a substantive due process claim is that a decision by a governmental body is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Williams v. City of Gulfport, Miss.,* 2011 WL 554047 * 3 (S.D. Miss. Feb. 7, 2011) (quoting *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926)).

Considerable discretion is afforded to municipalities in rendering decisions on provision of water services. The Mississippi Supreme Court has determined that:

> the discretion to be exercised by the city authorities in the extension of its water system may be said to be limited to a refusal to extend where to do so would be unreasonable under the conditions and circumstances presented in the particular case; but, as we have said, unless the discretion is abused by the municipal authorities, their decision will be determinative.

City of Greenwood v. Provine, 108 So. 284, 286 (1926) (citations omitted).

In *Ladner v. Mississippi Pub. Utilities Co.,* 131 So. 78 (1930), the Mississippi Supreme Court, citing *City of Greenwood,* determined that the discretion afforded to municipalities providing water services is likewise afforded to water companies:

> the rule is the same in the case of a water company operated under a franchise granted by the municipal authorities as in the case where the municipality owns and operates a water system. The duty of such a water company to extend the service to all applicants who reside within the municipality and are willing to comply with its regulations is not an absolute one, but it is charged with the duty of furnishing water where there is a reasonable demand for it, and a reasonable extension of the service can be made to meet the demand, considering the cost of the extension and the maintenance of the service, the present and prospective number of subscribers or customers, the present development and the prospective growth and development of the locality to be served, and the present and prospective revenue to be obtained from furnishing water in the territory to be served by such extension.

Id. at p. 79.

Both *Greenwood* and *Ladner* make clear that considerable discretion is afforded to municipalities in rendering decisions on the provision of water services. While there may be a factual distinction between the extension of an entire water system, and

the provision of new water service to a prospective customer from an existing water line, the Court sees little difference between the two scenarios from the standpoint of whether a municipality is afforded discretion in deciding whether to supply water service to a prospective customer.

Throughout this litigation, Defendant has consistently maintained, and has produced competent summary judgment evidence to support this contention, that the denial of water service to Roundhill was due to the perceived inability of the Landon Road water line to meet the requisite fire flow requirements of City Ordinance No. 2051. Even if the Court construes the March 14, 2006, "will serve" letter, issued to the engineer for the original property developer several years before Plaintiff purchased Roundhill, as a representation by Defendant on which Plaintiff could have reasonably relied in order to establish a property interest, the subsequent denial of water service, even if a negligent or incorrect decision by Defendant, does not rise to the level of an abuse of discretion, nor was it arbitrary or capricious. In sum, the evidence does not support a conclusion that the denial of water service in this case was a violation of Plaintiff's substantive due process rights. Summary judgment is proper on the substantive due process claim.

2. Procedural Due Process

Plaintiff submits that in order to block the Roundhill and Group 781 developments, Defendant erected numerous procedural barriers, including refusal to sign a bill of exceptions, refusal to place the matter on the City Council agenda, and refusal to respond to written correspondence. Pls.' Resp. to Mot. for Summ. J. [642], at pp. 25-26.

Procedural due process affords a right to adequate notice and the opportunity to be heard. *Honore v. Douglas,* 833 F.2d 565, 569 (5th Cir. 1987). Ownership in real estate is an interest protected by the due process clause. *Bd. of Regents v. Roth,* 408 U.S. 564, 572 (1972). "To bring a procedural due process claim under § 1983, a plaintiff must first identify a protected life, liberty or property interest and then prove that governmental action resulted in a deprivation of that interest." *Baldwin v. Daniels,* 250 F.3d 943, 946 (5th Cir. 2001) (citing *San Jacinto Sav. & Loan v. Kacal,* 928 F.2d 697, 700 (5th Cir. 1991)); *see also Blackburn v. City of Marshall,* 42 F.3d 925, 935 (5th Cir. 1995).

Because Plaintiff has not shown the deprivation of a constitutionally protected property interest, a procedural due process claim cannot withstand summary judgment. In addition, the record evidence reflects that there were proceedings between the parties over this issue in the Harrison County Circuit Court. Even though the outcome was not satisfactory to Plaintiff, it could have appealed this decision, or

pursued other state created avenues for relief. The Court cannot say that, in a constitutional sense, Plaintiff was denied adequate notice or a right to be heard. Summary judgment is proper on the procedural due process claim.

C. Equal Protection Claim

The Complaint alleges that Defendant's refusal to provide water service to Roundhill was part of an illegal scheme to exclude "low income Black persons," which denied Plaintiff equal protection under the law. Compl. [1] at p. 10. It is undisputed that Plaintiff is not a member of a racial minority.

Defendant submits that it is entitled to judgment as a matter of law on Plaintiff's equal protection claim, inasmuch as Plaintiffs have failed to proffer evidence demonstrating that it "treated Roundhill differently than other similarly situated subdivisions located in Harrison County, that are provided water service by the City of Gulfport." Def.'s Mem. in Supp. of Mot. for Summ. J. [592] at p. 20. Defendant contends that because Roundhill and 781 Group were both denied water service due to fire flow issues in the Landon Road water line, Plaintiffs cannot establish that they were treated differently than others similarly situated. Plaintiff counters that the certain 2003 International Fire Code ["IFC"] requirements upon which Defendant relied to deny water service were not similarly enforced as to English Manor, Holliman Place, The Meadows, and Sam's Club

developments, all of which Plaintiff contends are similarly situated. Pls.' Resp. in Opp. to Mot. for Summ. J. [642], at p. 29.

The Equal Protection Clause prohibits differential treatment of persons similarly situated without a rational basis, *Mikeska v. City of Galveston,* 451 F.3d 376, 381 (5th Cir. 2006), and protects individuals from governmental action that treats similarly situated individuals differently, *John Corp. v. City of Houston,* 214 F.3d 573, 577 (5th Cir. 2000).

> To state a claim of racial discrimination under the Equal Protection Clause and section 1983, the plaintiff 'must allege and prove that [she] received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent.'

Bowlby v. City of Aberdeen, Miss., 681 F.3d 215, 227 (5th Cir. 2012) (quoting *Priester v. Lowndes Cnty.,* 354 F.3d 414, 424 (5th Cir. 2004)).

The Court finds that Plaintiff has not proffered any persuasive evidence, whether direct or circumstantial, that Plaintiff is a minority or a member of some other protected class, or that Defendant's decision to deny water service was motivated by discriminatory intent. Defendant has offered a legitimate, nondiscriminatory reason for not approving water service to Roundhill, namely the fact that the Landon Road line could not meet the fire flow requirement of City Ordinance No. 2051.

Although not affirmatively pled in the Complaint, based on the arguments contained in Plaintiff's Response, it appears that Plaintiff is actually pursuing a "class of one" equal protection theory. In *Bush v. City of Gulfport, Miss.,* 454 Fed. App'x 270, 280 (5th Cir. 2011), the Fifth Circuit discussed the burden that a "class of one" plaintiff must meet in order to establish an equal protection violation. "[W]here the plaintiff alleges being intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment, . . . [a]n equal protection challenge to a municipality's permitting decision requires a plaintiff to 'show that the difference in treatment with others similarly situated was irrational.'" *Bush,* 454 Fed. App'x at 281 (quoting *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000), and *Mikeska v. City of Galveston,* 451 F.3d 376, 381 (5th Cir. 2006)).

In the present case, the record evidence pertaining to Sam's Club, Holliman Place, English Manor, and The Meadows does not support a conclusion that these entities were sufficiently "similarly situated" to Roundhill to support an equal protection claim. Roundhill is a residential subdivision located just outside the City of Gulfport, along the Landon Road water line. It requested, and was later denied, water service in 2010. Though located nearby, Sam's Club is a commercial business, and is not comparable to a residential neighborhood. Aff. of Robert K. Riemann, [659-1], att. as Ex. "A" to Def.'s Rebuttal to Mot. for Summ. J.

Holliman Place, a residential subdivision located within the city limits, was required to meet the fire flow test. When it did not pass, Defendant refused to issue a certificate of occupancy and, only after a required loop was constructed around this subdivision, did Defendant perform additional testing and thereafter supply water service. Dep. of Robert K. Riemann, [659-2], at pp. 5-15, att. as Ex. "B" to Def.'s Rebuttal to Mot. for Summ. J.

English Manor, a residential subdivision located in Harrison County and serviced by the City, was approved for water service on October 9, 2006, but this occurred prior to Defendant's adoption of the 2003 IFC, which included the fire flow requirement at issue here. Aff. of Robert K. Riemann, [659-1], att. as Ex. "A" to Def.'s Rebuttal to Mot. for Summ. J. These IFC requirements, which were adopted on November 6, 2006, formed the basis of Defendant's decision to deny water service to Roundhill.

Finally, The Meadows is a residential subdivision located within the city limits, and there is no evidence establishing when this subdivision requested water service from Defendant. *See* Dep. of Robert K. Riemann, [641-49], att. as Ex. "DD-1" to Pl.'s Resp. to Mot. for Summ. J. Plaintiff cites to no portion of the record which establishes that The Meadows: 1) was similarly situated to Roundhill; or 2) was geographically proximate to Roundhill and was granted water service during the same time period that Roundhill was denied water service.

Plaintiff has not carried its summary judgment burden with sufficient evidence that another, similarly situated, residential neighborhood was treated more favorably by Defendant. Nor does the record contain sufficient evidence tending to show that Defendant's denial of water service was "irrational" under the circumstances during the relevant time period. The evidence submitted does not create a genuinely disputed material fact question as to whether Defendant violated Plaintiff's right to equal protection under the law by refusing to provide water service to Roundhill, in light of Ordinance No. 2051 as it existed during the relevant time frame. *See Ladner v. Mississippi Public Utilities Co.,* 131 So. 78, 79 (1930); *City of Greenwood v. Provine,* 108 So. 284, 286 (1926); *Shadburn v. Tishomingo County Water Dist., Inc.,* 710 So. 2d 1227, 1234 (Miss. Ct. App. 1998). Defendant is therefore entitled to judgment as a matter of law on Plaintiff's equal protection claim.

D. Fifth Amendment Takings Claim

Plaintiff contends that Defendant's denial of water service to Roundhill amounts to a taking of property without just compensation. It argues that:

> [a] 'temporary taking' is sufficient to support a 5th Amendment takings claim. Plaintiffs' development was placed on halt for thirteen months, giving rise to a temporary taking. Plaintiffs were also deprived of their right to a water well.

Pls.' Resp. to Mot. for Summ. J. [642], at p. 29. Plaintiff offers no further argument with respect to this allegation.

The Fifth Amendment Takings Clause is "made applicable to the States through the Fourteenth Amendment, and case law directs that private property shall not 'be taken for public use, without just compensation.'" *Urban Developers LLC v. City of Jackson, Miss.,* 468 F.3d 281, 292 (5th Cir. 2006) (quoting *Chicago, B. & Q.R. v. Chicago,* 166 U.S. 226, 229 (1897)).

In order to establish a takings claim, Plaintiff must demonstrate: (1) a taking of property by Defendant; and (2) Defendant's denial of just compensation therefor. MISS. CONST. ART. III, § 17. While neither party has raised this issue, the Court is first compelled to examine whether Plaintiff's takings claim is ripe for adjudication at this juncture.

> The Supreme Court has adopted a two-prong test for ripeness under the Fifth Amendment's Takings Clause, explaining that such claims are not ripe until (1) the relevant governmental unit has reached a final decision as to how the regulation will be applied to the landowner; and (2) the plaintiff has sought compensation for the alleged taking through whatever adequate procedures the state provides.

Urban Developers LLC, 468 F.3d at 292-93 (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985)).

Under Mississippi law, "a property owner may bring an inverse condemnation action to obtain just compensation for governmental takings." *Kessler v. City of Jackson, Miss.,* 43 F.3d 671 *2 (5th Cir. 1994).

The record contains no evidence that Plaintiff pursued an inverse condemnation action or other appropriate procedural vehicle to seek compensation for Defendant's alleged taking of property without just compensation. In light of the foregoing authorities, in particular the availability of inverse condemnation proceedings under Mississippi law, this Court is of the opinion that Plaintiff cannot pursue a Fifth Amendment takings claim in this Court unless and until the available state procedures for seeking just compensation have been exhausted. *See Wilhelmus v. Parish of St. Bernard,* 2010 WL 1817770 * 2 (E.D. La. May 3, 2010) (citing *John Corp. v. City of Houston,* 214 F.3d 573, 581 (5th Cir. 2000)). Plaintiff's takings claim is not ripe for consideration by this Court, and it should be dismissed without prejudice.

E. First Amendment Claim

Defendant moves for summary judgment on Plaintiff's First Amendment claim, on the grounds that Plaintiff has failed to offer any proof demonstrating a violation of its rights to free speech and/or association. Plaintiff's Response argues that:

> Plaintiffs' First Amendment claim is a claim for 'freedom of association'. Plaintiffs' contention is that plaintiffs have been penalized

> due to their history of serving a black-majority customer base. With respect to this issue, plaintiffs would adopt the evidence presented in opposition to the City's motion for summary judgment on the FHA/1982 claims. (In addition, in the interest of not inadvertently omitting some critical argument or exhibit, plaintiffs would respectfully ask that all memoranda and exhibits filed in connection with each of plaintiffs' summary judgment oppositions be considered as being incorporated herein by reference.)

Pl.'s Resp. to Def's Mot. for Summ. J. [642] at p. 29.

"The Constitution guarantees freedom of association . . . as an indispensable means of preserving other individual liberties." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 618 (1984). In order for Plaintiff to establish a violation of the right to free assembly or association, it must demonstrate that Defendant: 1) intruded into a person's choice to 'enter into and maintain certain intimate human relationships;' and/or 2) interfered with an organization engaged in activities protected by the First Amendment, such as speech, redress of grievances, and the exercise of religion. *Id.*; *see also Swanson v. City of Bruce, Mississippi,* 105 Fed. App'x 540, 542 (5th Cir. 2004) (city entitled to summary judgment on free association claim inasmuch as no protected intimate relationship existed between police chief and assistant police chief, and relationship was deemed social and professional in nature). "The Constitution does not include a 'generalized right of 'social association.'" *Wallace v.*

Texas Tech Univ., 80 F.3d 1042, 1051 (5th Cir. 1996) (quoting *City of Dallas v. Stanglin,* 490 U.S. 19, 25 (1989)).

> Although First Amendment protection of social association is not limited to family relationships, it is, at least in many contexts, limited to relationships 'that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'

Wallace, 80 F.3d at 1051-52 (quoting *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 545 (1940) (internal citations omitted)).

Based on the record, the Court concludes that Plaintiff has neither offered sufficient legal argument nor proffered "significant probative evidence," *Hamilton,* 232 F.3d at 477, in support of a theory that its right to freedom of association or assembly has been violated by Defendant. No reasonable fact finder could conclude that, based on these facts, Defendant violated Plaintiff's First Amendment rights. Because no genuine issue of material fact exists, Defendant is entitled to judgment as a matter of law on Plaintiff's First Amendment claim.

III. CONCLUSION

For the foregoing reasons, the Court concludes that insufficient evidence has been proffered to

establish genuine issues of material fact as to Plaintiff's claims brought pursuant to 42 U.S.C. § 1983. Defendant is therefore entitled to judgment as a matter of law on these claims. Finally, the Court concludes that Plaintiff's takings claim is not ripe for this Court's adjudication, and it should be dismissed without prejudice.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, for the reasons more fully stated herein, the Motion for Partial Summary Judgment on Plaintiff's 42 U.S.C. § 1983 claims [591] filed by Defendant City of Gulfport on March 26, 2012, is **GRANTED**, and Plaintiff's due process, equal protection, and First Amendment claims against Defendant City of Gulfport are **DISMISSED WITH PREJUDICE**.

IT IS, FURTHER ORDERED AND ADJUDGED that, for the reasons more fully stated herein, Plaintiff's Fifth Amendment takings claim is **DISMISSED WITHOUT PREJUDICE**.

SO ORDERED AND ADJUDGED, this the 20th day of July, 2012.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
SOUTHERN DIVISION

L&F HOMES AND DEVELOPMENT, LLC, d/b/a HYNEMAN HOMES AND LARRY MITRENGA	§	**PLAINTIFFS**
v.	§	**Civil Action No. 1:10cv387HSO-JMR.**
CITY OF GULFPORT, MISSISSIPPI	§	**DEFENDANT**

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT CITY OF GULFPORT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S STATE LAW CLAIMS

BEFORE THE COURT is Defendant City of Gulfport's Motion for Summary Judgment on Plaintiffs' State Law Claims [581] filed March 26, 2012. Plaintiff[1] filed a Response [635] on April 5, 2012. The

[1] The Court notes that the allegations contained in the Complaint, and the arguments presented in the pleadings associated with the instant Motion, refer to Plaintiffs Larry Mitrenga and L&F Homes and Development, LLC ["L&F"], collectively. In its Memorandum Opinion and Order [746] entered on July 2, 2012, the Court dismissed Plaintiff Larry Mitrenga for lack of standing. Therefore, analysis of the claims is limited to those brought by the remaining Plaintiff, L&F Homes and Development, LLC.

City of Gulfport filed a Rebuttal in support of the Motion [662] on April 12, 2012. After due consideration of the record, the submissions on file, and the relevant legal authorities, the Court finds that because Plaintiff's state law claims cannot succeed as a matter of law, the City of Gulfport's Motion for Summary Judgment [581] should be granted.

I. FACTS AND PROCEDURAL HISTORY

On July 2, 2012, this Court entered a Memorandum Opinion and Order [746] which set forth the relevant facts and procedural history in this case. They will not be repeated here, however the Court adopts and incorporates them by reference. With respect to the present Motion, the Complaint asserts that:

> (A) [t]he City has violated state law and is in breach of its contracts with the state and/or county, as well as its contract with plaintiffs' predecessor in title [and plaintiffs are entitled to assert rights under these contracts as successors in interest and/or as third party beneficiaries], in that the City is required to provide adequate water service to surrounding areas, including Roundhill, by state law and relevant contracts and the City is, according to its own assertions in connection with the 781 Group project, is failing to carry out this duty;
>
> (B) Plaintiffs have detrimentally relied on the City's representations that the Roundhill

> subdivision was an existing entitled community as of December 2009 and the City is estopped from changing position concerning the subdivision's status as existing entitled community.

Compl. [1] ¶ A & B, at p. 10; Am. Compl. While an Amended Complaint was filed on March 3, 2011 [61], no additional state law claims were asserted. The City of Gulfport ["Defendant"] contends that it is entitled to summary judgment on Plaintiff's state law claims for breach of express contract, breach of implied contract, detrimental reliance, and estoppel.

II. DISCUSSION

A. Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). To rebut a properly supported motion for summary judgment, the opposing party must "show, with 'significant probative evidence,' that there exists a genuine issue of material fact." *Hamilton v. Segue Software, Inc.,* 232 F.3d 473, 477 (5th Cir. 2000) (quoting *Conkling v. Turner,* 18 F.3d 1285, 1295 (5th Cir. 1994)).

In analyzing Plaintiff's state law claims, this Court applies Mississippi law. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 79-80 (1938); *Krieser v. Hobbs,* 166 F.3d 736, 739 (5th Cir. 1999).

> The core of what has become known as the '*Erie* Doctrine' is that the substantive law to be applied by a federal court in any case before it is state law, except when the matter before the court is governed by the United States Constitution, an Act of Congress, a treaty, international law, the domestic law of another country, or in special circumstances, by federal common law.

Hanley v. Forester, 903 F.2d 1030, 1032 (5th Cir. 1990) (citing *Erie R. Co. v. Tompkins,* 304 U.S. 64, 79-80 (1938)).

B. Breach of Contract Claims

1. Express Contract

Defendant argues that at no time did it enter into an express contract with Plaintiff for the provision of new water service to Roundhill. At the time Plaintiff purchased Roundhill in 2009, no final inspection had occurred and no letters or papers granting water service to Roundhill had been issued. Defendant asserts that Plaintiff's reliance on Mr. Robert "Kris" Riemann's March 14, 2006, "will serve" letter to Plaintiff's predecessor, as the basis for arguing that an express contract was created for Defendant to provide water services to Roundhill, is misplaced. According to Defendant, the "will serve" letter merely informed the original developer's engineer where water could be accessed, and whether Roundhill was eligible to request connection to the sewer main.

> At the time of the March 14, 2006 letter, Roundhill's water and sewer system was not in place and it would be necessary for the City to inspect and approve the system before any connections could be made.

Def.'s Mem. in Supp. of Mot. for Summ. J. [582], at p. 18.

Plaintiff maintains that a subsequent Wastewater Service Agreement[2], and the March 14, 2006, "will serve" letter[3], together with testimony and other evidence[4], collectively formed an express contract between it and Defendant for the provision of water service to Roundhill.

> The issue is not whether the will serve letter, considered as a stand alone document, became an express contract when issued by the City in March 2006. The issue is whether the will serve letter, considered as an attachment to the Wastewater Service Agreement, became part of an express contract with the

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[2] Att. as Ex. "A" to Pls.' Resp. to Mot. for Summ. J. [635-1] at pp. 5-12.

[3] Att. as Ex. "A" to Pls.' Resp. to Mot. for Summ. J. [635-1] at pp. 13-14.

[4] Plaintiff's Response concedes that: "having had the opportunity to study the Orange Grove Utilities, Inc. agreement, they would agree that they are not third party beneficiaries to this agreement." Pls.' Mem. in Opp'n to Mot. for Summ. J. [636] at p. 6. Therefore, this document will not be considered in determining whether there existed an express contract between the parties.

> City in summer 2006, when the City Council approved the Wastewater Service Agreement, the Mayor signed the Wastewater Service Agreement on the authority of the Council, and the City placed the Wastewater Service Agreement AND the will serve letter in the City's public records in a manner which indicates that the City regards the will serve letter to be an attachment to the Wastewater Service Agreement.

Pls.' Mem. in Opp'n to Mot. for Summ. J. [636] at p. 3.

Plaintiff maintains that

> [i]t is clear that the City water meter was, in fact, installed in 2007, water service was instituted in 2007, and it appears probable that such a contract was signed in January 2007. Plaintiffs infer, since the City has not alleged to the contrary, that the missing 2007 contract contained terms similar or identical to the March 2011 contract.

Pls.' Resp. in Opp. to Mot. for Summ. J. [636], at pp. 4-5.

"[I]n any suit for breach of contract, the plaintiff has the burden of proving by a preponderance of the evidence the existence of a valid and binding contract, that the defendant has broken or breached it, and that the plaintiff has suffered monetary damages as a result." *Weible v. Univ. of S. Mississippi,* 89 So.3d 51, 59 (Miss. Ct. App. 2011) (quoting *Garner v. Hickman,* 733 So.2d 191, 195 (Miss. 1999)).

> Under Mississippi law, questions of contract construction are questions of law, rather than questions of fact committed to the fact finder. *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.,* 908 So.2d 107, 110 (Miss. 2005). In order to be enforceable, a contract "must be reasonably complete and its essential terms reasonably certain." *Leach v. Tingle,* 586 So.2d 799, 801 (Miss. 1991). Courts use a reasonableness standard in deciding if a contract is definite enough to be enforced. *Id.* at 802. Only when agreements are "'vague, indefinite and uncertain' . . . in which the promises and performances to be rendered by each party are not reasonably certain, are [they] not enforceable as contracts." *Massengill v. Guardian Mgmt. Co.,* 19 F.3d 196, 202 (5th Cir. 1994) (quoting *First Money, Inc. v. Frisby,* 369 So.2d 746, 751 (Miss. 1979)).

J.A.M. Promotions, Inc. v. Tunica County Arena & Exposition Ctr., Inc., 2012 WL 739428 *2 (5th Cir. Mar. 7, 2012).

With regard to contracts with public entities, Mississippi law requires that, to be enforceable, any such contract must appear in the official minutes of the relevant public board, and those so contracting are responsible for ensuring that the contract is properly recorded. *Bruner v. Univ. of S. Mississippi,* 501 So.2d 1113, 1115 (Miss. 1987) (citations omitted).

In the present case, there is insufficient evidence that a specific, written contract, was entered into between Plaintiff and Defendant. Nor is there any

record of any such a contract being entered in the official minutes or records kept by Defendant. With respect to Plaintiff's theory that certain testimony and evidence, when considered collectively, formed an express contract, the Court is of the view that even construing the March 14, 2006, "will serve" letter as a letter of intent, it does not support a conclusion that an enforceable express contract for the provision of water service was ever created.

The "will serve" letter states, in pertinent part, as follows:

> water service is available . . . in order to access this supply, you will be required to extend the main to the property of the proposed development; *All plans for improvements are subject to the review and approval of the Gulfport Engineering Department prior to construction.* Once the improvements are completed, the Gulfport Engineering Department shall inspect and approve the system prior to final acceptance by the City.

March 14, 2006, Letter, att. as Ex. "1" to Pl.'s Resp. to Def.'s Mot. for Summ. J. [635], at pp. 13-14 (emphasis in original).

The letter is clear that, in order to obtain water service from Defendant, the developer would be required to fulfill additional conditions precedent. Plaintiff essentially acknowledges that the letter, in and of itself, did not create an express contract.

The Court has also considered the "will serve" letter in conjunction with the Wastewater Service Agreement and other evidence relied upon by Plaintiff. Having thoroughly reviewed this evidence, no reasonable fact finder, which in this case would be the Court, as this case has been designated as a non-jury matter by agreement of the parties, could conclude that this collective evidence was sufficient to form a valid, binding, and enforceable express contract for Defendant to supply new water service to Roundhill.

2. Implied Contract

Plaintiff next contends that the March 14, 2006, "will serve" letter, together with the additional documentation and evidence, demonstrate that an implied contract was created for the provision of new water service to Roundhill. Defendant disputes the existence of an implied contract. Defendant contends that even if the Court determines that an implied contract was created, it is nonetheless immune from liability pursuant to the Mississippi Tort Claims Act ["MTCA"], MISS. CODE ANN. §§ 11-46-9, *et seq*.

A contract that arises from the conduct of the parties, also known as a contract implied in fact, has the same legal effect as an express contract. It carries as much weight as, and is as binding as, an express contract. *Franklin v. Franklin ex rel. Phillips,* 858 So.2d 110, 120 (Miss. 2003). An implied contract is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a

fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Grigson v. Creative Artists Agency L.L.C.,* 210 F.3d 524, 533 (5th Cir. 2000) (internal citations omitted). In the present case, construing the evidence in the light most favorable to Plaintiff, the Court will presume, without deciding, that in the absence of an express contract, the record supports the existence of an implied contract between Plaintiff and Defendant for provision of new water service. The Court turns to Defendant's asserted immunity under the MTCA.

The MTCA affords immunity to governmental entities for certain torts committed by their employees while acting in the course of their employment. MISS. CODE ANN. § 11-46-5(1). While the breach of an express contract does not fall within the enumerated torts for which municipalities can claim protection under the MTCA, *see Weible,* 89 So.3d at 59 (citing *City of Jackson v. Estate of Stewart ex. rel. Womack,* 908 So.2d 703, 710-11 (Miss. 2005)), the MTCA may, under certain circumstances, afford immunity to a municipality for the breach of an implied contract, *id.* at 59 (quoting *Stewart,* 908 So.2d at 711).[5] In relevant

[5] If the alleged conduct falls within one of the enumerated exceptions found in MISS. CODE ANN. § 11-46-9, immunity applies and "[t]he state cannot be held liable for damages." *Williams v. City of Gulfport, Miss.,* 2010 WL 1946627 * 4 (S.D. Miss. May 7, 2010) (quoting *State v. Hinds County Bd. of Supervisors,* 635 So.2d 839, 842 (Miss. 1994)).

part, the MTCA provides immunity to municipalities for actions:

> (d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused; . . .
>
> (g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;
>
> (h) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature; . . . .

MISS. CODE ANN. §§ 11-46-9(1)(d), (g), and (h).

With regard to Defendant's claim of entitlement to immunity pursuant to subsections (d) and (g), Plaintiff argues that the City:

> does not have discretion to invent an imaginary fire flow problem in order to refuse water service to disfavored developers and plaintiffs' evidence concerning the installation of the water meter in 2007 establishes, according even to the testimony of the City's own witnesses, that the process of obtaining water service for Roundhill had advanced to the point that the will serve letter had become irrevocable and the City no longer had discretion to deny service.

Pls.' Mem. in Opp'n to Mot. for Summ. J. [636] at p. 6.

Plaintiff submits that subsection (h) does not apply in this case, inasmuch as Plaintiff has demonstrated that Defendant acted arbitrarily and capriciously.

For purposes of assessing immunity under the MTCA, the Mississippi Supreme Court has held that:

> the discretion to be exercised by the city authorities in the extension of its water system may be said to be limited to a refusal to extend where to do so would be unreasonable under the conditions and circumstances presented in the particular case; but, as we have said, unless the discretion is abused by the municipal authorities, their decision will be determinative.

City of Greenwood v. Provine, 108 So. 284, 286 (1926) (citations omitted).

In *Ladner v. Mississippi Pub. Utilities Co.,* 131 So. 78 (1930), the Mississippi Supreme Court, citing *City of Greenwood,* determined that the discretion afforded to municipalities in providing water services also applies to water companies:

> the rule is the same in the case of a water company operated under a franchise granted by the municipal authorities as in the case where the municipality owns and operates a water system. The duty of such a water company to extend the service to all applicants who reside within the municipality and are willing to comply with its regulations is not an absolute one, but it is charged with the duty of furnishing water where there is a reasonable demand for it, and a reasonable extension of the service can be made to meet the demand, considering the cost of the extension and the maintenance of the service, the present and prospective number of subscribers or customers, the present development and the prospective growth and development of the locality to be served, and the present and prospective revenue to be obtained from furnishing water in the territory to be served by such extension.

Id. at p. 79.

Although these cases dealt with extensions of water systems, the Court is of the view that both *Greenwood* and *Ladner* stand for the proposition that considerable discretion is afforded to municipalities in rendering decisions on the provision of new water

services. Even if the Court assumes that Defendant's decision to deny new water service was erroneous, or even negligent, so long as that decision did not amount to an abuse of discretion, Defendant is entitled to avail itself of immunity under the MTCA. The record evidence supports the conclusion that Defendant's refusal to extend new water service to Roundhill was based upon a perceived lack of adequate fire flow pressure in the Landon Road water line. Although it appears that this perception later turned out to be incorrect, even if Defendant's conduct rose to the level of negligence, this does not amount to an abuse of discretion, nor does it demonstrate that Defendant's decision to deny new water service was arbitrary and capricious.

Thus, even assuming the evidence established the existence of an implied contract, the Court is of the opinion that Defendant's conduct in this case did not rise to the level of an abuse of discretion, or was otherwise arbitrary and capricious in nature. The evidence relied upon by Plaintiff is insufficient to overcome Defendant's entitlement to immunity under MISS. CODE ANN. §§ 11-46-9(1)(d), (g), and (h). Summary judgment is appropriate on Plaintiff's implied contract claim.

C. Detrimental Reliance and Estoppel Claims

Plaintiff contends that because there is conflicting evidence regarding the nature of the assurances given to it by Mr. Robert K. Riemann and Mr. Melvin

Bullock, both employees of Defendant, regarding the import of the "will serve" letter, a material fact question exists as to whether Plaintiff detrimentally relied on said representations, thereby precluding summary judgment. Pls.' Mem. in Opp'n to Mot. for Summ. J. [636] at p. 7. Defendant counters that any assurances given by either Mr. Riemann or Mr. Bullock, as employees, could not legally bind Defendant. Def.'s Rebutal [sic] to Mot. for Summ. J. [662], at p. 7.

While Plaintiff does not specifically plead the doctrine of promissory estoppel, it "may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetuation of fraud or would result in other injustice." *Weible,* 89 So.3d at 67. The doctrines of promissory estoppel, equitable estoppel, and detrimental reliance "are means by which a party may be precluded from asserting contract defenses such as lack of consideration or the statute of frauds." *Id.* at 68 (citing *Thompson v. First Am. Nat'l Bank,* 19 So.3d 784, 788 (Miss. 1999)).

"Under Mississippi law, 'the doctrine of equitable estoppel may be applied against the state and its municipalities.'" *Bush v. City of Gulfport, Miss.,* 454 Fed. App'x 270, 280 (5th Cir. 2011) (quoting *Suggs v. Town of Caledonia,* 470 So.2d 1055, 1057 (Miss. 1985)). In order for equitable estoppel to be applied against a municipality, a plaintiff must demonstrate: (1) a belief and reliance on some representation; (2) a

change of position, as a result of such belief or reliance; and (3) detriment or prejudice resulted due to a change of position. *Mayor & Bd. of Aldermen, City of Clinton v. Welch,* 888 So.2d 416, 432 (Miss. 2004).

Plaintiff's argument that its reliance on representations made by two employees, Mr. Riemann and Mr. Bullock, caused it harm, is unavailing. Such verbal statements by a municipality's employees are insufficient to support an estoppel claim against a municipality.

> The Mississippi Supreme Court has further explained that 'the unauthorized acts of one of [a municipality's] officials does not estop a municipality from acting in its governmental capacity.' *Suggs,* 470 So.2d at 1057. Consistent with this rule, the Mississippi Supreme Court has declined to apply the doctrine when an equitable estoppel claim is based upon the informal actions of governmental employees, rather than an official government act. . . . *Moore ex rel. Benton County v. Renick,* 626 So.2d 148, 153 (Miss. 1993)).

Bush, 454 Fed. App'x at 280; *see also Robert E. Ratliff Co., Inc. v. Mississippi State Highway Comm'n,* 400 So.2d 1211, 1214 (Miss. 1981) (verbal statement by public employee is insufficient to support estoppel claim against the state).

The Court concludes that Plaintiff has not shown the existence of any official government action, prior to Defendant's denial of water service to Roundhill,

sufficient to support an estoppel claim. Plaintiff's reliance on unofficial representations by Defendant's employees is insufficient.

III. CONCLUSION

For the foregoing reasons, the Court concludes that insufficient evidence has been presented to establish genuine issues of material fact as to Plaintiff's state law claims for breach of contract, equitable estoppel, and detrimental reliance. Defendant is entitled to judgment as a matter of law on Plaintiff's state law claims.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, for the reasons more fully stated herein, the Motion for Summary Judgment on Plaintiff's State Law Claims [581] filed by Defendant City of Gulfport on March 26, 2012, is **GRANTED,** and these claims against Defendant City of Gulfport are **DISMISSED WITH PREJUDICE.**

SO ORDERED AND ADJUDGED, this the 20th day of July, 2012.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
SOUTHERN DIVISION

L&F HOMES AND DEVELOPMENT, LLC, d/b/a HYNEMAN HOMES AND LARRY MITRENGA	§	**PLAINTIFFS**
v.	§	**Civil Action No. 1:10cv387HSO-JMR**
CITY OF GULFPORT, MISSISSIPPI	§	**DEFENDANT**

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT CITY OF GULFPORT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S 42 U.S.C. § 1982 AND FAIR HOUSING ACT CLAIMS

(Filed Jul. 11, 2012)

BEFORE THE COURT is the City of Gulfport's Motion for Partial Summary Judgment [593] filed March 26, 2012. Plaintiffs filed a Response [644] on April 6, 2012. The City of Gulfport filed a Rebuttal in support of the Motion [663] on April 12, 2012. After due consideration of the record, the submissions on file, and the relevant legal authorities, the Court finds that because Plaintiffs' Fair Housing Act and 42 U.S.C. § 1982 claims fail as matter of law, the City of Gulfport's Motion for Partial Summary Judgment [593] should be granted.

I. FACTS AND PROCEDURAL HISTORY

On July 2, 2012, this Court entered a Memorandum Opinion and Order [746] which set forth the relevant facts and procedural history in this case. They will not be repeated here; however, the Court adopts and incorporates them by reference. For this reason, the Court will focus only on the facts pertinent to resolution of the instant Motion.

In relevant part, the Complaint asserts that:

> Defendant has violated the Fair Housing Act and 42 U.S.C. § 1982 by destroying plaintiffs' subdivision as part of a scheme to exclude low income Black persons from residing in the Gulfport area.

Compl. [1] ¶ C, at p. 10. The City of Gulfport ["Defendant"] contends that it is entitled to summary judgment on these claims.

II. DISCUSSION

A. Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). To rebut a properly supported motion for summary judgment, the opposing party must show, with "significant probative evidence," that there exists a genuine issue of material fact." *Hamilton v. Segue Software, Inc.,*

232 F.3d 473, 477 (5th Cir. 2000) (citing *Conkling v. Turner,* 18 F.3d 1285, 1295 (5th Cir. 1994)).

The Court notes that the allegations contained in the Complaint, and the arguments presented in the pleadings associated with the instant Motion, refer to Plaintiffs Larry Mitrenga and L&F Homes and Development, LLC, collectively. In its Memorandum Opinion and Order [746] entered on July 2, 2012, the Court dismissed Plaintiff Larry Mitrenga for lack of standing. Therefore, analysis of the remaining claims is limited to those brought by Plaintiff, L&F Homes and Development, LLC ["L&F"].

B. 42 U.S.C. § 1982 Claims

Defendant argues that without "proof that Plaintiffs are members of a racial minority, the claims under 42 U.S.C. § 1982 are clearly not actionable." Def.'s Mem. in Supp. of Mot. for Summ. J. [595] at p. 25. The Response [645] concedes that there are no Mississippi authorities addressing this question, arguing:

> as a matter of common sense, that the relationship between the injury to the 781 Group and the injury to Roundhill is so close that, whatever the prudential boundaries which limit recovery under 1982 may be, Roundhill stands inside these boundaries. . . . If the reason was racially discriminatory – and the proof of pretext gives rise to the inference that it was – Roundhill was denied water service for racially discriminatory reasons,

> and plaintiffs should be permitted to proceed under 42 U.S.C. § 1982.

Pls.' Mem. in Opp'n to Def.'s Mot. for Summ. J. [645], at pp. 15-16.

Section 1982 provides that:

> [a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982.

"Section 1982 proscribes discrimination with respect to real or personal property interests. . . . Like § 1981, § 1982 is principally derived from § 1 of the Civil Rights Act of 1866." *Bobo v. ITT, Cont'l Baking Co.,* 662 F.2d 340, 343 (5th Cir. 1981) (citing *City of Memphis v. Greene,* 451 U.S. 100, 120 (1981)). In order to support a claim under § 1982, L&F must show that it is a member of a racial minority, and that Defendant intentionally engaged in discrimination. *Green v. State Bar of Texas,* 27 F.3d 1083, 1086 (5th Cir. 1994); *see Chapman v. Arlington Hous. Auth.,* 145 F. App'x 496, 497 (5th Cir. 2005). Because it is undisputed that L&F, as well as Mr. Mitrenga himself are not members of a racial minority, Defendant is entitled to judgment as a matter of law on the claims brought pursuant 42 U.S.C. § 1982.

C. Fair Housing Act Claim

The Complaint asserts that, at approximately the same time that L&F was purchasing Roundhill, "Group 781, LLC, intended to construct homes for low income purchasers . . . in a nearby subdivision area . . . and it was expected that the substantial majority of the persons who would occupy the 781 Group subdivision would be low income Black persons." Compl. [1] ¶¶ 13-15, at p. 6. Plaintiffs' Response submits that:

> the City's determined opposition to the 781 Group's proposed development was racially discriminatory . . . [and] [t]here is ample evidence to support the conclusion that Roundhill was collateral damage in the City's effort to oppose the 781 Group project: City officials decided that it was necessary to deny water service to Roundhill in order to better defend the City's position in the 781 Group litigation.

Pls.' Resp. in Opp. to Def.'s Mot. for Summ. J. [645] at p. 12.

The Fair Housing Act, 42 U.S.C. § 3601, *et seq.* ["FHA"], makes it unlawful to "otherwise make unavailable or deny, a dwelling to any person because of race, ..." 42 U.S.C. § 3604(A). The FHA has been interpreted to include "exclusionary zoning and the refusal to permit tying into the city's water and sewer systems through the denial of permits. . . ." *Luckett v. Town of Bentonia,* 2007 WL 1673570, *3 (S.D. Miss. June 7, 2007) (citing *Kennedy Park Homes Ass'n, Inc.*

v. City of Lackawanna, 436 F.2d 108 (2nd Cir. 1970); *United Farmworkers v. City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974); *United States v. Black Jack,* 508 F.2d 1179 (8th Cir. 1974); *Resident Advisory Bd. v. Rizzo,* 564 F.2d 126 (3rd Cir. 1977)). "To recover under the FHA, an injured party may proceed under either a theory of disparate treatment or disparate impact (also called "discriminatory effect)." *Homebuilders Ass'n of Mississippi, Inc. v. City of Brandon, Miss.,* 640 F. Supp. 2d 835, 841 (S.D. Miss. 2009) (citing *Simms v. First Gibraltar Bank,* 83 F.3d 1546, 1555 (5th Cir. 1996)); *see also Hanson v. Veterans Admin.,* 800 F.2d 1381, 1386 (5th Cir. 1986).

1. Disparate Treatment

The *McDonnell Douglas* burden-shifting framework is employed to analyze disparate treatment housing discrimination claims. *Mitchell v. Shane,* 350 F.3d 39, 47 (2d Cir. 2003) (citing *Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032, 1038 (2d Cir. 1979)).

> . . . [O]nce a plaintiff has established a *prima facie* case of discrimination, the burden shifts to the defendant to assert a legitimate, non-discriminatory rationale for the challenged decision. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-03 (1973). If the defendant makes such a showing, the burden shifts back to the plaintiff to demonstrate that discrimination was the real reason for the defendant's action. *See Schnabel v. Abramson,* 232 F.3d 83, 87 (2d Cir. 2000).

> Summary judgment is appropriate if no reasonable jury could find that the defendant's actions were motivated by discrimination. *Id.* at 91.

Mitchell, 350 F.3d at 47.

A disparate treatment claim requires L&F to demonstrate deliberate discrimination on the part of Defendant. Such treatment may be proved through either direct or circumstantial evidence. *Munoz v. Orr,* 200 F.3d 291, 299 (5th Cir. 2000). In the present case, in order to establish a *prima facie* disparate treatment claim, the following four elements are required: 1) Plaintiffs were members of a protected class; 2) they applied for and were qualified for water and sewer service from Defendant; 3) the water and sewer service were denied or rejected; and 4) Defendant provided similarly situated individuals outside the protected class with water and sewer service. *Luckett,* 2007 WL 1673570, *4 (citing *Selden Apartments v. United States Dep't of Housing and Urban Dev.,* 785 F.2d 152, 159 (6th Cir. 1986)).

Defendant contends that this FHA claim fails as a matter of law because: 1) Plaintiffs offer nothing more than mere speculation or their belief to establish that a member of a protected class has in fact been discriminated against; 2) water and sewer service were denied to both Roundhill and Group 781 based on fire flow pressure, a legitimate non-discriminatory reason; and 3) Plaintiffs have offered no evidence that similarly situated developments,

comprised of individuals outside the protected class, have been provided water and sewer service by Defendant. Defs.' Mem. in Supp. of Mot. for Summ. J. [595] at pp. 18-20.

According to Plaintiffs' Response [645], in order "to prove a claim under the Fair Housing Act, a litigant does not have to prove that he or she was the intended target of the discriminatory act." Pls.' Mem. in Opp'n to Def.'s Mot. for Summ. J. [645], at p. 13. They argue that:

> [t]he FHA prohibits discrimination "because of race" (42 U.S.C. 3604), defines an "aggrieved person" as "one who claims to have been injured by a discriminatory housing practice" (42 U.S.C. 3602(I)), and gives every aggrieved person the right to sue under the FHA (42 U.S.C. 3613).

Id., n.4, at p. 13.

This argument goes more to the question of whether Plaintiffs ever possessed standing to pursue an FHA claim, even though they were not members of a racial minority or protected class. Defendant contends that notwithstanding the question of standing, this claim cannot withstand summary judgment on its merits.

> To survive summary judgment . . . [plaintiff] must establish (1) a fact issue as to whether the City's stated reason for its decision – i.e., that the project violates the City's municipal ordinances – is pretextual *and* (2) a reasonable

> inference that race was a significant factor in the refusal. The City's "refusal may have been unsound, unfair, or even unlawful, yet not have been violative of the [Fair Housing Act] if there is no evidence . . . that race was a significant factor in [the City's] decision."

Artisan/Am. Corp. v. City of Alvin, Tex., 588 F.3d 291, 295 (5th Cir. 2009) (quoting *Sims v. First Gibraltar Bank,* 83 F.3d 1546, (5th Cir. 1996)).

The Court finds that Plaintiffs have not proffered sufficient competent summary judgment evidence tending to show that Roundhill was a member of a protected class, or of any actual discrimination by the City in denying water service to Roundhill subdivision. Nor does the record contain sufficient evidence establishing that similarly situated residential developments, consisting of members not in the protected class, have been provided water service by Defendant. The evidence submitted on this point consists of commercial businesses located near Roundhill subdivision, along with an assortment of other properties which could not reasonably be compared to Roundhill.

Even assuming sufficient evidence has been submitted to establish a *prima facie* disparate treatment claim under the FHA, Defendant has offered a legitimate, non-discriminatory reason for its denial of water service to Roundhill. The City contends that its reason for denying such water service during the relevant time frame was due to insufficient pressure in the Landon Road water line, evidenced by Ordinance No. 2501. Def.'s Mem. [595] at p. 21. L&F offers

little beyond conjecture and speculation to meet its burden of showing pretext. This is insufficient to withstand summary judgment.

2. Disparate Impact

Courts likewise utilize the *McDonnell Douglas* burden-shifting framework to evaluate FHA disparate impact claims:

> First, a plaintiff must make a prima facie case of discrimination by 'identifying and challenging a specific [housing] practice, and then show[ing] an adverse effect by offering statistical evidence of a kind or degree sufficient to show that the practice in question has caused the adverse effect in question,' . . . Second, if the plaintiff makes a prima facie case, the defendant must offer a "legitimate business reason" for the challenged practice, . . . Third, if the defendant offers such a reason, the plaintiff must demonstrate that the defendant's reason is "a pretext for discrimination, or that there exists an alternative [housing] practice that would achieve the same business ends with a less discriminatory impact.". . .

Graoch Associates # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n, 508 F.3d 366, 374 (6th Cir. 2007) (internal citations omitted).

With regard to disparate impact claims, case law has established that proof of an intent to discriminate is not required. Instead, the "focus is on facially

neutral employment practices that create such statistical disparities disadvantaging members of a protected group that they are 'functionally equivalent to intentional discrimination.'" *Munoz v. Orr,* 200 F.3d 291, 299 (quoting *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 987 (1988)). Statistical reports, surveys, or other such evidence are common methods for demonstrating adverse effect.

In *Artisan/Am. Corp. v. City of Alvin, Tex.,* 588 F.3d 291 (5th Cir. 2009), plaintiffs brought discriminatory treatment and discriminatory effect claims under the FHA. The Fifth Circuit Court of Appeals considered and analyzed both types of claims under a burden shifting theory. In spite of extensive statistical evidence offered by the plaintiff, the Fifth Circuit affirmed summary judgment in favor of the defendant City on plaintiff's discriminatory effect claim, absent proof of a waiting list for affordable housing, a demonstrable shortage of affordable housing, or identifiable tenants affected by the challenged action. *Id.* at 298-99.

In *Hanson v. Veterans Admin.,* 800 F.2d 1381, 1386 (5th Cir. 1986), the district court considered all of the extensive statistical evidence proffered and deemed it insufficient to sustain a discriminatory effect claim under the FHA. It concluded that plaintiff failed to demonstrate that defendant's appraisals resulted in a racially-based, negative impact on home values. The Fifth Circuit affirmed.

The Court has reviewed the record in this case, including the numerous exhibits submitted in connection with this Motion, and concludes that Plaintiffs have proffered no statistical or other competent evidence tending to show, among other things, the availability or non-availablility of low-income housing in the relevant area, or the racial make-up of Roundhill and/or Group 781. Plaintiffs have not met their summary judgment burden on the merits of their disparate impact or discriminatory effect FHA claims. Summary judgment is appropriate.

III. CONCLUSION

For the foregoing reasons, the Court concludes that insufficient evidence has been proffered to establish genuine issues of material fact as to Plaintiffs' claims pursuant to the Fair Housing Act and 42 U.S.C. § 1982. Defendant is therefore entitled to judgment as a matter of law on these claims.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, for the reasons more fully stated herein, the Motion for Partial Summary Judgment on Plaintiffs' Fair Housing Act and 42 U.S.C. § 1982 claims [593] filed by Defendant City of Gulfport on March 26, 2012, is **GRANTED**, and these two claims against Defendant City of Gulfport are **DISMISSED WITH PREJUDICE**.

SO ORDERED AND ADJUDGED, this the 11th day of July, 2012.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
SOUTHERN DIVISION

L&F HOMES AND DEVELOPMENT, LLC, d/b/a HYNEMAN HOMES AND LARRY MITRENGA	§	**PLAINTIFFS**
v.	§	**Civil Action No. 1:10cv387HSO-JMR**
CITY OF GULFPORT, MISSISSIPPI	§	**DEFENDANT**

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT CITY OF GULFPORT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF LARRY MITRENGA'S INDIVIDUAL DAMAGES CLAIMS, AND DISMISSING PLAINTIFF LARRY MITRENGA FOR LACK OF STANDING

(Filed Jul. 2, 2012)

BEFORE THE COURT is the City of Gulfport's Motion for Partial Summary Judgment [589] filed March 26, 2012. On April 5, 2012, L&F Homes and Development, LLC, and Larry Mitrenga filed a Response to the Motion for Partial Summary Judgment [633], which seeks dismissal of the individual damages claims of Plaintiff Larry Mitrenga. The City of Gulfport filed a Rebuttal in support of the Motion [665] on April 12, 2012. After due consideration of the record, the submissions on file, and the relevant legal

authorities, the Court finds that because Plaintiff Larry Mitrenga lacks standing to pursue his individual claims in this Court, the City of Gulfport's Motion for Partial Summary Judgment [589] should be granted.

I. FACTS AND PROCEDURAL HISTORY

In December 2009, Plaintiff L&F Homes and Development, LLC ["L&F"] purchased the Roundhill subdivision in Harrison County, Mississippi, just outside the city limits of Gulfport. Compl. [1-1] at p. 2. In order to secure financing for the purchase, Plaintiff Larry Mitrenga pledged an $800,00.00 [sic] certificate of deposit.[1] Subsequent to the purchase of the property, Plaintiffs learned that the subdivision was not an existing entitled community for purposes of receiving water and sewer services. *Id.* at pp. 3-4. The City of Gulfport ["Defendant"] issued a letter denying Plaintiffs' request for service verification of the Roundhill subdivision.

Plaintiffs contend that they sought administrative relief from the decision, but were not informed of the proper procedure for obtaining a hearing or administrative appeal. Instead, Plaintiffs filed a bill of exceptions in the Circuit Court of Harrison County, First Judicial District. *Id.* at pp. 4-5. The Mayor did

[1] According to Plaintiffs, the "bank still has the CD, has not yet applied it to the balance of the loan, ..." Pls.' Resp. to Mot. for Summ. J. [634], n.3, at p. 3.

not sign the bill of exceptions. Plaintiffs filed a petition for mandamus in the state court. *Id.* The City moved to quash the mandamus on service of process grounds, and also moved the state court to deny mandamus on the theory that the City was improperly named. *Id.* at p. 5. On September 10, 2010, the Circuit Court granted the City's Motion to Dismiss for lack of jurisdiction, on the basis that a hearing had not yet been held before the Gulfport City Council. Ex. "E" to Def.'s Mot. to Dismiss [8-1].

Plaintiffs then filed suit in this Court on August 2, 2010, seeking damages, declaratory relief, unspecified punitive damages, costs, and attorneys' fees. They advance claims for: (1) breach of contract; (2) detrimental reliance and estoppel; (3) violation of the Federal Fair Housing Act, 42 U.S.C. § 3601, *et seq.*; (4) violation of 42 U.S.C. § 1982; (5) violation of procedural due process; (6) violation of substantive due process; (7) violation of equal protection; and (8) expropriation of property without "just" compensation. Plaintiffs filed an Amended Complaint [61] on March 3, 2011, adding a claim for violation of their First Amendment rights of freedom of speech and of association [61-1]. By Order [351] entered November 11, 2011, Plaintiffs' claims for punitive damages, attorneys' fees under state law, declaratory relief, and injunctive relief, were dismissed. Defendant now seeks dismissal of Plaintiff Larry Mitrenga's individual damages claims.

II. DISCUSSION

A. Legal Standard

Rule 56(a) of the Federal Rules of Civil Procedure states that the Court shall grant summary judgment on each claim or defense on which summary judgment is sought if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986); *Meyers v. M/V Eugenio C.,* 842 F.2d 815, 816 (5th Cir. 1988).

To rebut a properly supported motion for summary judgment, the opposing party must present significant probative evidence, since there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Booth v. Wal-Mart Stores, Inc.,* 75 F. Supp. 2d 541, 543 (S.D. Miss. 1999). If the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). The nonmovant may not rely on mere denials of material facts, nor on unsworn allegations in the pleadings or arguments and assertions in briefs or legal memoranda. *Booth,* 75 F. Supp. 2d at 543.

The mere existence of a disputed factual issue does not foreclose summary judgment. The dispute must be genuine, and the facts must be material. *Id.*

With regard to "materiality," only those disputes or facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment. *Id.* (citing *Phillips Oil Company v. OKC Corp.,* 812 F.2d 265, 272 (5th Cir. 1987)). Where "the summary judgment evidence establishes that one of the essential elements of the plaintiff's cause of action does not exist as a matter of law, ... all other contested issues of fact are rendered immaterial." *Id.* (quoting *Topalian v. Ehrman,* 954 F.2d 1125, 1138 (5th Cir. 1987)).

B. Plaintiff Larry Mitrenga's Individual Damages Claim

1. Standing

Article III of the United States Constitution confines this Court to adjudicating actual "cases" and "controversies." U.S. Const. art. III, § 2, cl.1.

> The standing requirement originates from the Constitution confining federal courts to 'Cases' and 'Controversies'. . . . The 'irreducible constitutional minimum of standing contains three elements': injury-in-fact, causal connection, and redressability.

Time Warner Cable, Inc. v. Hudson, 667 F.3d 630, 635 (5th Cir. 2012) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

The "injury in fact" element requires "an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent,

not conjectural or hypothetical.'" *Lujan,* 504 U.S. at 561 (internal citations omitted).

The Complaint includes demands for pre-purchase development costs, actual costs, loss of tax advantages, sales incentives, property taxes, lost profits, future lost profits of L&F, lost income of Larry Mitrenga, post sale expenses, economic losses due to damage to commercial reputation, personal injury damages, attorneys' fees, and costs. Compl. [1] at pp. 25-30. Plaintiffs contend that these losses were incurred by both L&F and Larry Mitrenga, individually. *Id.*

Defendant moves to dismiss Plaintiff Larry Mitrenga's individual damages claims, on the grounds that Mr. Mitrenga has no standing to assert claims for damages in this lawsuit. Def.'s Mem. in Supp. of Mot. for Partial Summ. J. [590] at p. 13. Defendant reasons that because Mr. Mitrenga "did not purchase Roundhill and has no individual ownership of Roundhill, there is no privity or duty between Mitrenga and the City, and therefore Plaintiff Larry Mitrenga lacks standing to assert individual damages claims." *Id* . at p. 14.

In response to Defendant's Motion, Mr. Mitrenga asserts that, in order to secure the loan for purchasing Roundhill subdivision, he "had to pledge personal assets, an $800,000.00, Certificate of Deposit." Resp. in Opp'n to Mot. for Summ. J. [634] at p. 3. He further argues that, as the investor/guarantor, he has standing to sue directly for harm that is separate and

distinct from that suffered by the corporation. *Id.* at p. 9. In particular, Mr. Mitrenga maintains that because he "suffered a violation of his individual rights in the form of a misrepresentation made directly to Mr. Mitrenga. . . . ," the legal principles identified in *Photo Arts Imaging Professionals, LLC v. Best Buy Co., Inc.,* 2011 WL 5860704 (S.D. Miss. Nov. 22, 2011), should apply. Pls.' Resp. to Mot. for Summ. J. [634] at p. 13.

> Although the general rule is that a stockholder can not pursue damages for the violation of a duty owed to the corporation, an 'exception to this rule arises where the stockholder seeks damages for the violation of a duty owed directly to him, but the exception comes into play only where the wrong itself amounts to a breach of the duty owed to the stockholder personally.'

Photo Arts, 2011 WL 5860704 at *2 (quoting *Jordan v. U.S. Fid. & Guar. Co.,* 843 F. Supp. 164 (S.D. Miss. 1993)).

Two pertinent distinctions must be made with regard to Plaintiffs' reliance on the *Photo Arts* decision: 1) the complaint in the *Photo Arts* case asserted negligence claims, while the Complaint filed here asserts neither negligence nor misrepresentation claims; and 2) the Court in *Photo Arts* ultimately determined that the plaintiffs lacked standing, inasmuch as they failed to present sufficient evidence of a duty the defendant owed to them individually. *Photo*

Arts, 2011 WL 5860704 at *2 (quoting *Jordan,* 843 F. Supp. at 175).

The Fifth Circuit has determined that standing requirements apply to actions brought to redress alleged injuries to corporate entities in civil rights actions. *Gregory v. Mitchell,* 634 F.2d 199, 202 (5th Cir. 1981). "An action to redress injuries to a corporation, whether arising out of contract or tort, cannot be maintained by a stockholder in his own name but must be brought in the name of the corporation, since the cause of action being in the corporation, the stockholder's rights are merely derivative and can be asserted only through the corporation." *Schaffer v. Universal Rundle Corp.,* 397 F.2d 893, 896 (5th Cir. 1968); *see also Nationalcare Corp., Inc. v. St. Paul Prop. & Cas. Ins. Co.,* 22 F. Supp. 2d 558, 562 (S.D. Miss. 1998).

In the present case, the record evidence establishes that L&F Homes, LLC, purchased and is the owner of the Roundhill subdivision. It is undisputed that Mr. Mitrenga did not purchase, and does not otherwise possess, any ownership interest in the Roundhill subdivision.[2] The Court concludes that

[2] Mr. Mitrenga's argument that he personally pledged a CD to secure financing for L&F does not change the result. "[I]ndividuals who personally lend or guarantee funds to a corporation, do so voluntarily," *see Howell Steel Co. v. Trustmark Nat'l Bank,* 666 F. Supp. 930, 932 (S.D. Miss. 1987), and such an act

> represents no more than an investment in the corporation, thus placing them in no better position than

(Continued on following page)

Mr. Mitrenga, as a member, or even as the sole shareholder, of L&F, does not possess standing in this case. Rather, the alleged violations of rights asserted in the Complaint can be asserted solely through L&F, as the corporate entity that purchased and owns Roundhill. Any claims for liability arising under federal law with respect to the City of Gulfport's denial of water service to the Roundhill subdivision can be adjudicated on behalf of the property owner, which is the corporate entity, L&F Homes, LLC. They cannot be pursued by Plaintiff Larry Mitrenga, individually.

2. Sufficiency of Proof Offered

Notwithstanding Mr. Mitrenga's lack of constitutional standing in this case, the Court further finds that Mr. Mitrenga has not proffered sufficient summary judgment evidence in response to the Motion which tends to support his claim that he has suffered any damages personal to him, whether they be financial losses or injuries to his physical health, as a result of

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> any other creditor. . . . With reference to the guaranteeing of the debt of the corporation, this court has previously held that the execution of such a guarantee, without more, does not give the guarantor standing to maintain a claim for the loss of his investment.

Howell Steel Co., 666 F. Supp. at 932.

In this case it is undisputed that whatever personal guarantees Mr. Mitrenga may have extended on behalf of L&F, to date he has not been called upon to make any payments based upon these guarantees.

Defendant's conduct surrounding the denial of water service to Roundhill. Even assuming Mr. Mitrenga possessed standing in this case, his individual damages claims could not withstand summary judgment.

III. CONCLUSION

For the foregoing reasons, the Court finds that because Plaintiff Larry Mitrenga lacks standing to assert individual damages claims, Defendant is entitled to judgment as a matter of law on this claim. Alternatively, Plaintiff Larry Mitrenga's claims for individual damages fail as a matter of law inasmuch as he has not proffered sufficient evidence of personal economic losses or medical evidence in support of these claims. Defendant's Motion for Partial Summary Judgment on Plaintiff Larry Mitrenga's Individual Damages Claim [589] should be granted. The remaining claims set forth in the Complaint [1] and Amended Complaint [61] will proceed solely on behalf of L&F Homes and Development, LLC.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, for the reasons more fully stated herein, the Motion for Partial Summary Judgment [589] filed by Defendant City of Gulfport on March 26, 2012, is **GRANTED**. Plaintiff Larry Mitrenga's claims for individual damages against Defendant City of Gulfport are **DISMISSED FOR LACK OF STANDING**, and Plaintiff Larry Mitrenga is **DISMISSED AS A PLAINTIFF FOR LACK OF**

STANDING. The remaining claims will proceed on behalf of L&F Homes and Development, LLC.

SO ORDERED AND ADJUDGED, this the 2nd day of July, 2012.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI FIRST JUDICIAL DISTRICT

L & F HOLMES [sic] **AND DEVELOPMENT, LLC**	**APPELLANT**
	CAUSE NO.
VERSUS	**A2401-10-146**
CITY OF GULFPORT	**APPELLEE**

ORDER

(Filed Sep. 10, 2010)

CAME ON FOR HEARING, on the City of Gulfport's Motion to Dismiss, and the Court, having heard the arguments of the parties and having considered the premises, finds the motion is well taken and should be granted because the Court finds that there has not been a hearing before the Gulfport City Council and this Court lacks jurisdiction. It is therefore,

ORDERED AND ADJUDGED that the City of Gulfport's Motion to Dismiss is hereby granted.

SO ORDERED AND ADJUDGED, this the 10th day of September, 2010.

/s/ L. P. Bourgeois, Jr.
LAWRENCE P. BOURGEOIS, JR.
CIRCUIT COURT JUDGE

Date Filed: 09/11/2013

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 12-60597

Cons. w/ 12-60600

L & F HOMES AND DEVELOPMENT, L.L.C., doing business as Hyneman Homes; LARRY MITRENGA,

Plaintiffs-Appellants

v.

CITY OF GULFPORT, MISSISSIPPI,

Defendant-Appellee

Cons. w/ 12-60601

LARRY MITRENGA,

Plaintiff-Appellant

v.

CITY OF GULFPORT, MISSISSIPPI,

Defendant-Appellee

Appeals from the United States District Court for the Southern District of Mississippi, Biloxi

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ON PETITION FOR REHEARING

Before GARZA, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Leslie H. Southwick
United States Circuit Judge

ORDINANCE NO. 2501

An ordinance of the City of Gulfport, MS adopting the 2003 edition of the *International Fire Code,* regulating and governing the safeguarding of life and property from fire and explosion hazards arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the occupancy of buildings and premises in the City of Gulfport, MS; providing for the issuance of permits for hazardous uses or operations; repealing Ordinance No. 2114 of the City of Gulfport, MS and all other ordinances and parts of the ordinances in conflict therewith.

The City Council of the City of Gulfport does ordain as follows:

Section 1. That a certain document being marked and designated as the *International Fire Code, 2003 edition,* including Appendixes A, B, C, D, E, and F, and G, as published by the International Code Council, be and is hereby adopted as the code of the City of Gulfport for regulating and governing the safeguarding of life and property from fire and explosion hazards arising from the storage, handling and use of hazardous substances, materials and devices, and from conditions hazardous to life or property in the occupancy of buildings and premises in the Gulfport and providing for the issuance of permits for hazardous uses or operations; and each and all of the regulations, provisions, conditions and terms of such *International Fire Code,* 2003 edition, published by

the International Code Council are hereby referred to, adopted and made a part hereof as if fully set out in this ordinance, with the additions, deletions and changes, if any, prescribed in Section 2 of this ordinance.

Section 2. That the following sections are hereby revised:

Section 101.1 Title: Insert City of Gulfport, MS

Section 108 Board of Appeals: rename as "Construction Board of Adjustment and Appeals"

Section 109.3. Violation penalties: delete "[specify offense), punishable by a fine of not more than [amount]dollars or by imprisonment not exceeding [number of days], or both such fine and imprisonment. Each day that a violation continues after due notice has been served shall be deemed a separate offense".

Insert: shall be guilty of a [*insert]* "misdemeanor in accordance Section 1-9 General Penalty of the Code of Ordinances of the City of Gulfport, MS.

Section 111.4. Failure to comply: delete in last portion of last sentence in paragraph . . . "liable to a fine of not less than (amount) dollars or more than (amount) dollars".

Insert: in last portion of last sentence in paragraph . . . "guilty of a misdemeanor in accordance with Section 1-9 of the

Code of Ordinances of the City of Gulfport, MS.

Section 3. That the limits referred to in certain sections of the 2003 *International Fire Code* are hereby established as follows:

Section 3204.3.1.1 (limits in which the storage of flammable cryogenic fluids in stationary containers is prohibited): As determined by the Fire Chief

Section 3404.2.9.5.1 (limits in which the storage of Class I and Class II liquids in aboveground tanks outside of buildings is prohibited): As determined by the Fire Chief

Section 3406.2.4.4 (limits in which the storage of Class I and Class II liquids in aboveground tanks is prohibited): As determined by the Fire Chief

Section 3804.2 (limits in which the storage of liquefied petroleum gas is restricted for the protection of heavily populated or congested areas): As determined by the Fire Chief

Section 4. That Ordinance No. 2114 of City of Gulfport, MS entitled Standard Fire Prevention Code, 1997 edition, and all other ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 5. That nothing in this ordinance or in the International Fire Code hereby adopted shall be construed to affect any suit or proceeding impending in any court, or any rights acquired, or liability

incurred, or any cause or causes of action acquired or existing, under any act or ordinance hereby repealed as cited in Section 2 of this ordinance; nor shall any just or legal right or remedy of any character be lost, impaired or affected by this ordinance.

Section 6. That if any section, subsection, clause, or phrase of this Ordinance, and the code referred to and adopted hereby be legally declared to be unconstitutional or legally unenforceable for any reason, the unconstitutional or unenforceable portion shall be severed from the ordinance, and all remaining portions shall continue in full force and effect, the same as if the ordinance was adopted excluding the unconstitutional or unenforceable portion.

Section 7. That this Ordinance shall he made a part of the official minutes of the Gulfport City Council and enrolled as required by law; and the City Clerk shall certify to is [sic] adoption, and cause it to be published as required by law; and for the protection, health and safety of people and property in the City of Gulfport, this Ordinance shall take effect upon November 1, 2006.

Section 8. If a project is designed by the IFC and ready to be permitted before the effective date of this ordinance, the Building Code Services office shall have the authority to issue the building permit.

Section 9. That Section 10-52 *Appeals* of the Code of Ordinances for the City of Gulfport, MS (Ordinance #1826) is hereby amended as follows:

Delete the last portion of the sentence. . . . the applicant may appeal from the decision of the chief of the bureau of fire prevention [delete: "to the mayor and city council"] within thirty (30) days from the date of the decision appealed.

Insert the last portion of the sentence. . . . the applicant may appeal from the decision of the chief of the bureau of fire prevention [insert: "to the Construction Board of Adjustment and Appeals"] within thirty (30) days from the date of the decision appealed.

The above and foregoing Ordinance, after having been first reduced to writing, was introduced by Councilman Hollimon, seconded by Councilman Smith and was adopted by the following roll call votes, to-wit:

YEAS:	ABSTENTIONS:	ABSENCES:	NAYS:
Hollimon	None	None	None
Holmes-Hines			
Roland			
Smith			
Carriere			
Resh			
Nalley			

WHEREUPON the President declared the motion carried and the Ordinance adopted, this the 17th day of October, 2006.

(SEAL:)

ATTEST:	ADOPT:
/s/ Kathy E. Johnson	/s/ Brian Carriere
CLERK OF THE COUNCIL	PRESIDENT

The above and foregoing Ordinance, having been submitted and approved by the Mayor, this the 18th day of October, 2006.

/s/ Brent Warr
BRENT WARR, Mayor

CITY HALL *GULFPORT, MISSISSIPPI*
2:30 P.M. *AUGUST 8, 2006*

Gary Hollimon, Ward One *Libby Milner-Roland, Ward Two* *Ella Holmes-Hines, Ward Three* *Council President Barbara Nalley Ward Seven* *Jackie Smith, Ward Four Brian Carriere, Ward Five Neil Resh,* Ward *Six*

PRAYER AND PLEDGE OF ALLEGIANCE

1) *THE AGENDA ORDER* – confirmation or adjustment of the agenda order.

2) *PRESENTATION AGENDA*

   a) *MAYOR'S REPORT*

   b) *ADMINISTRATION UPDATE TO PRIOR REQUESTS*

3) *PUBLIC AGENDA*

   CITIZEN HEARING – Mr. Mike Miller will address the Council regarding an engineering project.

   CITIZEN HEARING – Ms. Deborah Owen will address the Council regarding the denial of an insurance claim.

   CITIZEN FORUM – Thirty minutes shall be allowed for public input with a three-minute time limit on each speaker.

4) *POLICY ISSUES*

   a) *APPROVAL* – of the City Council minutes for May 31 and June 6, 2006.

b) *APPEAL* – regarding denial by the Zoning Board of a special exception use request to operate a restaurant in an I-1 zoning district south of and adjacent to 19th Street, east of 29th Avenue and west of 26th Avenue – Case # 0607ZB145.

c) *ORDINANCE* – adopting advisory base flood elevations and floodplain damage prevention.

d) *HEARING* – regarding zoning at property located on 37th Street between 12th and 13th Avenues – Case # 0509PC167.

e) *ORDINANCE* – amending the building permit fee schedule.

f) *RESOLUTION* – approving contract for professional consultant services for administration and inspection of building permits and agreement for reimbursement of consultant fees by project owners.

g) *RESOLUTION* – approving the purchase of real property located adjacent to Katie Patterson Booth Community Center at 26th Street and Searle Avenue.

h) *RESOLUTION* – approving permit encroachment agreement for sewer main to cross easement and gas pipeline in connection with the North Orange Grove Interceptor Project, Contract A.

i) *RESOLUTION* – approving permit encroachment agreement for sewer main to cross

easement and high pressure gas line in connection with the North Orange Grove Interceptor Project, Contract A.

j) *RESOLUTION* – approving a wastewater service agreement to connect the Harrison County Utility Authority West Orange Grove Interceptor for subdivision development.

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[307] LEGAL DEPARTMENT
CITY OF GULFPORT

P. O. Box 1780
Gulfport, MS 39502

City Hall
2nd Floor
2309-15th Street

HARRY P. HEWES,
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Jeffrey S. Bruni,
Asst. City Attorney
& Litigation
Supervisor
Margaret E. Murdock,
Assistant City
Attorney

MEMORANDUM

[To Request Matter to be placed upon Council Agenda]

To: Mayor Brent Warr: Attention David Nichols, CAO

Council President Barbara Nalley
Councilman Gary Hollimon
Councilwoman Libby Milner Roland
Councilwoman Ella Holmes-Hines
Councilman Jackie Smith
Councilman Brian Carriere
Councilman Neil Resh

Kathy E. Johnson, Council Clerk
Ronda Washington, Deputy Council Clerk

From: Harry P. Hewes, City Attorney [HPH]

Dated: July 27, 2006

RE: RESOLUTION TO APPROVE ROUNDHILL FARMS, LLC. WASTEWATER SERVICE AGREEMENT TO CONNECT TO THE HARRISON COUNTY UTILITY AUTHORITY WEST ORANGE INTERCEPTOR FOR SUB-DIVISION DEVELOPMENT ON NORTH SIDE LANDON ROAD WEST OF U. S. HIGHWAY 49, GULFPORT

This is to respectfully request placement and consideration of the attached item, referenced above, on the City Council Agenda for August 8, 2005.

Subject: In order to properly utilize public sewer distribution services of the Harrison County Utility Authority (formerly known as Harrison County Wastewater Management District), Roundhill Farms, LLC. Desires to apply to the Authority to connect to its West Orange Grove interceptor system. The City of Gulfport requires a Wastewater Service Agreement to enable this connection. The municipality must be the connecting party, and shall be the billing utility provider for the service in order to allow the connection. Bill Powell has reviewed the connection plans and consents to the approval. Plans were designed by Harris Henreich Engineers

The attached items have been presented to, or originate from the following Departments:

Department	Approve	Disapprove
Engineering Dept.	(see memo from Bill Powell, P.E.)	
Legal Department	Harry P. Hewes [HPH]	

Also reviewed and approved by:

Submitted for review and approval to:

David Nichols, CAO, and/or	/s/ David Nichols	_____
Mayor Brent Warr	_____	_____

[308] There came on for consideration at a duly constituted meeting of the Mayor and Members of the City Council of the City of Gulfport, Mississippi, held on the 8th day of August, 2006 the following Resolution:

A RESOLUTION BY THE GULFPORT CITY COUNCIL TO APPROVE IN BEHALF OF CITY OF GULFPORT FOR *ROUNDHILL FARMS, LLC* TO APPLY FOR CONNECTION TO HARRISON COUNTY UTILITY AUTHORITY'S WEST ORANGE GROVE INTERCEPTOR ON NORTH SIDE OF LANDON ROAD WEST OF HIGHWAY 49 AND TO AUTHORIZE EXECUTION OF WASTEWATER SERVICE AGREEMENT TO SERVICE THE PROPERTY

WHEREAS, Roundhill Farms, LLC by Sherman Muths, III, Manager Member ("Applicant/Owner"), address of 1311 Spring St., Gulfport, MS 39503 is the

professed owner of an interest in real property on the North Side of Landon Road West of U. S. Highway 49, where it is in need of connection to the Harrison County Utility Authority (formerly known as Harrison County Wastewater District) West Orange Grove Interceptor for its new subdivision development and property; and the Mayor and City Council ("Governing Authority") of the City of Gulfport have been requested by the Owner/Applicant to enter into a Wastewater Service Agreement with Roundhill Farms, LLC as required to tie their project into an 8 inch gravity sewer main of the Harrison County Utility Authority ("the Authority") by constructing and connecting an 8" gravity sewer main from its property along easements currently held by the Authority into the Authority's 8" gravity sewer interceptor line running generally North-Northeast along the North side of Landon Road, west of Highway 49, and to utilize the Authority's easements related to an interceptor system under City of Gulfport jurisdiction; and

WHEREAS, to meet its needs for wastewater discharge and treatment, the Owner/Applicant by and through its consulting engineers, Harris Heinrich Engineers has presented an acceptable plan for the connection reviewed by the City Engineering Department, and because the Authority cannot contract with an individual for use of the interceptor, but only with the government entity having jurisdiction over the subject interceptor, the owner is required to obtain approval of its application by the City of

Gulfport, and to enter into a Wastewater Service Agreement with the City to service the accounts of all users from this connection; and the City of Gulfport Public Works and Engineering Department has reviewed the engineering plans, and has no objections thereto; and

[309] WHEREAS, the Authority treats and disposes of all wastewater collected by the City of Gulfport, and under Contract, the City distributes all such wastewater to the Authority; and no private entity can connect to the Authority's interceptor system in and from the City, except by Wastewater Service Agreement under which the City of Gulfport shall allow connection and shall charge the Owner/Applicant such rates as required to pay for the treatment and disposal of the Owner/Applicant's wastewater collected by the system; and

WHEREAS, the Applicant shall submit to the City of Gulfport its Application for Connection to Interceptor System of the Harrison County Wastewater Management District, and to enable the City to approve said Application it has also entered into a *Wastewater Service Agreement,* a copy annexed hereto as *Exhibit "A",* and the City Engineer and City Attorney have reviewed said documents and found them acceptable for approval; and the Governing Authority is of the opinion that said Application and Agreement should be hereby approved to enable the Owner/Applicant at its expense to connect to and receive sewer disposal and treatment services, and for all users thereof to be charged and administered

according to the City Ordinances; and the Mayor should be hereby authorized to execute the Agreement in behalf of the City of Gulfport.

NOW THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF GULFPORT, MISSISSIPPI, AS FOLLOWS:

SECTION 1. That the matters, facts, and things recited in the Preamble hereto are hereby adopted as the official findings of the Governing Authority.

SECTION 2. That the proposed Application for Connection to Interceptor System of the Harrison County Utility Authority by Roundhill Farms, LLC. (copy annexed hereto as *Exhibit "B"*) be, and it is hereby approved for submittal to the Authority; and

SECTION 3. As a prerequisite by the Authority for approval of the aforesaid Application, the Mayor in behalf of the City of Gulfport is hereby authorized to execute the *Wastewater Service Agreement* between the City of Gulfport and Roundhill Farms, LLC, substantially in the form annexed hereto as *Exhibit "A"*.

SECTION 4. That this Resolution be spread on the Minutes of the Gulfport City Council, and it shall be in full force and effect immediately upon its passage and enactment according to law.

[310] The above and foregoing Resolution, after having been first reduced to writing and read by the Clerk, was introduced by Councilman Carriere,

seconded by Councilman Resh, and was adopted by the following roll call vote:

AYES:	NAYS:	ABSENT:
Hollimon	None	None
Roland		
Holmes-Hines		
Smith		
Carriere		
Resh		
Nalley		

WHEREUPON the President declared the Resolution adopted, this the 8th day of August, 2006.

(SEAL)

ATTEST:	ADOPTED:
/s/ Kathy E. Johnson	/s/ Barbara Nalley
CLERK OF THE COUNCIL	PRESIDENT

The above and foregoing Resolution submitted to and approved by the Mayor, this the 9th day of August, 2006.

APPROVED:

/s/ Brent Warr
MAYOR

[311] **EXHIBIT "A"**

WASTEWATER SERVICE AGREEMENT

THIS Wastewater Service Agreement, (hereinafter "Agreement), entered into as of this the ___ day of ___, 2006, by and between the City of Gulfport, Mississippi, a municipal corporation existing under and by virtue of the laws of the State of Mississippi, having a principal address at 2309 15th Street, Gulfport, Mississippi, 39501, (hereinafter, the "City"), and Roundhill Farms, LLC, a Limited Liability Corporation registered to do and doing business in the State of Mississippi, having a principal address at 1311 Spring Street, Suite 3, Gulfport, Mississippi 39507, (hereinafter "Roundhill Farms").

RECITALS:

1. On February 5, 1985, the Harrison County Wastewater Management District, now called the Harrison County Utility Authority, (hereinafter, the "Authority"), entered into an Amended and Restated Wastewater Service Contract, (hereinafter, the "Wastewater Service Contract"), whereby the Authority would establish a treatment program for the effective treatment and disposal of wastewater from the City to cause compliance with the standards of water quality established by the Mississippi Air and Water Pollution Control Law, and the Federal Water Pollution Control Act.

2. The Wastewater Service Contract requires that the City deliver to the Authority all of its

wastewater for treatment and disposal in the treatment system.

3. The Authority is the owner of a 8" gravity sewer main running generally north-northeast along the north side of Landon Road, west of Highway 49, Harrison County, within the utility area served by the City of Gulfport, Mississippi.

4. The City of Gulfport has requested the Authority to consent to allow Roundhill Farms to make use of certain easement areas for the construction and connection of an 8" gravity sewer main as required for new construction.

5. Roundhill Farms has made application to the Authority for this construction and connection, as required by Harrison County Utility Authority District Policy IV-13, (hereinafter, the "District Policy"), and such application has been approved by the District upon review and certification by Garner Russell & Associates, as engineering consultants, and that the technical requirements of District IV-13 have been met.

6. The application by Roundhill Farms includes its representation that written proof showing that all necessary consents for the proposed construction and connection have been obtained from the City of Gulfport and that Roundhill Farms will fully comply with all Authority requirements throughout its use of the [312] easements to perform all of the conditions of the Authority's Policy as well as those contained in Roundhill Farms application.

7. Roundhill Farms has agreed that any such lines constructed at the end of the 12 month warranty period shall be for all purposes the property of Roundhill Farms.

8. Pursuant to Section 9 of the Wastewater Service Contract, the Authority is prohibited from permitting any Person other than a Public Agency to discharge wastewater into the Treatment System on a regular basis, and to cause such connections within the City to be fully covered by a service agreement as set forth in the instrument.

9. The City of Gulfport desires to enter into a wastewater service contract with Roundhill Farms so as to allow Roundhill Farms to make use of certain easement areas of the Authority for the construction and connection of an 8" gravity sewer main as required for new construction.

10. Roundhill Farms desires to enter into a wastewater service contract with the City of Gulfport so as to allow it the use of certain easement areas of the Authority for the construction and connection of an 8" gravity sewer main as required for new construction, and has agreed to comply fully with all applicable Authority, City, County, State and Federal Laws and Regulations in its said connection and use thereof.

NOW, THEREFORE, in consideration of the mutual covenants herein set forth, it is agreed by and between the City of Gulfport, Mississippi and Roundhill Farms as follows:

1. Roundhill Farms shall proceed to finance, construct and connect an 8" gravity sewer main from its property along easements currently held by the Harrison County Utility Authority into the Authority's 8" gravity sewer interceptor line running generally north – northeast along the north side of Landon Road, west of Highway 49, Harrison County, within the utility area served by the City of Gulfport, Mississippi, in accordance with the plans set forth by Harris & Heinrich, LLC, Gulfport, Mississippi, dated February 21, 2006, relating to Roundhill Farms sewer main and its connection to the existing Authority sewer main, and acceptable to the Authority, whose acceptance shall not be unreasonably withheld.

2. Roundhill Farms contracts with the City of Gulfport that the City treat any and all wastewater of Roundhill Farms and the City agrees to treat any and all such wastewater of Roundhill Farms pursuant to its Wastewater Service Contract with the Authority. Roundhill Farms and the City of Gulfport agree that the wastewater of Roundhill Farms which is discharged into the Authority's System, as defined in the Wastewater Service Contract, [313] shall be deemed to be wastewater of the City of Gulfport.

3. The City of Gulfport agrees to establish and charge such rates for the use of the sewerage collection facilities as shall be sufficient to enable the City to pay that portion of the contract sums attributable to wastewater delivered to the Authority from Roundhill Farms and required to be paid by the City of Gulfport to the Harrison County Utility Authority

pursuant to the Wastewater Service Contract. Roundhill Farms agrees to pay to the City of Gulfport as payment for the services to be performed by the City, the amounts payable by the City to the Authority pursuant to the terms of the Wastewater Service Contract attributable to wastewater delivered to the Authority from Roundhill Farms. Roundhill Farms agrees to pay such amounts to the City of Gulfport at such times as to enable the City to make timely payment of the same to the Authority in accordance with the terms of the Wastewater Service Contract, and to comply fully with the City's User Charge Ordinance and other applicable ordinances and regulations.

4. The City acknowledges its obligation to levy a Special Ad Valorem Tax, as defined in said Wastewater Service Contract, in whatever amount is necessary from time to time so that the proceeds of the Special Ad Valorem Tax, together with other amounts legally available to the City therefore (including revenues derived by the City from the operation of its collection facilities), will at all times be sufficient to pay the Authority when due the contract sums and all other amounts due pursuant to the terms of said Wastewater Service Contract. Roundhill Farms and the City of Gulfport agree that the amounts received by the City from Roundhill Farms pursuant to the provisions of Section 3 hereof shall be deemed to be revenues derived by the City from the operation of its collection facilities.

5. Roundhill Farms will at all times comply with the Sewer Use Ordinance of the City and of the Authority, and all other applicable ordinances and regulations of the City and Authority. Violations of any such duly adopted ordinances or regulations of the City or the Authority by Roundhill Farms will constitute a default hereunder and shall be grounds for termination of this Agreement unless, after notice of such default, the same is promptly cured by Roundhill Farms. Roundhill Farms will make any part of its facilities connected to the City's or Authority's lines reasonably available for inspection by the City or the Authority upon request of the City or Authority.

6. This Agreement is supplemental to and in furtherance of the purposes set forth in the Wastewater Service Contract entered between the City of Gulfport and the Harrison County Utility Authority dated February 5, 1985, and the provisions thereof shall be binding to the parties hereto for and during the entirety of the term ofs [sic] said Wastewater Service Contract, and each of the parties hereto do specifically accept, ratify and confirm said Wastewater Service Contract; and the terms and conditions thereof.

[314] IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officers, as of the day and year first above written.

ATTEST: CITY OF GULEPORT [sic], MISSISSIPPI

_____ BY: _____
[MAYOR]

ATTEST: Roundhill Farms, LLC

/s/ [Illegible] Favre BY: /s/ Sherman Muths III
7/18/06

[314-A] **WASTEWATER SERVICE AGREEMENT**

THIS Wastewater Service Agreement, (hereinafter "Agreement), entered into as of this the 8th day of August, 2006, by and between the City of Gulfport, Mississippi, a municipal corporation existing under and by virtue of the laws of the State of Mississippi, having a principal address at 2309 15th Street, Gulfport, Mississippi, 39501, (hereinafter, the "City"), and Roundhill Farms, LLC, a Limited Liability Corporation registered to do and doing business in the State of Mississippi, having a principal address at 1311 Spring Street, Suite B, Gulfport, Mississippi 39507, (hereinafter "Roundhill Farms").

RECITALS:

1. On February 5, 1985, the Harrison County Wastewater Management District, now called the Harrison County Utility Authority, (hereinafter, the "Authority"), entered into an Amended and Restated

Wastewater Service Contract, (hereinafter, the "Wastewater Service Contract"), whereby the Authority would establish a treatment program for the effective treatment and disposal of wastewater from the City to cause compliance with the standards of water quality established by the Mississippi Air and Water Pollution Control Law, and the Federal Water Pollution Control Act.

2. The Wastewater Service Contract requires that the City deliver to the Authority all of its wastewater for treatment and disposal in the treatment system.

3. The Authority is the owner of a 8" gravity sewer main running generally north – northeast along the north side of Landon Road, west of Highway 49, Harrison County, within the utility area served by the City of Gulfport, Mississippi.

4. The City of Gulfport has requested the Authority to consent to allow Roundhill Farms to make use of certain easement areas for the construction and connection of an 8" gravity sewer main as required for new construction.

5. Roundhill Farms has made application to the Authority for this construction and connection, as required by Harrison County Utility Authority District Policy IV-13, (hereinafter, the "District Policy"), and such application has been approved by the District upon review and certification by Garner Russell & Associates, as engineering consultants, and that

the technical requirements of District IV-13 have been met.

6. The application by Roundhill Farms includes its representation that written proof showing that all necessary consents for the proposed construction and connection have been obtained from the City of Gulfport and that Roundhill Farms will fully comply with all Authority requirements throughout its use of the [314-B] easements to perform all of the conditions of the Authority's Policy as well as those contained in Roundhill Farms application.

7. Roundhill Farms has agreed that any such lines constructed at the end of the 12 month warranty period shall be for all purposes the property of Roundhill Farms.

8. Pursuant to Section 9 of the Wastewater Service Contract, the Authority is prohibited from permitting any Person other than a Public Agency to discharge wastewater into the Treatment System on a regular basis, and to cause such connections within the City to be fully covered by a service agreement as set forth in the instrument.

9. The City of Gulfport desires to enter into a wastewater service contract with Roundhill Farms so as to allow Roundhill Farms to make use of certain easement areas of the Authority for the construction and connection of an 8" gravity sewer main as required for new construction.

10. Roundhill Farms desires to enter into a wastewater service contract with the City of Gulfport so as to allow it the use of certain easement areas of the Authority for the construction and connection of an 8" gravity sewer main as required for new construction, and has agreed to comply fully with all applicable Authority, City, County, State and Federal Laws and Regulations in its said connection and use thereof.

NOW, THEREFORE, in consideration of the mutual covenants herein set forth, it is agreed by and between the City of Gulfport, Mississippi and Roundhill Farms as follows:

1. Roundhill Farms shall proceed to finance, construct and connect an 8" gravity sewer main from its property along easements currently held by the Harrison County Utility Authority into the Authority's 8" gravity sewer interceptor line running generally north – northeast along the north side of Landon Road, west of Highway 49, Harrison County, within the utility area served by the City of Gulfport, Mississippi, in accordance with the plans set forth by Harris & Heinrich, LLC, Gulfport, Mississippi, dated February 21, 2006, relating to Roundhill Farms sewer main and its connection to the existing Authority sewer main, and acceptable to the Authority, whose acceptance shall not be unreasonably withheld.

2. Roundhill Farms contracts with the City of Gulfport that the City treat any and all wastewater of Roundhill Farms and the City agrees to treat any and

all such wastewater of Roundhill Farms, pursuant to its Wastewater Service Contract with, the Authority. Roundhill Farms and the City of Gulfport agree that the wastewater of Roundhill Farms which is discharged into the Authority's System, as defined in the Wastewater Service Contract, [314-C] shall be deemed to be wastewater of the City of Gulfport.

3. The City of Gulfport agrees to establish and charge such rates for the use of the sewerage collection facilities as shall be sufficient to enable the City to pay that portion of the contract sums attributable to wastewater delivered to the Authority from Roundhill Farms and required to be paid by the City of Gulfport to the Harrison County Utility Authority pursuant to the Wastewater Service Contract. Roundhill Farms agrees to pay to the City of Gulfport as payment for the services to be performed by the City, the amounts payable by the City to the Authority pursuant to the terms of the Wastewater Service Contract attributable to wastewater delivered to the Authority from Roundhill Farms. Roundhill Farms agrees to pay such amounts to the City of Gulfport at such times as to enable the City to make timely payment of the same to the Authority in accordance with the terms of the Wastewater Service Contract, and to comply fully with the City's User Charge Ordinance and other applicable ordinances and regulations.

4. The City acknowledges its obligation to levy a Special Ad Valorem Tax, as defined in said Wastewater Service Contract, in whatever amount is necessary from time to time so that the proceeds of the

Special Ad Valorem Tax, together with other amounts legally available to the City therefore (including revenues derived by the City from the operation of its collection facilities), will at all times be sufficient to pay the Authority when due the contract sums and all other amounts due pursuant to the terms of said Wastewater Service Contract. Roundhill Farms and the City of Gulfport agree that the amounts received by the City from Roundhill Farms pursuant to the provisions of Section 3 hereof shall be deemed to be revenues derived by the City from the operation of its collection facilities.

5. Roundhill Farms will at all times comply with the Sewer Use Ordinance of the City and of the Authority, and all other applicable ordinances and regulations of, the City and Authority. Violations of any such duly adopted ordinances or regulations of the City or the Authority by Roundhill Farms will constitute a default hereunder and shall be grounds for termination of this Agreement unless, after notice of such default, the same is promptly cured by Roundhill Farms. Roundhill Farms will make any part of its facilities connected to the City's or Authority's lines reasonably available for inspection by the City or the Authority upon request of the City or Authority.

6. This Agreement is supplemental to and in furtherance of the purposes set forth in the Wastewater Service Contract entered between the City of Gulfport and the Harrison County Utility Authority dated February 5, 1985, and the provisions thereof

shall be binding to the parties hereto for and during the entirety of the term ofs [sic] said Wastewater Service Contract, and each of the parties hereto do specifically accept, ratify and confirm said Wastewater Service Contract; and the terms and conditions thereof.

[314-D] IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officers, as of the day and year first above written.

ATTEST:	CITY OF GULEPORT [sic], MISSISSIPPI
/s/ Ronda S. [Illegible]	BY: /s/ Brent Warr [MAYOR]
ATTEST:	Roundhill Farms, LLC
/s/ [Illegible] Favre 7/18/06	BY: /s/ Sherman Muths III

[315] ROBERT K. RIEMANN, P.E.
Director of Public Works

Department of
Public Works
City of Gulfport
4030 Hewes Avenue
Gulfport MS 30507
Telephone
(228) 868-5740
Fax (228) 868-5743

[SEAL]
CITY *of* GULFPORT
OFFICE OF THE DIRECTOR OF PUBLIC WORKS
Post Office Box 1730 • Gulfport MS 39502-1780 •
Phone: (228) 868-5700

March 14, 2006

Mr. Aaron Harris, P.E.
Harris Heinrich Engineers
608 34th Street, Suite B
Gulfport, MS 39507
Office (228) 575-8200
Fax (228) 575-8201

Re: Water & Sewer Service Availability for Single-Family Residential Subdivision Development (Parcel #0709B-01-006.000) Located on Landon Road (Roundhill Farms Subdivision)

Dear Mr. Harris:

This is to inform you of the current status of water and sewer service for a proposed development located at the above referenced parcel on the north side of Landon Road west of the entrance to the Gulfport Sportsplex. The proposed development will consist of a 73 lot single-family residential subdivision as

shown on plans submitted by Aaron Harris, P.E. dated 2/21/06.

Water:

The Department of Public Works has determined that water service is available for the above referenced development. There is currently a twelve (12)-inch water main located at Landon Road south of the proposed site near the entrance to the Gulfport Sportsplex. In order to access this supply, you will be required to extend this main to the property of the proposed development. This extension within the right of way will become the property of the City of Gulfport after installation and approval by City of Gulfport.

Sewer:

This is to confirm that the City of Gulfport, Department of Public Works has determined that you are eligible to request that the Harrison County Wastewater and Solid Waste Management District approve the connection of a sewer gravity main from your proposed 73 lot single family residential subdivision about 800 L.F. to the 8-inch gravity interceptor. that runs north of Landon Road.

Please contact the City Engineer, Bill Powell for the "Instructions to Application for Connection" HCWMD Policy IV-13 and "Application for Connection" guidelines required by the District. These documents

should be carefully reviewed, and all data construction details and other required information should be furnished with your completed application. Your transmittal letter should contain a certification that the application complies with all requirements of District Policy IV-13.

[316] Also, the City of Gulfport Attorney will need to prepare a "Wastewater Service Agreement", which must be executed by you and then approved by the City Council prior to the City forwarding your application to the District. Please contact Bill Powell, City Engineer, at (228) 868-5815 for additional assistance and plan review.

In order to access this collection system, you will be required to extend this main to the property of the proposed development. This extension within the right of way and utility easement will become the property of the City of Gulfport after installation and approval by the City of Gulfport. Plans for this extension should be completed by a Professional Engineer and approved by the Gulfport Engineering Department prior to construction.

All plans for improvements are subject to the review and approval of the Gulfport Engineering Department prior to construction. Once the improvements are completed, the Gulfport Engineering Department shall inspect and approve the system prior to final acceptance by the City. Map is shown below.

[Map Omitted In Printing]

If I can be of further assistance, please contact me at (228) 868-5741.

Sincerely,

/s/ Robert K. Rieman
Robert K. Rieman, P.E.
Director of Public Works

cc: Bill Powell, Engineering
Bob Sutton, Director of Economic Development

* * *

[Diagrams Omitted In Printing]

* * *

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[321] APPLICATION FOR CONNECTION
TO INTERCEPTOR SYSTEM
THE HARRISON COUNTY UTILITY AUTHORITY

The undersigned Applicant, including any and all of its representatives, agents, officers and/or employees (hereinafter "Applicant") hereby applies for consent of the Harrison County Utility Authority, pursuant to Policy IV-13 (attached hereto as Attachment 1), to make connections into the Authority's interceptor system. Consent may also be requested hereby for the use of certain easements and/or rights-of-way of the Authority as necessary for such connection.

Application hereby acknowledges its ongoing responsibility to familiarize itself with and to comply with all terms of District Policy IV-13, this application and of any other documentation requesting or

granting rights relating to connection into the Authority's interceptor system or use of Authority's easements or rights-of-way. Applicant further acknowledges that any consent granted by the Authority pursuant to this application is contingent upon its compliance with all of such terms.

Applicant hereby agrees that any and all lines constructed pursuant to this Application shall at all times and for all purposes be considered the property and sole responsibility of Applicant.

Attached hereto as Attachment 2 is an agreement with either the appropriate private utility or with Harrison County which complies with Section 2 of District Policy IV-13.

Applicant acknowledges that any rights granted to it by the Authority pursuant to this Application may be transferred, assigned or otherwise alienated without the prior written consent of the Authority.

Applicant will confer with the Authority's engineering consultants prior to any construction in order to avoid damage to any existing lines.

Applicant acknowledges that it has the responsibility to obtain necessary consent from all parties having any interest in the subject property and all such documentation shall be attached to this Application as Attachments. The terms of these consents must show agreement to Applicant's proposed use for the subject property and that Applicant's proposed use will in no way impair or infringe upon the

Authority's rights as to such property. Applicant acknowledges that additional consents may be required after the Authority's legal counsel reviews the title to the subject property in order to determine all parties having interests therein.

Applicant will make its connection and use the Authority's easement area in such a manner as to not interfere with the Authority's existing lines or with the right of the Authority to access its lines and use its easement for maintenance and repair of its lines.

[322] Applicant acknowledges that its use of the Authority's easement will be at the sole risk and expense of Applicant and that Applicant will hold the Authority harmless for any damage, loss or injury resulting from Authority's use of such easement.

Applicant will reimburse the Authority for any costs or expenses for damage to the Authority's lines and agrees that if it becomes necessary for the Authority to relocate, rearrange or otherwise alter its lines due to Applicant's use of the easement, Applicant will cooperate fully and will bear the expense of any resulting changes to its own facilities.

Applicant's Use of the Authority's easement shall in no way affect the validity of the Authority's easement nor in any way modify or restrict the use or rights of the Authority. Applicant shall in no way interfere with the Authority's superior rights in and title to its easement.

Applicant will indemnify, defend and hold harmless the Authority from all claims, loss or other damages arising out of Applicant's use of the Authority's easement.

Applicant shall attach hereto as Attachments all documents necessary to comply with the terms of Section f. of the District Policy IV-13. This documentation shall include a detailed survey and legal description showing exact placement of the proposed line.

Applicant agrees to technical review by the Authority's engineers prior to connection and that it will modify its plans as necessary to obtain approval by the Authority.

PUBLIC AGENCY	APPLICANT
/s/ Brent Warr	MANAGING PARTNER
BY: MAYOR	BY: /s/ Sherman Muths III
HARRISON COUNTY UTILITY AUTHORITY	ROUNDHILL FARMS, LLC
/s/ Kamran Pahlavan	
EXECUTIVE DIRECTOR	

* * *

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA, Plaintiffs	CASE NO. SECTION
v.	
CITY OF GULFPORT, MISSISSIPPI, Defendant	

COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES AND PRELIMINARY AND PERMANENT INJUNCTIONS

NOW INTO COURT through undersigned counsel come plaintiffs L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES ("L & F Homes") and LARRY MITRENGA, plaintiffs herein, and respectfully move and represent as follows:

(1)

Jurisdiction of this matter exists under 28 U.S.C. 1331 (federal question) because this case arises under the laws of the United States, with supplementary jurisdiction of related state claims under 28. U.S.C. 1362.

(2)

Named defendant herein is CITY OF GULFPORT, MISSISSIPPI ("Gulfport" or "City"), a municipality organized under the laws of the State of Mississippi.

(3)

Plaintiff L & F Homes is a closely held Mississippi limited liability company. Plaintiff Larry Mitrenga, an individual domiciled in Mississippi, is the owner and manager of L & F Homes. The business of L & F Homes is residential construction. While L & F Homes has constructed homes at a wide variety of price points, historically, most of L & F Homes's customers have had incomes at the lower end of the middle class. Historically, the racial mix of L & F Homes' customers has been approximately 55% Black and approximately 45% White.

(4)

In December 2009, L & F Homes purchased a piece of land in Harrison County, Mississippi just outside the Gulfport city limits. This piece of land, known as the Roundhill Subdivision, was and is an "existing entitled community", which means that all legal requirements had been met, all work necessary to secure permits had been done, and all necessary permissions had been given, and the City had even entered into a contract with the then-owner to provide necessary services. Therefore, it would be possible for L & F Homes to purchase this land and

immediately start to construct a new subdivision and sell homes.

(5)

To make doubly sure that the Roundhill Subdivision was an "existing entitled community", prior to purchasing the Roundhill tract, Mr. Mitrenga and other L & F Homes representatives repeatedly checked with officials of the City of Gulfport to make sure that the subdivision was, in fact, an "existing entitled community" and there would be no obstacle to immediate development. On each occasion, city officials assured L & F Homes representatives that the Roundhill Subdivision was an existing entitled community and there would be no obstacle to immediate development. In a final communication in December 2009, on the eve of completing the purchase, Mr. Mitrenga made one final check. He telephoned the responsible city official and explained clearly and explicitly to the city's representative that plaintiffs were not interested in the tract if it was not an "existing entitled community" because any serious problem in pulling permits could create serious cash flow problems for both L & F Homes and Mr. Mitrenga personally (since Mr. Mitrenga was pledging personal assets in order to secure financing for the development of Roundhill). Mr. Mitrenga told the city official that, if there was any problem or question about the Roundhill Subdivision's status, he needed to know about it while there was still time to back out of the deal. After being informed of these facts, the

city representative firmly and unequivocally assured Mr. Mitrenga that the Roundhill Subdivision was an "existing entitled community" and there was absolutely no obstacle to immediate development. In reliance on these representations, L & F Homes moved forward and purchased the Roundhill tract. In reliance on these representatives, Mr. Mitrenga pledged personal assets in order to secure financing for the project.

(6)

After L & F purchased the Roundhill tract, L & F had additional contacts with representatives of the City of Gulfport who continued to assure L & F that the Roundhill tract was an existing entitled community. However, when L & F attempted to move forward with the project, representatives delayed the issuance of permits by temporizing and nitpicking.

(7)

Finally, after much pressure from L & F for action, Gulfport representatives issued a written decision denying L & F's request for a service verification letter (a necessary step in the development process). Gulfport representatives did not give any reason for the denial and, when L & F representatives requested reasons through informal communication, Gulfport representatives refused to explain the decision. L & F reapplied and Gulfport representatives issued a second denial, again without giving any reasons.

(8)

L & F representatives sought to pursue an administrative appeal by asking for a hearing before the City Council or by requesting any other hearing or administrative review which might be available, so that L & F representatives could present their case to those who were responsible for making the decision. L & F representatives asked city officials about the proper method for requesting such a hearing or appeal. Gulfport representatives refused to provide any information concerning the proper steps for obtaining a hearing or administrative appeal. In addition, in response to informal contacts by L & F representatives, Gulfport representatives continued to refuse to provide any reason for denying the service verification letter.

(9)

L & F representatives sought to obtain review of Gulfport's actions in state court by filing a bill of exceptions in state court. Gulfport representatives have blocked any forward progress in state court by using the following procedural maneuvers: refusing to carry out the ministerial action of signing the bill of exceptions, then contesting plaintiffs' petition for mandamus on technical procedural grounds. These maneuvers are explained in more detail in the subsequent paragraphs.

(10)

In order for a bill of exceptions seeking review of the City's actions to proceed forward in state court, it is necessary for the relevant government official (in this case, Gulfport's mayor) to carry out the ministerial task of supplying the relevant documents to the district court or signifying that the documents supplied by the plaintiff are accurate. The relevant official carries out this task by reviewing and signing the bill of exceptions and supplying accurate documents. This is a ministerial task which the relevant government official is legally obligated to perform. In plaintiffs' case, the mayor has refused to sign the bill of exceptions, even though he is legally obligated to sign the bill and has no reasonable basis for refusing. Gulfport has responded to the bill of exceptions in state court by arguing that, since the mayor has not signed off, the state court cannot proceed further in the matter.

(11)

Plaintiffs, in response, filed a petition for mandamus asking the state judge to order the City to have the relevant official (in this case, the mayor) sign off on the bill of exceptions so that the state court appeal can proceed forward. Defendant City of Gulfport responded to the petition for mandamus by presenting a series of technical procedural arguments. First, the City moved to quash the petition of mandamus due to an alleged lack of proper service.

Then, when plaintiffs mooted this objection by obtaining service, the City filed a new motion alleging that the petition should be denied as procedurally defective because plaintiffs had sued the City instead of naming the mayor individually as a defendant in mandamus. A hearing to resolve this latest quibble has not yet been held and, in the meantime, due to the mayor's deliberate illegal action in refusing to sign the bill of exceptions in defiance of applicable state law, the bill of exceptions remains on hold such that it is not possible to obtain relief in state court.

(12)

Since representatives of the City of Gulfport have consistently refused to give any reason for failing to provide the service verification letter, plaintiffs are left to infer the City's reasons by examining the surrounding circumstances. The surrounding circumstances are as follows:

(13)

At approximately the same time that plaintiffs were purchasing the Roundhill tract, a group of developers using the name 781 Group, LLC decided to locate another subdivision in the same general area as the Roundhill subdivision.

(14)

The Roundhill subdivision and the 781 Group project would use the same water supply, a water system maintained by the City under various agreements with state and county authorities. As a practical matter, the water supply is either adequate for both developments or inadequate to support either development. Thus, to the extent that allowing a development is contingent on having an adequate water supply, city officials must permit both projects or neither project.

(15)

The 781 Group intended to construct homes for low income purchasers. On information and belief, it was expected that the substantial majority of the persons who would occupy the 781 Group subdivision would be low income Black persons.

(16)

Further on information and belief, certain local officials are strongly opposed to the construction of homes for Black residents of low and moderate income in the Gulfport area and these officials were determined to shut down the 781 project in order to exclude low income Black residents from the area. On information and belief, as an excuse to shut down the 781 project, these officials claimed that the city water supply was not sufficient to support residential development in the area where the 781 project was

proposed to be located. On information and belief, these claims of inadequacy were false and city officials knew these claims to be false. However, on information and belief, city officials deliberately made these false claims for the purpose of blocking the 781 development so that low income Black persons could be prevented from locating in the area.

(17)

On information and belief, since the Roundhill subdivision and the proposed 781 subdivision were in the same area and would be served by the same water supply as explained above, this meant that, in order to maintain an appearance of consistency, city officials could not allow the Roundhill development to proceed while denying permits to the 781 Group on the basis of inadequate water. On information and belief, in order to maintain an appearance of consistency while denying permits to the 781 Group project, city officials determined to also deny the service verification letter to the Roundhill project. The practical effect of denying the "will serve" letter to Roundhill has been to prevent construction of the Roundhill subdivision, causing grievous economic loss to plaintiffs as detailed hereafter.

(18)

Roundhill was designed as a middle class development. L & F Homes did not expect to sell houses in the Roundhill subdivision to low income persons and

L & F Homes expected that the racial mix of customers for the Roundhill subdivision would approximate the racial mix in Harrison County as a whole. Thus, plaintiffs initially inferred that the Roundhill project had been derailed as a form of collateral damage and, more specifically, plaintiffs inferred that the true goal of city representatives was to block the 781 project, with the Roundhill project being destroyed as one step toward that goal. However, more recently, plaintiffs have learned that, at the time plaintiffs were seeking permits, there were rumors among city officials that the Roundhill subdivision was going to be a low income development which would provide housing for a group of persons who would be disproportionately Black. On information and belief, plaintiffs' previous history of supplying the housing needs of lower income Black customers was known to city representatives and may have contributed to the spread of this rumor. In other words, on information and belief, it appears that city representatives may have targeted Roundhill directly because they believed, or suspected, that plaintiffs intended to supply housing for a predominantly low income Black customer base, even though, in this particular case, this was not plaintiffs' intention.

(19)

Appended hereto as Exhibit A is a copy of Plaintiffs' Notice of Claim under the Mississippi Tort Claims Act (exhibits omitted). This Notice of Claim was filed with the City on or about April 27, 2010. A

period of more than 90 days has passed since the date of filing the claim and no response has been received. This notice of claim sets forth the facts (as known through April 27, 2010) in considerable detail and the allegations and demands contained therein are incorporated herein by reference.

(20)

In May 2010, after filing the Notice of Claim, plaintiffs made another attempt to obtain the proper permits but the City of Gulfport again refused the permits without giving any reason.

(21)

Additional information has become known to plaintiffs since the filing of the Notice of Claim, including the following. On information and belief, in spring and early summer 2010, City has, without valid cause, denied permits to at least two additional housing developments that were intended to provide housing to low income residents who would be predominantly Black. On further information and belief, county representatives have tested the water supply in the area and found that it would be perfectly adequate to support the Roundhill development and the 781 Group development. On further information and belief, since denying the 781 permit due to "inadequate water supply" and denying the Roundhill permit without giving any reason, the City has authorized brand new commercial projects to be built in

the same area using the same supposedly inadequate water supply, including three hotels and a Sam's outlet. These events further support plaintiffs' inference that, when the City denied the 781 project, the City's claim of inadequate water supply was false because, if the water supply was inadequate for the 781 project (or inadequate for Roundhill), it would also be inadequate for these commercial projects. These events further supports plaintiffs' inference of racial motivation.

(22)

On information and belief, the above and foregoing actions of city officials represent the steps in a continuing and ongoing scheme to exclude low income Black residents from the Gulfport area. Additionally or alternatively, on information and belief, while the racial motive appears to be the most likely explanation of the City's actions in the case of Roundhill, it appears on information and belief that city officials may have other improper motivations, such as to prevent competition with favored developments and/or force developers of property outside the City limits, including Roundhill, to acquiesce to becoming part of the City (and, thus, paying City property taxes) as a condition of development, when the City has no legal authority to do this.

(23)

On information and belief, the acts of the representatives of the City of Gulfport described hereinabove and, in more detail, in the Notice of Claim appended hereto as Exhibit A, are wrongful and in violation of plaintiffs' rights in the following respects:

(A) The City has violated state law and is in breach of its contracts with the state and/or county, as well as its contract with plaintiffs' predecessor in title (and plaintiffs are entitled to assert rights under these contracts as successors in interest and/or as third party beneficiaries), in that the City is required to provide adequate water service to surrounding areas, including Roundhill, by state law and relevant contracts and the City is, according to its own assertions in connection with the 781 Group project, failing to carry out this duty;

(B) Plaintiffs have detrimentally relied on the City's representations that the Roundhill subdivision was an existing entitled community as of December 2009 and the City is estopped from changing position concerning the subdivision's status as existing entitled community;

(C) Defendant has violated the federal Fair Housing Act and 42 U.S.C. 1982 by destroying plaintiffs' subdivision as part of a scheme to exclude low income Black persons from residing in the Gulfport area;

(D) Defendant has violated plaintiffs' rights under the U.S. Constitution, the State Constitution of Mississippi, and applicable state law, rendering defendant liable under 42 U.S.C. 1983 and other applicable laws, by:

(D)(1) denying procedural due process to plaintiffs through numerous actions (e.g., by refusing to grant plaintiffs a hearing or administrative appeal, by refusing to sign off on the bill of exceptions in violation of state law, by refusing to give plaintiffs any reason for the decision to deny the service verification letter);

(D)(2) denying substantive due process to plaintiffs by acting arbitrarily and capriciously and without any reasonable basis;

(D)(3) denying equal protection to plaintiffs by rejecting plaintiffs' subdivision as part of an illegal scheme to exclude low income Black persons from the area;

(D)(4) taking plaintiffs' property without just compensation and without due process of law inasmuch as the Roundhill Subdivision was an existing entitled community, yet defendant has illegally prevented development of same.

(E) defendant has otherwise violated plaintiffs' legal rights as set forth herein and in Exhibit A appended hereto.

(24)

As a result of the above and foregoing wrongful actions of defendant, plaintiffs have sustained serious economic loss. Due to cash flow problems, L & F Homes is effectively shut down. Mr. Mitrenga is using his personal funds to keep L & F solvent, having paid $ 1,892,859 in personal funds to date. In addition, Mr. Mitrenga's health is suffering as a result of the extreme stress caused by this situation. These and other elements of damage are set forth in more detail in Exhibit A appended hereto. It appears that, if the City is not required to correct its wrongful actions, a reasonable amount to compensate L & F Homes and to Mr. Mitrenga personally could be as high as forty million dollars ($ 40,000,000.00).

(25)

In addition, because city officials have acted willfully, wantonly, and with reckless or intentional disregard for plaintiffs' rights, the City is liable for punitive damages under applicable state and federal law.

(26)

The City is also liable for plaintiffs' attorney fees under applicable state and federal law.

(27)

Plaintiffs would show that there is a great likelihood that plaintiffs will succeed on the merits in this matter, and plaintiffs are threatened with irreparable harm by the City's protracted stalling techniques, including but not limited to irreparable harm to Mr. Mitrenga's health and the destruction of plaintiffs' business, wherefore plaintiffs would pray for preliminary injunctive relief in this matter and, in particular, plaintiffs would pray that this Honorable Court schedule a preliminary injunction hearing in this matter and, after due proceedings had, the City should be required to immediately issue a service verification letter and any other documents necessary to permit plaintiff to proceed to construct at least some houses in the proposed Roundhill subdivision, in order to alleviate plaintiffs' cash flow problems and prevent the total destruction of plaintiffs' business.

(28)

In addition, plaintiffs would pray for a declaratory judgment finding the Roundhill Subdivision to be an existing entitled community, and for a permanent injunction requiring the City to issue a service verification letter and all necessary permits to permit plaintiffs to move forward and develop the Roundhill Subdivision according to plan.

WHEREFORE plaintiffs L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA pray that, after due proceedings

had, this Honorable Court enter judgment against defendant CITY OF GULFPORT, MISSISSIPPI, granting plaintiffs the following relief:

I. A preliminary injunction requiring defendant to issue a service verification letter so that plaintiffs can commence construction of at least some homes in the Roundhill Subdivision to alleviate plaintiffs' severe cash flow problems;

II. A declaratory judgment finding the Roundhill Subdivision to be an existing entitled community and requiring defendant to issue a service verification letter and all other necessary licenses and permits so that plaintiffs may proceed to completely develop the entire subdivision;

III. An award of actual damages in the amount of forty million dollars ($ 40,000,000.00) or such other amount as may be shown to be reasonably necessary to compensate plaintiffs for the damages complained of herein;

IV. An award of punitive damages, attorney fees, and costs as provided by law in such amounts as this Honorable Court may find to be reasonable on the evidence presented.

Respectfully submitted this the [30] day of [July], 2010.

By **L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA**

/s George W. Healy, IV
George W. Healy, IV (14991)

George W. Healy, IV & Associates
1323 28th Avenue
Gulfport, MS 39501
228-575-4005

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(504) 524-3223

CATHERINE LEARY†
OF COUNSEL
†LICENSED IN LOUISIANA ONLY

April 27, 2010

VIA REGULAR AND CERTIFIED MAIL
70091410000070930993
c/o Mayor George Schloegel
Office of the Mayor
P.O. Box 1780
Gulfport, MS 39502
(228) 868-5700

VIA REGULAR AND CERTIFIED MAIL
70091410000070931006
c/o Mike Necaise
Gulfport City Clerk
2309 15th Street
Gulfport, MS 39502
(228) 868-5700

RE: **NOTICE OF CLAIM**

CLAIMANT:	**L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA**
DATE OF OCCURRENCE:	**March 15, 2010**
PLACE OF OCCURRENCE:	**Roundhill subdivision**

Gentlemen:

Now come claimants and present their notice of claim as follows.

I. THE CIRCUMSTANCES WHICH BROUGHT ABOUT THE INJURY

Summary of circumstances which brought about the injury: During the time period from October 2009 through December 2009, City representatives repeatedly assured claimants and the general public that a certain tract of land known as the Roundhill subdivision was an existing entitled community such that claimants could purchase the subdivision and immediately begin to construct and sell single family homes. Claimants, in reliance on these representations, purchased the tract of land on December 30, 2009. In the first week of January 2010, claimants requested a "will serve" letter from the City so that claimants could begin construction.

The City responded to claimants' request by temporizing for several months while continuing to assure claimants that the "will serve" letter would be provided as soon as a few relatively minor problems were corrected. Finally, after claimants had corrected each and every minor problem identified by the City, the City denied claimants' request for a "will serve" letter (service verification letter) without giving any reasons. Claimants attempted to obtain an explanation of this decision and/or a reconsideration of this decision by formal and informal means, repeatedly contacting the Mayor, the City Council, and other city officials in an attempt to obtain explanation and/or resolution. However, city officials rejected claimants' efforts.

These actions by the City were arbitrary and capricious on their face and illegal in violation of state and federal law. On information and belief, these actions by the City were taken as part of a scheme to discriminate against minority and low income persons by creating obstacles which would prevent these persons from obtaining housing in the Gulfport area.

Claimants have suffered serious economic loss as a result of these events.

Detailed statement of circumstances which brought about the injury:

Claimants are L & F Homes and Development, LLC d/b/a Hyneman Homes, a closely held limited

liability company, and Larry Mitrenga individually, owner and manager of L & F Homes.

For approximately 17 years, L & F Homes has been in the business of developing subdivisions and building homes in the Gulf Coast area. Mr. Mitrenga owns and manages L & F Homes. L & F Homes specializes in middle income housing selling in the price range of $100,000 to $ 175,000. Over the years, L & F developed the ability to operate very efficiently by working with subcontractors using handpicked and trained crews and building approximately fifteen different models of home.[1] L & F's customers have historically been middle class persons with a racial mix approximately 55% Black and approximately 45% White.

The business of L&F Homes has now been severely damaged, causing serious loss to L&F Homes

[1] Since the same models were built over and over again on different sites, the subcontractors and crews had the ability to work with a high degree of efficiency, building a house in approximately 75 days (eleven weeks) whereas another contractor, operating with less efficiency, would take approximately 135 days (19 weeks to build a similar house). This efficient operation enabled L & F Homes to be highly competitive in the Gulf Coast housing market while making a profit of approximately 23% on each home built. In a typical year, L&F would build as few as 80 homes and as many as 140 or more homes. For example, during the twelve month time period from October 2008 to October 2009, in spite of the severe recession which was under way during this time period, L & F was able to construct and sell 99 homes.

and to Mr. Mitrenga personally, due to the wrongful actions of defendant described as follows.

There is a tract of land known as the Roundhill tract. The land is located in Harrison County outside the city limits of the City of Gulfport but within the City's "franchise area."[2] During the 2006-2007 time period, the then-owner of the land took the steps necessary to develop this land as a subdivision.[3]

The then-owner completed all legal requirements, obtained all necessary authorizations and permits, and constructed all necessary infrastructure including all necessary sewerage, water, gas, and power lines, as well as roads, curbs, gutters, manholes, telephone lines and other necessary fixtures such that no step was left other than to hookup the individual house utilities and build and sell the houses. The net effect of the then-owner's efforts was that, by mid-2009, the then-owner had created a subdivision of 73 fully developed single family home

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[2] The "franchise area" is an area in which the City is legally obligated to provide water and sewer services pursuant to state law and agreements with the county government. It may be worth noting that, under applicable law and the agreements with the County, the City is the ONLY entity which is legally authorized to provide water and sewer service in this area: no other provider is allowed to provide such services.

[3] Key events in this process included the signing of a Wastewater Service Agreement with the City of Gulfport pursuant to the City Council's August 9, 2006 resolution authorizing such and agreement; and recordation of the subdivision plat on February 7, 2007.

lots which constituted an "existing entitled community" in that it had been properly zoned for development, the plat had been approved, all legal requirements for development had been met, and all infrastructure had been constructed.

The then-owner decided to sell the property. Claimant L&F Homes, having just finished a development, was in the market for a new completed subdivision with 70 to 100 lots. After approximately three months of study and analysis involving full time efforts by claimant Larry Mitrenga as well as extensive efforts by other persons employed by claimants, claimants decided that the Roundhill Farms property would be suitable for building new homes.

To make absolutely certain that there was no obstacle to building homes, claimants repeatedly checked with governmental authorities including representatives of the City of Gulfport to make sure that there was no legal obstacle to permitting new home construction.

The sequence of events was as follows:

In October 2009, claimants' representatives requested an updated "will serve" letter.

On November 5, 2009, city representative Kris Riemann told Larry Mitrenga that it was not necessary to obtain an updated "will serve" letter as the Roundhill development had already been fully approved and the sewer and water were already connected to the city's system.

However, out of an excess of caution, Mr. Mitrenga instructed broker Steve Elrod to ask for an updated letter. On or about November 17, 2009, a representative of the City of Gulfport told Mr. Elrod that Melvin Bullock would sign an updated letter and Mr. Elrod could pick the letter up at the Public Works desk. However, when Mr. Elrod came to pick up the letter on or about November 18, there was no letter prepared. Instead, Mr. Bullock came out and told Mr. Elrod that it would be a waste of time to prepare a new letter as the original letter was still valid.

At this point, the City of Gulfport had gotten into a legal dispute with developers of a different project (the 781 Group LLC) and on or about November 18, 2009, a judicial hearing was held concerning the 781 project. On or about December 18, 2009, the attorney for the 781 Group mentioned to Mr. Mitrenga that he had questioned Mr. Riemann under oath concerning the Roundhill project and Mr. Riemann had testified that the Roundhill project "was already tied into the (city's) sewer and water system." Mr. Riemann's sworn public testimony served as further confirmation to claimants that the Roundhill development had already been accepted by the City, had already been tied into the city's water and sewer system, and the City would not have any objection to the building of the individual homes.

During this time period, the attorney for the then-owners of Roundhill wanted to set up the closing. The recession was under way and economic conditions were such that it was very difficult to

obtain financing. As a result, Mr. Mitrenga found he would have to commit his personal assets in order to secure financing and Mr. Mitrenga and L&F would be financially stretched if a hitch developed after purchase of the property.

Mr. Mitrenga wanted to be absolutely positive that there was no legal impediment to building the houses, so on or about December 22 or 23, 2009, Mr. Mitrenga telephoned Mr. Riemann to make the situation clear. Mr. Elrod was in Mr. Mitrenga's office and listened to the phone conversation.

Mr. Mitrenga explained to Mr. Riemann that the seller was pressing to close and L & F had the option of moving forward or withdrawing from the deal. Mr. Mitrenga explained to Mr. Riemann that, due to the recession, he personally would have to go out on a limb by committing his personal assets to finance the project. Therefore, L & F would be at risk of serious financial trouble and Mr. Mitrenga personally would be at risk of serious financial trouble if L & F purchased the property and the development did not move forward smoothly. Mr. Mitrenga explained to Mr. Riemann that, before making the commitment to purchase the property, Mr. Mitrenga wanted to make absolutely sure that there was no legal impediment to moving forward with the development because L &F, and Mr. Mitrenga personally, would be at risk of serious financial difficulties if the project got bogged down.

After telling Mr. Riemann this, Mr. Mitrenga asked Mr. Riemann to state whether there was any impediment of any kind which might prevent building the houses. Mr. Mitrenga said if there was any possibility of an impediment, would Mr. Riemann please let him know while he could still walk away from the deal.

Mr. Riemann responded by affirming to Mr. Mitrenga that there was no impediment of any kind and, to the contrary, the project was "good to go."

Relying on the representations of city officials as described above, L & F purchased the Roundhill property on December 30, 2009. The purchase price was $ 2,405,018. L & F paid approximately $ 700,000 in cash. The balance of the purchase was financed by Citizens' Bank. The terms of the loan were eighteen months at 4.75% interest with interest payable monthly (approximately $ 7300/month) and the principal due as a balloon payment at the conclusion of the eighteen months. In order to obtain the loan, Mr. Mitrenga had to use personal funds to obtain and pledge an $ 800,000 certificate of deposit. The terms of the pledge are that, if the principal is not repaid at the conclusion of the eighteen month period, the certificate of deposit will be cashed and used to pay part of the principal and L&F will have to refinance to pay off the balance.

On or about January 13, 2010, claimants filed request ID 117,158 (water and sewer verification request) with the City of Gulfport. The purpose of this

request was to obtain a letter from the City which would confirm that claimant had met City requirements. Claimant would then deliver the letter to the County. On receipt of the letter, the County would assign 911 required addresses to the 73 lots. Claimants and the County expected this request to be granted as a matter of routine. City representatives had repeatedly assured claimants that all requirements had been met, Mr. Riemann had testified to this under oath, and the City had previously given the County a "will serve" letter for the Roundhill subdivision.

However, the letter was not issued. Claimants' representatives made several calls to find out the reason for the delay and city officials responded that the matter was in the hands of the Engineering Department.

On or about January 25, 2010, Mr. Mitrenga spoke to Kris Riemann to find out the reason for the delay. Mr. Riemann told Mr. Mitrenga that the delay was occurring because there were a few "punch out" items that the original developer did not complete and he would send a list. Mr. Mitrenga pointed out that any problems on the punch list should have been taken up with the original developer. However, he agreed to look at the list. Mr. Mitrenga reemphasized that it was very important to L&F to move forward promptly. Mr. Riemann gave Mr. Mitrenga to understand that the "will serve" letter would be issued as soon as the list was completed.

Mr. Mitrenga checked with the designing engineer/ contractor, Bobby Heinrich, who stated that the punch list had been completed in April 2007. Mr. Mitrenga asked to meet with City reps to go over the punch list and the earliest day the City would agree to meet was February 3, 2010. On February 3, 2010, city officials (Wayne Miller, Al Farris, John Garrison, and Ernie Carpenter) met at the Roundhill property with Mr. Mitrenga, L&F's project manager Billy Douglas, and Bobby Heinrich.

The officials inspected the property and confirmed that the items on the January 2010 punch list had, in fact, been completed. However, they stated that, as a result of the passage of time, there were additional items that needed to be taken care of. The clear implication of their statements indicated that once these additional items were taken care of, the letter of service would be issued.

On February 4, 2010, Wayne Miller delivered the new punch list of 33 items, notably a requirement that L & F flush the entire water system, provide updated bacteriological samples, and video inspect the entire sewer system. L & F took care of all 33 matters at a cost in excess of $13,000, except that the City through Public Works Department employee Rebecca Mason agreed to flush the water system and charge L & F for the flush.

On February 8, 2010, L & F called for a reinspection and was told that the reinspection could not take place until February 17.

On February 17, 2010, there was another meeting at the property. Present at this meeting were Mr. Mitrenga, Billy Douglas, Bobby Heinrich, Wayne Miller, and various other city representatives and contractors, as well as an L & F employee named Alex who was present to lift the manhole covers. In the presence of Mr. Mitrenga, Mr. Douglas, and Mr. Heinrich, Mr. Miller stated that he had just talked to Kris Riemann and if the punch list was completed, the service letter could be issued within a day or two. After the inspection, Mr. Miller agreed that the February 2010 punch list had also been satisfactorily completed. He wanted one additional item: to remove a few pieces of broken brick in the bottom of one manhole, which was done immediately.

It should be noted that throughout this time period, L & F and Mr. Mitrenga continued to fully cooperate with City officials, incurring extra expenses and suffering additional delays without challenging the City's actions, because L & F and Mr. Mitrenga relied on the representations of city officials that the "will serve" letter would be issued as soon as the punch lists were completed.

On February 22, 2010, L&F received a letter from the City stating that the service request was not accepted. There was no explanation.

Mr. Mitrenga and other L & F representatives immediately began a series of phone calls to, and meetings with, city officials to present L & F's position and seek to have the decision reversed.

On February 22, 2010, Bobby Heinrich called Wayne Miller to find out what was going on and Mr. Miller refused to provide any explanation other than to state, "It's been taken out of my hands."

On February 22, 2010, Mr. Mitrenga called Kris Riemann and was told the same thing.

On February 25, 2010, Mr. Mitrenga and L & F's attorney, Virgil Gillespie, met with Margaret Murdock, an attorney with the city attorney's office, presented L & F's documentation, and demonstrated that Roundhill was an approved, platted, and recorded development with a "will serve" commitment from the City. Ms. Murdock seemed to believe the matter could be resolved to L & F's satisfaction.

During the next ten days, Ms. Murdock refused to return phone calls from L & F representatives.

On March 9, 2010, Mr. Mitrenga and Bobby Heinrich requested a meeting with Mayor Schloegel. The mayor's administrative assistant, Rebecca Kajdan, stated that Mr. Mitrenga could meet with the mayor at 1:00 p.m. Then she called back and said the mayor did not want to meet with Mr. Mitrenga at the scheduled time. Bobby Heinrich was able to speak with the mayor and reported back that the mayor would look into L & F's difficulties and get back with L & F's representatives within a short time.

On March 10, 2010, Mr. Mitrenga again asked Rebecca Kajdan to set up a meeting with the mayor.

As of March 15, 2010, the mayor had still not "gotten back" with L & F's representatives as promised during the March 9, 2010 meeting between the mayor and Mr. Heinrich. Therefore Mr. Mitrenga called the mayor's office again. This time, the mayor's administrative assistant told him that the mayor has a public open meeting every Monday at 4 pm and speaks with members of the public on a first come first serve basis. If Mr. Mitrenga would attend this meeting, he could have a few minutes to speak with the mayor. Mr. Mitrenga showed up at the meeting, presented the mayor with the documentation to show that Roundhill is a fully entitled community, and asked the mayor to look into it. The mayor agreed to speak to Jeff Bruni, the City attorney, concerning the matter.

On March 15, 2010, Mr. Mitrenga sent an email to Mr. Dombrowski, president of the City Council, explaining the situation and asking for help to get the matter placed before the city council for consideration.

On March 16, 2010, Mr. Mitrenga also asked for help from Roundhill's original developer, Sherman Muths, a prominent local attorney. Mr. Muths wrote a letter to the mayor, copying Mr. Dombrowski, explaining that Roundhill had been fully permitted and formally accepted by the City and permits should issue.

On March 17, 2010, Mr. Mitrenga again asked Mr. Dombrowski to bring the matter before the City council for consideration.

On March 18, 2010, Mr. Elrod asked Mr. Dombrowski to speak with Mr. Mitrenga. Mr. Dombrowski told Mr. Elrod that the matter was "in legal" and he would have to speak with Mr. Bruni before speaking with Mr. Mitrenga. Mr. Dombrowski agreed to make the rest of the City council aware that there was an issue.

On March 19, 2010, Mr. Mitrenga emailed Rebecca Kajdan and again asked to speak with the mayor.

On March 22, 2010, Rebecca Kajdan emailed to say that Gloria Byrd would arrange a meeting between Mr. Mitrenga and city officials concerning the development.

On March 26, 2010, Mr. Mitrenga and L&F's current counsel met with Mr. Bruni.

As of this writing (April 26, 2010), in spite of numerous appeals by L & F representatives, the City has refused to reconsider its decision and no city official has given any explanation for the decision. To the contrary, city officials other than the mayor have claimed that they have no power to alter the decision and the mayor has remained incommunicado.

In the meantime, informal communications and investigations have led claimants to draw certain conclusions about what is going on.

It appears that, in fall 2009, the 781 Group, LLC, sought permission to build a "Mississippi cottage" development in the same general vicinity as the Roundhill development. The mayor and other City representatives oppose this "Mississippi cottage" development because it would serve lower income residents of Mississippi, a group expected to be disproportionately composed of Black citizens. As a result, the City has refused to allow the "cottage" development to proceed, resulting in litigation between the City and the 781 Group. On further information and belief, in an effort to block the "Mississippi cottage" development, City officials have inaccurately claimed that the water and sewer service to the area is inadequate to support the "Mississippi cottage" development and this alleged inadequacy has been used as a pretext to deny permits to the proposed "Mississippi cottage" development.

On further information and belief, in order to maintain the pretext that the water and sewer service is inadequate to support further development in the area, City officials are forced to claim that the service is insufficient to support the Roundhill development, in spite of the fact that this is manifestly not the case as evidenced by the approvals previously issued to claimant's predecessor in title and the representations repeatedly made to claimant's representatives.

On further information and belief, one reason City officials have been prepared to block the Roundhill development is that, due to claimant's practice of

selling moderately priced homes to Black families in the past, claimant is suspected of having some association or alliance with the 781 Group. In fact, the Roundhill subdivision is intended to be an upscale development and is not expected to include low income residents or a disproportionate number of Black residents (i.e. not significantly different from Harrison County population as a whole). However, on information and belief, it appears that City officials have chosen to destroy the Roundhill project, without any just reason or cause, because they perceive the destruction of Roundhill to be a necessary step in excluding low income Black citizens from the Gulfport community.

On further information and belief, there may be additional motives for the City's decision to deny the service request which are improper and as yet undisclosed and unsuspected by claimant. For example, at one point it was informally suggested that the matter might be resolved if L & F would agree to construct a $400,000 water line at its own expense and if L & F would agree to allow the development to be annexed by the City, which would enable the City to tax the property. This supports the inference that the City is seeking to delay the project as a means of extorting financial advantages to which the City is not entitled.

* * *

With kind regards, I am

Sincerely,

George W. Healy, IV

GWH/ks
cc: Larry Mitrenga

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA, PLAINTIFFS

v. CIVIL ACTION NO.:1:10CV387HSO-JMR

CITY OF GULFPORT, MISSISSIPPI, DEFENDANT

AFFIDAVIT OF LARRY MITRENGA EXECUTED PURSUANT TO 28 U.S.C. 1746

COUNTY OF HANCOCK

STATE OF MISSISSIPPI

I, Larry Mitrenga, aver under oath pursuant to the provisions of 28 U.S.C. 1746, as follows.

I have reviewed the complaint filed in this matter and the Notice of Claim appended thereto as Exhibit A and incorporated therein by reference. To the best of my knowledge and belief, all statements contained therein are true and correct in all respects.

I personally participated in meetings and communications as described in the complaint and Notice of Claim and these meetings and communications are accurately described in the complaint and Notice of Claim.

L & F Homes is a regularly conducted business. As active member of L & F Homes, I supervise the

conduct of this business and the maintenance of the business records. I am responsible for maintaining the records and I have physical custody of the records. It is the policy and practice of L & F Homes to retain copies of all emails and correspondence relating to L & F Homes' business. The documents attached to the Opposition to Motion for Summary Judgment as Exhibits C, D, and F(1) are accurate copies of documents which were included in the business records of L & F Homes according to the above and foregoing policy and practice of L & F Homes and, to the best of my knowledge and belief, these are accurate records of communications which took place on the dates and times indicated.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 4, 2010.

/s/ L Mitrenga
Larry Mitrenga

(Signature)".

BRENT WARR
Mayor

WILLIAM W. POWELL, P.E.
Director of Engineering

ENGINEERING DEPARTMENT
4050 Hewes Avenue
Gulfport, Mississippi 39507
Telephone (228) 868-5815
Fax (228) 868-5822

[LOGO]

CITY *of* GULFPORT

Post Office Box 1780 • Gulfport, MS 39502 1780 •
Phone: (228) 868-5700

December 18, 2006

Mr. Kamran Pahlavan, P.E.
Executive Director
Harrison County Utility Authority
P.O. Box 2409
Gulfport, MS 39505-2409

Re: Roundhill Farms Subdivision

Dear Mr. Pahlavan:

With reference to your letter of November 11, 2006, the City has approved the plans and specifications for the water system for the referenced subdivision.

Sincerely,

/s/ William W. Powell
William W. Powell, P.E.
Director of Engineering

WWP/cb

CITY of GULFPORT

[LOGO]

GEORGE SCHLOEGEL
MAYOR

Our Mission *To provide efficient, effective and openly responsive municipal services to all citizens while promoting responsible economic development, preserving our heritage, and enhancing our quality of life, and creating a better community.*

Monday, February 22, 2010

HYNEMAN COMPANIES
PO BOX 4984
BILOXI MS 39535

Dear HYNEMAN COMPANIES:

Thank you for reporting the following concern to the Department of Public Works:

REQUEST ID: 117,158

CONCERN: WATER & SEWER SERVICE VERIFICATION REQUEST

INCIDENT ADDRESS:
ROUNDHILL SUBDIVISION LOTS 1-73

The Service Request was closed on 2/19/2010 12:59:50PM and was addressed as follows:

RESOLUTION: NOT ACCEPTED BY THE CITY OF GULFPORT

We appreciate your patience and cooperation. If there are any questions or concerns with the work performed, please contact one of our Quality Control Inspectors between the hours of 7:00 A.M. to 3:50 P.M., Monday through Friday. Their phone numbers are listed below:

For concerns about the work completed, please call:

Type	Inspector	Phone Number
Water & Sewer	Melvin Bullock	(228) 518-0799
	Al Farris	(228) 518-0431
Streets & Drainage	John Thomas	(228) 518-0775
	Joe Johnson	(228) 518-2223
Traffic	Rodney Ladner	(228) 518-1256
Billing Department		(228) 868-5720
		(228) 831-0781
To report an additional complaint or new work request, please call the following departments: Streets & Drainage issues: 868-5805 Water & Sewer issues: 868-5765 Traffic issues: 868-5874		

Have a Great Mississippi Gulf Coast Day!

Department of Public Works
4050 Hewes Avenue
Gulfport, MS 39507
(228) 868-5740

Ben E. Wolfe, Jr. Director of Public Works
Ronald M. Smith Asst. Director of Public Works

"Providing Quality Service in a Timely Manner to Exceed our Citizens' Expectations"

Mayor putting City of Gulfport in harms way

Mon, Mar 15, 2010 at 3:38 PM

Larry Mitrenga <larry@hyneman.com>
To: Ricky Dombrowski <rdombrowski@cableone.net>
Bcc: Larry Mitrenga <larry@hyneman.com>

HI Ricky,

I am confident that the city council is totally unaware of the actions the mayor, engineering dept., and city attorney are taking regarding Roundhill Subdivision. I am at wits end and reaching out prior to filing a multi million dollar lawsuit which I am 100% likely to win after consulting with Virgil Gillespie, Robert Swartz and George Healey. The city's actions have placed me in total financial peril and I have to act immediately. The last thing I want to do is sue the city but the administration is leaving me no choice.

I contracted to purchase Roundhill in October 2009. Sherman Muths developed it and the subdivision was approved and the plat was recorded in February 2007. Since the community is in the county but within 1 mile of city limits it needed the city to enter into a contract with the regional waste water authority. This was done and approved by the city council and mayor on 7/18/06. As part of my due diligence I secured all of the approvals which were issued and recorded. I received confirmation that it had been accepted by the county and that the warranty period had expired with nothing else to do. The city had

issued a will serve letter prior to development in March 2006 so I called Kris Riemann and verified that. I asked Kris if there was anything that would prevent me from pulling permits immediately to start presold homes I needed to know before I closed on the $2.5 million loan on 12/31/09. I closed as scheduled and applied for a county permit and was told the city would give me the service letter in 3 days. That was in early January. Since then I have gone through the chain of command and eventually told by the engineering dept. that it was out of their hands after they made me jump through hoops. I then went to the legal dept. and provided Margaret Murdoch with all the information and she said it looked pretty cut and dry. After not receiving any call back from her Virgil finally got hold of her and was told it was out of her hands. 2 weeks ago I received notice from the city that my request for water has been denied. Whose "hands" is it in?

Ricky, you are the only person I know on the council other than Ella and I really need your help in protecting the city from its bad judgement in this matter. I have to act quick or it will be too late as I am losing sales and credibility with prospects due to the delay. If I have to file suit it will be a path of no return. I have built more homes in the city of Gulfport over the past 17 years than any other builder but this decision will put me out of business after 33 years.

I would like to meet so I can show you all the documentation and get this matter before the city council immediately; is that possible?

Larry Mitrenga
Hyneman Homes

RE: Mississippi Gulf Resort Classic

Thu, Mar 18, 2010 at 3:02 PM

Greater Gulf Realty <elrod1@bellsouth.net>
To: rdombrowski@cableone.net
Cc: elrod1@bellsouth.net

Ricky,

No law suit has been filed.

The City has illegally stopped Larry from pulling building permits.

He has been road blocked since early January.

I personally went to Public Works back in November numerous times BEFORE we closed.

I was told we DID NOT NEEED [sic] UPDATED "WILL SERVE" LETTER, we were hooked up to the system and good to go.

Larry has 100 subs that have been put out of work now for over 2 months.

Most live in Gulfport.

Sherman Muths developed this subdivision.

Bruni???? LOL

You need to speak with Larry.

The City of Gulfport employees I have dealt with on this matter has no idea what “public servants” means and the responsibility That comes with it.

We went over and beyond the call of duty to make sure there were no issues before we closed the deal.

It has been road block after road block after road block and gross misrepresentations made.

This is criminal.

You need to step in and help us sort this out.

TIME IS OF THE ESSENCE. PLEASE ?????

-----Original Message-----
From: rdombrowski@cableone.net
[mailto:rdombrowski@cableone.net]
Sent: Thursday, March 18, 2010 2:51 PM
To: Greater Gulf Realty
Subject: Re: Mississippi Gulf Resort Classic

It is in legal right now and I need to talk to Jeff Bruni first.

[Quoted text hidden]

Sent from my BlackBerry® smartphone

RE: Mississippi Gulf Resort Classic

Thu, Mar 18, 2010 at 3:26 PM

Greater Gulf Realty <elrod1@bellsouth.net>
To: Mitrenga Cell <larry@hyneman.com>

Elrod, Greater Gulf Realty

Begin forwarded message:

From: rdombrowski@cableone.net
Date: March 18, 2010 3:14:37 PM CDT
To: “Greater Gulf Realty” <elrod1@bellsouth.net>
Subject: Re: Mississippi Gulf Resort Classic
Reply-To: rdombrowski@cableone.net

Again this is something I can not talk about without legal involved. I will make sure that the rest of the council is aware and make the Mayor and legal address this soon.

Sent from my BlackBerry® smartphone

[Quoted text hidden]

1323 28TH AVENUE
SUITE A
GULFPORT, MISSISSIPPI 39501
(228) 575-4005
(800) 858-4549
Fax: (228) 575-4006
E-mail: gwhealyiv@aol.com

GEORGE W. HEALY, IV*
*LICENSED IN MISSISSIPPI AND LOUISIANA

CASSIDY LEE ANDERSON***
***LICENSED IN MISSISSIPPI AND ALABAMA

NEW ORLEANS OFFICE****
291 St. Charles Avenue
SUITE 2411
NEW ORLEANS, LA 70170
(504) 524-3223

CATHERINE LEARY†
OF COUNSEL
†LICENSED IN LOUISIANA ONLY

May 4, 2010
VIA REGULAR AND CERTIFIED MAIL

[7009 2820 0002 6786 7620]
Ricky Dombrowski
President of the City Council
City of Gulfport
Gulfport City Council Office
P. O. Box 1780
Gulfport, MS 39502
Email: rdombrowski@gulfport-ms.gov

RE: L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA APPEAL/REQUEST FOR DE NOVO HEARING

Dear Mr. Dombrowski:

L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA herewith appeal the February 22, 2010 and April 28, 2010 rulings of the Department of Public Works in which water service verification identification was denied/not accepted by the City of Gulfport. Alternatively, L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA would like a de novo hearing before the full City Council in order to seek the City's Council's permission to obtain water and sewer service for the Roundhill Subdivision.

As you know, Mr. Mitrenga and his agents have been trying to obtain a full-blown hearing before the City Council for some time. Enclosed as exhibit A is a copy of an email sent by Mr. Mitrenga to Mr. Dombrowski on March 15, 2010. Additionally, please find enclosed as exhibit B an affidavit of Carrol R. Fletcher, an employee of L & F Homes.

L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA would like to be placed on the agenda at the next city council meeting. Please consider this a formal request.

With kind regards, I am

Sincerely,

/s/ G M Healy, IV
George W. Healy, IV

GWH/ks
Enclosures
A. email sent by Mr. Mitrenga to Mr. Dombrowski on March 15, 2010
B. an affidavit of Carrol R. Fletcher, an employee of L & F Homes
cc:
Clerk of Council – Kathy Johnson [7009 2820 0002 6786 8559]
Mayor George Schloegel [7009 2820 0002 6786 8535]
Larry Mitrenga
Jeffrey S Bruni [7009 2820 0002 6786 8542]

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

L & F HOMES AND DEVELOPMENT,
LLC d/b/a HYNEMAN HOMES and
LARRY MITRENGA,
Plaintiffs,

VERSUS CIVIL ACTION NO: 1:10CV387 HSO-JMR

CITY OF GULFPORT, MISSISSIPPI,
Defendant.

**30(b)(6) DEPOSITION OF
THE CITY OF GULFPORT,
ROBERT K. REIMANN, DESIGNEE**

Taken at the offices of Copeland, Cook, Taylor & Bush, P.A., 2781 C.T. Switzer Sr. Drive, Suite 200, Biloxi, Mississippi, on Tuesday, November 1, 2011, beginning at 10:17 a.m.

* * *

[72] that there was inadequate fire flow on the west end of the Landon Road water line?

A. I don't know.

Q. All right. You represented that in November of 2009 there was inadequate fire flow as to the 781 Group; isn't that correct?

A. Yes.

Q. Approximately when before that did the City first determine that there was inadequate fire flow down on the western end of the Landon Road water line?

A. I don't know.

Q. What was the mechanism by which the City realized that there was inadequate fire flow at that area?

A. For which I testified to?

Q. Anybody at the City testified to.

A. I testified based on a report that was done by Garner Russell & Associates.

Q. And that report you testified to was based on projections; isn't that correct?

A. Some projections and some actual.

Q. All right. Let me direct your attention to the actual facts that the City had at their disposal in November of 2009, which indicated an [73] inadequate fire flow on the western end of the Landon Road water line.

A. You're directing me to what?

Q. I'm asking you a question.

A. Okay.

Q. You indicated earlier that you had projections and actual information concerning unacceptable fire flow, correct?

A. In the report, yes.

Q. Well, let me ask you this: What factual basis did you have in November of 2009 that there was inadequate fire flow in front of Mr. Mitrenga's project?

A. I can't recall.

Q. Was it based on a physical test of the water line?

A. I can't recall.

Q. But you did have actual physical evidence in November of 2009 that there was inadequate water flow to support a residential subdivision in that area; isn't that correct?

MR. WHITFIELD:

Object to the form.

A. I can't recall.

MR. HEALY:

[74] Q. Well, didn't you just testify a couple of minutes ago that you had both projections and actual information which showed this?

A. When I said actual, I meant the actual – they used the number – the house count and the number

of the current number of customers that were out on the line, and then they used projected numbers, if you were to add certain types of development, if you were to add homes or commercial, different types of projects.

Q. All right. Well, let me ask you the question a different way: Did you have any physical tests which were performed by engineers in November of 2009, or prior to November of 2009, which indicated an inadequate fire flow in front of Mr. Mitrenga's project?

A. There were fire flow tests that were done before then.

Q. All right. Well, it brings me back to my original question: When did the City first become aware that there was inadequate fire flow at the western end of the Landon Road water line?

A. And I don't know the answer to that question.

Q. Was it sometime in 2009?

[75] A. I don't know.

Q. Was it in 2008?

A. I don't know.

Q. All right. Who is the person who first alerted the City or any official, the County, anybody, that there was, in fact, a fire flow problem at the western end of the Landon Road water line?

A. I was alerted based on the report by Garner Russell, and that's what I testified to, was that report.

Q. As we sit here today, that's the first thing that you can recollect which indicated a fire flow problem in that area; is that correct?

A. Yes.

Q. And although you indicate that there were tests that were taken earlier, you can't point to a physical test conducted by an engineer which disclosed an inadequate fire flow, can you, sir, prior to November of 2009?

A. No.

Q. All right. Now, what is the City's policy for testing fire flow in connection with residential areas?

A. The – we don't have a specific policy. [76] Through the years, there's been – the fire department has done some testing in different parts of the City, but we don't have a specific policy for testing fire flow throughout the City.

Q. All right. Does the City have a policy, or has the City had a policy at any time over the last six years that before a subdivision will be given approval, that a fire flow test must be conducted?

A. Not a – not a written policy, but the fire department did do some flow testing years ago.

Q. All right. The City has approved other subdivisions within the City franchise district over the past three years, haven't they, sir?

MR. WHITFIELD:

Object to the form.

A. I don't know. I can't remember a subdivision.

MR. HEALY:

Q. All right. The City has approved the Oakwood Park Estates between 50th and 51st Avenues north of 28th Street within the last three years, haven't they, sir?

A. I don't know.

* * *

[illegible] MR. HEALY:

Q. To your knowledge, sir, were all the items taken care of that the City needed to be taken care of in connection with this punch list?

A. Yes. The only outstanding item was the fire flow issue had to be resolved, but it was not on the punch list.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI SOUTHERN DIVISION

L & F HOMES AND DEVELOPMENT,
LLC d/b/a HYNEMAN HOMES and
LARRY MITRENGA,
Plaintiffs,

VERSUS CIVIL ACTION NO: 1:10CV387 HSO-JMR

CITY OF GULFPORT, MISSISSIPPI,
Defendant.

30(b)(6) DEPOSITION OF THE CITY OF
GULFPORT, ROBERT K. RIEMANN, DESIGNEE

Taken at the offices of Copeland, Cook, Taylor & Bush, P.A., 2781 C.T. Switzer Sr. Drive, Suite 200, Biloxi, Mississippi, on Monday, March 26, 2012, beginning at 10:03 a.m.

* * *

[49] MR. HEALY:

Q. When did the City first learn of the fire flow problem on Landon Road?

MR. WHITFIELD:

That did come up.

A. November 2009.

MR. HEALY:

Q. All right. And what did you do as a result of this finding of a fire flow insufficiency?

A. We noted that we had a fire flow problem there.

* * *

DCI
Diversified Consultants, Inc.
• 395 EDGEWOOD TERRACE DRIVE
•PHONE 601-366-6408
JACKSON, MISSISSIPPI 39206
jelliott@diconeng.com
CONSULTING ENGINEERS, CITY, COUNTY
AND REGIONAL PLANNERS

January 29, 2010

Kris Riemann, P.E.
Director of Engineering
City of Gulfport, MS
4050 Hewes Avenue
Gulfport, MS 39507

Dear Kris:

A development company in the Gulfport area asked us to look into a fire flow problem on west Landon Road in the old Orange Grove water system area just north of the Gulfport corporate area. They were planning a residential development on the south side of Landon Road about half way between U.S. Highway 49 and Canal Road. They were advised (apparently by the Gulfport Fire Department) they would need about 1500 gpm of fire flow for their project. Field flow tests by the fire department indicated a flow from fire hydrants in the area of only 700 to 800 gpm, as I understand the situation.

The development group asked us to take a look at the problem and recommend solutions. The information furnished to me indicated there was a 12-inch water

feeder main along Landon Road extending west from the 34th Street water well to the entrance to the proposed development. This 12-inch water main also connected the 34th Street well with the 1,000,000-gallon elevated water tank at the Crossroads Mall. When I reviewed this information, it appeared to me that there should be considerably more fire flow than 700 to 800 gpm available at the proposed residential project area. I advised the development group that I suspected there was a water main valve or valves throttled down on the 12-inch main or some other type of obstruction in the water main between the fire hydrant on Landon Road near the project area and the sources of water supply.

I advised the group that this could be verified to some extent by plotting a hydraulic profile between the fire hydrant and the sources of supply, but that we would need permission from the city to open fire hydrants and search for valves. Representatives of the group discussed this with the acting fire marshal, as I understand it, and invited him to accompany representative [sic] of my firm on a field investigation set for January 19th. The fire marshal gave the group permission to perform the work, but he could not accompany the surveyors.

My people checked the gate valve on the 12-inch water main downstream of the large capacity water well on the south end of 34th Street and found it was almost completely closed. We left the valve in the position that we found it, mostly closed, because we

thought the city may have purposely closed the valve for some reason.

My surveyor also found a large pressure drop on Landon Road in the vicinity of the 34th Street and Landon Road intersection and suspected that a valve in this general area was throttled down and mostly closed. He found a valve box at the northwest corner of the intersection but could not get a valve wrench on the valve operating nut due to debris in the box. We could not confirm this was an active water main valve or that it was partially closed.

However, we strongly suspect that a 12-inch water main valve in the vicinity of 34th Street and Landon Road is probably mostly closed. If not, it appears there is some other obstruction in the water main that is seriously impeding fire flow in this general area. We believe that there would be sufficient fire flow at the Landon Road project area if there were no obstructions in the water main such as partially closed valves.

Throttled valves or other obstructions in the primary water feeder main serving west Landon Road could present a serious public health or safety problem, as you well know, and you may want to check into this matter. We will be happy to furnish you the results of our field work if it would be of any value to you.

If you have any questions regarding this matter, or if we can assist in any way, please give us a call.

Very truly yours,

/s/ James A. Elliott
James A. Elliott, P.E.

[LOGO]

GEORGE SCHLOEGEL *JOHN R. KELLY*
Mayor *Chief Administrative Officer*

CITY *of* GULFPORT
Post Office Box 1780 • Gulfport, MS 39502-1780 •
Phone: (228) 868-5700

PRIVILEGED AND CONFIDENTIAL
COMMUNICATION UNDER MISS. R. CIV. P. 408
FOR SETTLEMENT PURPOSES ONLY

March 19, 2010

VIA E-MAIL AND U. S. MAIL

Ms. Peg Songin
Unity Street Corporation
2668 Beach Boulevard, Suite 806
Biloxi, Mississippi 39531

Re: 781 Group, LLC v. City of Gulfport;
Property along JFM Parkway

Dear Peg:

* * *

the City has tested the water line and resulting pressure in and around Landon Road and has had independent engineers review the same and has consistent and reliable data to reflect that fire flow is unfortunately inadequate for development along JFM Parkway. The lawyers tell me that someone on behalf of the developers similarly tested the line and reached similar results, though the developers are claiming something about valves in the line possibly

being closed. This has been checked and is not the case, however.

* * *

AFFIDAVIT OF JAMES A. ELLIOTT, P.E.

STATE OF MISSISSIPPI

COUNTY OF HINDS

BEFORE ME, the undersigned, a Notary Public, on this day personally appeared JAMES A. ELLIOTT, who is personally known to me, and first being duly sworn according to law, upon his oath deposes and says as follows:

1. That my name is JAMES ELLIOTT; I am over the age of eighteen, and I reside in Ridgeland, Mississippi, and have offices in Jackson, Mississippi.

2. That I am fully competent to make this affidavit.

3. That I have personal knowledge of the facts stated herein, and that they are all true and correct.

4. That I am a licensed Professional Engineer.

5. That I have been employed by Diversified Consultants, Inc., as an engineer, planner, and corporate president for over 40 years.

6. That I am currently working as an expert witness for Larry Mitrenga and L&F Homes and Development, LLC, in the Mitrenga v. City of Gulfport case.

7. That on March 19, 2012, I sent an experienced representative of my firm, Diversified Consultants, Inc., to Gulfport observe the city public works forces search for a valve on

the 12-inch water feeder main on Landon Road whose exact location had been lost over the years. The following people were observing the work: George Healy representing Mr. Mitrenga, John Grant representing DCI, a photographer assisting Mr. Healy and recording the proceeding, the attorney representing the City of Gulfport and Kris Riemann the Gulfport City Engineer. Three Gulfport public works personnel equipped with excavation equipment performed the excavation work necessary to locate the lost valve.

8. That I understand the purpose of the work was for the city to investigate Mr. Elliott's opinion, as stated in his expert witness report prepared as a part of the litigation between Mr. Mitrenga and the City of Gulfport, that there was a throttled valve or other obstruction in the 12-inch water feeder main in the area between Fire Hydrant 3 and Fire Hydrant 4 (see Report of Expert Witness James A. Elliott, P.E.).

9. That the Gulfport public works personnel located a 12-inch, Mueller Model 2360 mechanical joint gate valve on the 12-inch water feeder main that had been covered up after about 45 minutes of excavation work. This valve was located about 90 feet west of Fire Hydrant 4 in the area between Fire Hydrants 3 and 4 in the area flagged in Mr. Elliott's report as the general area where, in his opinion, the obstruction was located.

10. That, upon investigation, the valve was determined to be 36.5 turns (turns of the valve operating nut) closed. The Mueller valve catalog specifies that this size and type of valves requires 38.5 turns of the operating nut to fully open it. Therefore, the 12-inch valve was 95% closed in terms of turns of the operating nut.

11. That it is my opinion that this throttled valve is the reason for most, if not all, of the abrupt 24 psi pressure loss in the 12-inch water main with a water flow of 715 gallon per minute, and that the throttled valve is most, if not all of the reason there was a deficiency in fire flow at the intersection of Landon Road and JFM Parkway, the entrance to Roundhill Subdivision.

12. That DCI's observer, Mr. Grant, was equipped with fire hydrant flow testing equipment and offered to retest fire flow at the fire hydrant at the entrance to Roundhill Subdivision to determine if opening of the valve had resolved the fire flow problem or if there was the possibility of other throttled valves or other obstructions. This offer was declined by the attorney representing the City of Gulfport.

13. Further affiant sayeth not.

/s/ James Elliott
James Elliott, P.E.

SUBSCRIBED AND SWORN TO before me on the 21 day of March 2012. To certify which witness my hand and official seal.

/s/ Natalie M. Tillman
Notary Public in and for the
State of Mississippi
My commission expires:

[Notary Stamp]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

L&F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES AND LARRY MITRENGA	**PLAINTIFFS**
VERSUS	**CIVIL ACTION NO. 1:10cv387HSO-JMR**
CITY OF GULFPORT, MISSISSIPPI A MUNICIPAL CORPORATION	**DEFENDANT**

ADDENDUM TO REPORT OF EXPERT WITNESS JAMES A. ELLIOTT, P.E.

This is an Addendum to Section 1 of the report of expert witness James A. Elliott, P.E., prepared in January 2012.

Addendum to Report of Expert Witness
James A. Elliott
Dated January 2012
L&F Homes and Development, LLC v
City of Gulfport, Mississippi
March 2012

Expert witness for the Plaintiffs, James A. Elliott, sent an experienced representative of his firm to Gulfport on March 19, 2012, to observe city public works forces search for a valve on the 12-inch water

feeder main on Landon Road whose exact location had been lost over the years. Representative of both Plaintiffs and Defendants observed this work.

The purpose of this work apparently was for the city to investigate the validity of Mr. Elliott's opinion, as stated in his expert witness report dated January 2012, prepared as a part of the litigation between Mr. Larry Mitrenga and the City of Gulfport, that there was a throttled valve or valves or other obstructions in the 12-inch water feeder main on Landon Road in the area between Fire Hydrant 3 and Fire Hydrant 4 that were causing a large pressure losses and restricting the fire flow available at the entrance to Roundhill Subdivision at the intersection of Landon Road and JFM Parkway. Mr. Elliott's opinion, as expressed in the reference report, was that sufficient fire flow would be available at the entrance to Roundhill subdivision to meet the requirements of Harrison County's International Fire Code (IFC) if the obstruction or obstructions were removed.

On March 19th after about 45 minutes of excavation work, Gulfport public works personnel located a 12-inch Mueller gate valve without a valve box that had been covered with dirt about 90 feet west of Fire Hydrant 4 in the area between Fire Hydrants 3 and 4 flagged in Mr. Elliott's report as the general area where, in his opinion, the obstruction or obstructions were located. Investigation of the valve revealed it was about 95% closed. It was not determined that this throttled valve was the only obstruction in the 12-inch water feeder main, but it is the witness's

opinion that it was, in all probability, the main cause of the deficient fire flow at the entrance to Roundhill Subdivision.

The field study conducted in November of 2011 by the witness and observed by representatives of both Plaintiffs and Defendant, to collect data for calculating the water system hydraulic grade line between the Crossroads elevated water storage tank and the fire hydrant (Fire Hydrant 1) at the intersection of Landon Road and JFM Parkway noted that Fire Hydrant 1 was flowing at the rate of about 715 gpm with a residual pressure of 20 psi. This is considerably less than the fire flow required by the IFC in a residential development such as Roundhill.

At the time of the November 2011 test, the 12-inch gate valve referenced above apparently was approximately 95% closed. A computer simulation of the hydraulic grade line in the Landon Road water line, assuming no throttled valves or other obstructions, indicates that the residual pressure at a flow of 715 should have been about 46 psi. Therefore, the available fire flow at the entrance to Roundhill under the conditions prevailing during the November 2011 test should have been about 2,000 gpm at a residual pressure of 20 psi, considerably more than required by the IFC in the proposed Roundhill development.

Based upon the new information resulting from the work of March 19, 2012, it is the witness's opinion that the throttled valve reduced the fire flow available at the entrance to Roundhill Subdivision under

the conditions prevailing in the field study of November 2011 from about 2000 gpm, considerably more than the IFC requirement, to approximately 715 gpm (a decrease of 65%), significantly less than required by the IFC. Therefore, it is the witness's opinion that more than sufficient fire flow should be available at the entrance to Roundhill subdivision under any reasonable conditions imposed on the water system if the 12-inch water feeder main on Landon Road between the Crossroads Tank, the 34th Street water well, and the intersection of Landon Road and JFM Parkway was fully open and unobstructed.

/s/ James A. Elliott

[Notary Stamp]

/s/ Natalie M. Tillman
March 22, 2012

Fwd: SERVICE REQUEST 70083 FROM JANUARY 2007

Tue, Mar 22, 2011 at 5:16 PM

elrod1@bellsouth.net <elrod1@bellsouth.net>
To: Mitrenga Cell <larry@hyneman.com>
Cc: GWHEALYIV@aol.com, c.oden87@yahoo.com

Water Dept revised letter including
Actual physical street address of
Roundhill property

Elrod- Greater Gulf Realty

Begin forwarded message:

From: "Sara Ladner" <sladner@gulfport-ms.gov>
Date: March 22, 2011 3:24:36 PM CDT
To: <elrod1@bellsouth.net>
Subject: SERVICE REQUEST 70083 FROM JANUARY 2007

In January of 2007 a service verification was done through public works to determine if water or sewer was available for 16520 Landon Rd Gulfport, Ms 39503, after further investigation this work order was actually done for the installation of yard meter. In order to request a copy of this verification you would need to fill out a records request with Mary Collins at City Hall, being that you are not the name on the service verification. To see if water and sewer are available at the present time, you would need to do a new service verification through public works at 228-868-5765, the request is free of charge and you will

receive a letter stating whether or not it is available. If you have any further questions feel free to contact us.

/s/ Sara Ladner
Office Assistant/SouthWest Water Company
1422 23rd Ave/Gulfport, MS 39501
Phone: 228.868.5720/Fax: 228.868.5722

GEORGE W. HEALY, IV & ASSOCIATES

LAW OFFICES

1323 28TH AVENUE
SUITE A
GULFPORT, MISSISSIPPI 39501
(228) 575-4005
(800) 858-4549
FAX: (228) 575-4006
EMAIL: gwhealyiv@aol.com

GEORGE W. HEALY, IV*
*LICENSED IN MISSISSIPPI AND LOUISIANA

REED BENNETT***
STAFF ATTORNEY
***LICENSED IN MISSISSIPPI ONLY

NEW ORLEANS OFFICE****
201 St. Charles Avenue,
SUITE 2411
NEW ORLEANS, LA 70170
(504) 524-3223

CATHERINE LEARY†
OF COUNSEL
†LICENSED IN LOUISIANA ONLY

January 29, 2012

via email and U.S. mail
W. E. Whitfield III
Kaara L. Lind
Copeland, Cook, Taylor & Bush PA
P.O. Box 10
Gulfport MS 39502

RE: *L & F Homes and Development, LLC, et al v. City of Gulfport*
USDC Southern District of Mississippi
Civil Action No.: 1:10-cv-387HSO-JMR

Dear Bill and Kaara,

Pursuant to the January 26, 2012 Order of Magistrate Judge John M. Roper, "Defendant must produce any and all water fire flow tests performed on Acadia Homes and the Meadows of Gulfport subdivisions located in the City of Gulfport and all fire flow water tests performed with regard to any subdivision outside the City of Gulfport in Harrison County, Mississippi prior to February 21, 2012." According to Plaintiff's inquiry and investigation, the following subdivisions are located in Harrison County, receive water service from the City of Gulfport, and fall within the purview of the Order:

1. English Manor Subdivision
2. Oaklane Estates Subdivision
3. Camelot Estates
4. Azalea Trace, Phase 3 Amended and Phase 4
5. Crystal Lakes Subdivision, Phase 1
6. Ol' Oaks Subdivision
7. Canal Crossing Subdivision
8. Oakberry Gardens
9. Meadowbrook Subdivision, Phase 2
10. Country Pines Subdivision
11. Ty Ridge Subdivision
12. Crown Hill I, Phase 1 and Phase 2
13. Crown Hill II, Phase 1 and Phase 2
14. Thorton Hill, Phase 1, Phase 2 and Phase 3
15. River Plantation Estates, Phase 1 and Phase 2

Please provide all fire flow tests for the above and foregoing subdivisions to our office by February 21, 2012 in accordance with the January 26, 2012

Order. According to our records, these were all built after 2006.

Sincerely,

George W. Healy, IV

GWH/rb
cc: Larry Mitrenga

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA PLAINTIFFS

VS. CAUSE NO.: 1:10CV387 HSO-JMR

CITY OF GULFPORT, MISSISSIPPI DEFENDANT

DEFENDANT'S COMPLIANCE WITH ORDER 480

COMES NOW the Defendant, the City of Gulfport, Mississippi, by and through its counsel of record, Copeland, Cook, Taylor & Bush, P.A., and in compliance with the Court's Order, Document 480, states as follows:

COURT ORDERED PRODUCTION NO. 1: All water fire flow tests performed on Holliman Place subdivision located in the City of Gulfport.

COMPLIANCE: Those documents located by the City after reasonable search and inquiry that are responsive to this ordered production are attached hereto as Bates Stamp pages 629-634. Should additional documents be located, said documents will be produced.

COURT ORDERED PRODUCTION NO. 2: All water fire flow tests performed on The Meadows of Gulfport subdivision located in the City of Gulfport.

COMPLIANCE: Those documents located by the City after reasonable search and inquiry that are responsive to this ordered production are attached hereto as Bates Stamp pages 629-634. Should additional documents be located, said documents will be produced.

COURT ORDERED PRODUCTION NO. 3: All fire flow water tests performed with regard to any subdivision outside the City of Gulfport in Harrison County, Mississippi and that the City serves with water.

COMPLIANCE: Those documents located by the City after reasonable search and inquiry that are responsive to this ordered production are attached hereto as Bates Stamp pages 629-634. Should additional documents be located, said documents will be produced.

Respectfully submitted, this the 22nd of February, 2012.

CITY OF GULFPORT,
MISSISSIPPI

BY: COPELAND, COOK, TAYLOR
& BUSH, P.A.

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s/KAARA L. LIND
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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

L & F HOMES AND
DEVELOPMENT, LLC
d/b/a HYNEMAN HOMES
and LARRY MITRENGA, PLAINTIFFS

v. CIVIL ACTION NO.:
1:10CV387HSO-JMR

CITY OF GULFPORT,
MISSISSIPPI DEFENDANT

AFFIDAVIT OF LARRY MITRENGA
PURSUANT TO 28 USC 1746

My name is Larry Mitrenga. I am the plaintiff in this case. I am a developer by profession. I've been in the business for 35 years and I've done business in Gulfport for the last 19 years. I build single family houses. I built developments, not isolated one-off homes. During the time period prior to Katrina, I built several developments in the City of Gulfport, probably around 400 homes total. These included Country Hills, Forest North, Williamsburg, and Fairfield I and II. I also own rental property consisting of single family residences which I rent out as landlord.

In the years prior to Katrina, my specialty was constructing developments for moderate income people. My target demographic was people who were not poor but had incomes below the median, people who would qualify based on income and credit rating for a government subsidy to help them buy a home. I

was familiar with the government subsidies that were available to help moderate income home buyers in this category and I would walk my buyers through it. I studied the people in my target market carefully to learn what appealed to them and what they could afford. I organized my business so I could build good quality houses in the price range that they could pay. My target demographic, the families with incomes in the moderate range, was slightly over half Black, roughly 55% Black to 45% White.

As part of my business, I would drive around the City of Gulfport and its immediate surrounding areas, looking for land that I could buy and use for development. During this time period, subsidized rental housing in the City and immediate surroundings consisted partly of government owned apartment complexes and partly of Section 8 housing. The government owned apartment complexes were easily identifiable. They were fifties style architecture, fenced off from the surrounding community, and they were pretty dilapidated. The people who rented units in these complexes were approximately 90% Black.

In the time period prior to Katrina, I got interested in Section 8 housing. I already owned rental property and I thought I might deliberately build some houses to place in the Section 8 Program. So I started investigating the Section 8 market. The way I would do this – some landlords will rent to tenants whose rent is paid by Section 8 and some won't. The ones that will take Section 8 tenants will say so in their ads. So I would get up early, read the ads for

rental property, and then drive around town visiting the houses and apartments that were advertized as available to Section 8 tenants. I looked at a lot of Section 8 property, a cross-section of the Section 8 homes in the City. I wouldn't talk to the people, I would just observe to see who lived in the houses and apartment buildings, what kinds of neighborhoods they were in, what kinds of condition they were in. During this pre-Katrina period, I could see that the people living in Section 8 property were approximately 75% Black. I could see this because I systematically visited the properties around the City and I looked at them. I decided not to get involved in Section 8 but I learned quite a bit about it from personal observation.

There were very few "tax credit" properties in the City of Gulfport prior to Katrina. I personally was aware of only one or two "tax credit" developments pre-Katrina and I don't really know much about their demographics.

When Katrina hit, the housing market was turned topsy turvy because a lot of people lost their homes including a lot of White people. For example, there were a lot of apartment complexes down by the beach that were in predominantly White neighborhoods and were occupied by predominantly White tenants and these people lost their apartments. A lot of Black people lost their homes also, and thousands of people were looking for someplace to live. Rents skyrocketed which made finding a place to live a lot more difficult for a lot of people.

In the aftermath of Katrina, the government provided a lot of subsidies for people who wanted to build residences in the area including investors and developers and, also, subsidies for people who wanted to buy homes. These subsidies included tax deductions (accelerated depreciation for people who would build property and rent at market rates) and tax credits (for people who would agree to build rental property and then hold the rates below market to serve low or moderate income tenants) and a program that gave grants to people of low or moderate incomes who needed help purchasing a home. I spent a lot of time looking into this because I am in the business and my specialty has been affordable housing. I continued to study the market carefully, including the needs and preferences of families in my target demographic (which is, as I said before, families with moderate incomes, not poor but below median). I continued to drive the City regularly to observe what was going on.

In the immediate aftermath of Katrina, the first wave of affordable housing to be constructed in the Gulfport area was FEMA trailer parks – travel trailer type arrangements – and the demographic makeup of the people living in the FEMA parks in Gulfport and its immediate vicinity was roughly 50 percent Black and 50 percent White. My impression is that Blacks were slightly in the majority but it wasn't lopsided like it had been before.

The next wave of affordable housing to be built in Gulfport and its immediate vicinity was Katrina

cottage developments. Going up and down the Gulf Coast area in the vicinity of Gulfport (I live in Biloxi and I don't only build in Gulfport), my impression was that the Katrina cottage developments tended to reflect the racial mix of the surrounding areas. A Katrina cottage development in a White majority area would be White majority, in a Black majority area would be Black majority.

The net effect of all this on the racial makeup of the people looking for subsidized housing was, the racial makeup wasn't as predictably Black as it would have been before Katrina. Four Katrina cottage developments that I am personally familiar with through observation had occupants with a racial breakdown approximately as follows. There was a development off Highway 49 which was White majority (approximately 60% White, approximately 40% Black), a development on 28th Street which was approximately 80% Black and approximately 20% White), a development near Switzer was approximately 50% White and approximately 50% Black, and a Katrina cottage development at Memorial on Broad, in a predominantly Black neighborhood, was approximately 65% Black.

I was completing one of my developments in Gulfport during this time period (Fairfield Phase III) and I wanted to market the houses to people who were applying for grants. I had brochures printed up. People who wanted grants had to line up to apply in person. Around April 2008, I went to the place where grant applications were going to be taken, just before

opening, so I could pass out brochures to everyone in line. There was a long line and the people in line were 80% Black. I passed out my brochures. When I sold the houses in Fairfield III, which sold in the range of $130,000 to $ 160,000, the buyers were approximately 60% Black and approximately 40% White.

The next wave of affordable housing was expected to be the so-called MEMA cottages or Mississippi cottages. There was a lot of publicity about these cottages and I looked into them to see what the opportunities were. I went as far as actually meeting with the man who owned the company that designed the homes which were used as prototypes for the MEMA cottages. Sadly, he was killed in a car accident after leaving my house. These MEMA cottages were a step up from Katrina cottages. They were well built to storm resistant standards, and they were small but very efficiently planned with good use of space. To my way of thinking, MEMA cottages were desirable homes.

I could see that MEMA cottages had characteristics which would make them particularly attractive to Black families. What I mean by this is as follows. As already explained above, I study my target demographic carefully to learn their needs and preferences. This is necessary for me to make my living as a builder. Also, I am a landlord. I own a fair amount of residential property which I rent out. I know from my experience that Black families in the Gulfport area are frequently organized in a way that's slightly different from White families. White families tend to

live in single family units. Black families tend to include members of their extended families as part of their household and they tend to have more kids living in a single household. This is clearly evident in my target demographic and, from what I've observed, this difference between Black and White families tends to be true across the economic spectrum in Gulfport. What this means, in terms of Black families as customers, is that Black families with limited means will tend to choose a small house with a yard in preference to an apartment if the house is affordable, whereas White families are more ready to consider apartments.

However, MEMA cottage developments were not accepted in Gulfport. What had happened was, the people in Gulfport had turned somewhat against subsidized housing, especially FEMA trailer or Katrina cottage type developments. There was a large Katrina cottage park in the City of Gulfport behind Williamsburg Subdivision. The Katrina Cottage Park was a Black majority development in a White majority neighborhood. Unfortunately, this particular development was troubled with serious crime issues. There was a lot of negative publicity. People looked down on Katrina cottages and anything they saw as being in the same category including MEMA cottages. I know from my own observation that there have been few or no MEMA cottages placed in the City of Gulfport. Cottage developments fell out of favor.

I was very familiar with the FEMA Park behind Williamsburg because I owned five rental houses in

the immediate vicinity of this FEMA park, two right on the fence dividing the subdivision from the park. In fact, I rented one of these two houses to my attorney, who lost his home, and I would see the park every time I visited my attorney. I saw and heard how people in the neighborhood were reacting to the problems at the park behind Williamsburg. They were not happy about the situation.

This is the environment in which the 781 Group was trying to develop its property. The 781 Group tract is located just outside City limits. I am extremely familiar with this neighborhood. The 781 Group tract is approximately 100 yards from the Roundhill tract. I studied this neighborhood with special care before L & F Homes purchased the Roundhill property. I have continued to study the neighborhood since that date because I am currently constructing and selling houses in this area.

This neighborhood is predominantly White, but it has features that make it attractive to Black families. The 781 Group's site is within walking distance of the Sportsplex and Water Park, which is inexpensive and great entertainment for kids in the summer, and, as noted above, Black families in the low to moderate income demographic find this appealing because they tend to have a lot of kids in a single household and this location would be good for their kids. In addition, the 781 Group's proposed MEMA cottage development would be particularly attractive to Black families because, as explained above, Black families tend to prefer small affordable houses rather

than apartments. Also, while it can be difficult to persuade Whites to move to Black majority neighborhoods, Black families for the most part appear to be comfortable moving into White majority neighborhoods. In addition, the population looking for rental property in the Gulfport area includes a substantially higher percentage of Black people than the population looking to purchase property. The 781 Group development would be a rental development and this feature would also tend to bring in Black occupants. My assessment at the time the 781 Group uproar began was that the 781 Group's development, if constructed, would be occupied by tenants who were 60% Black or higher, probably higher.

My experience in the area since that time has confirmed my original assessment. The fact that this neighborhood is appealing to Black families is reflected in the traffic I've been getting at Roundhill since we started building in March 2011 (by traffic, I mean people coming to look at homes). We keep a very close eye on traffic because it is important to us to watch the market. I want to make sure we are hitting our market in terms of product and price range. The traffic at Roundhill has been approximately 60% Black since we started building in spring 2011 and this percentage has been steady since spring 2011. However, the houses we built are priced at a level that a lot of Black purchasers do not qualify for loans and, as a result, we've been selling to a demographic that is not tilted Black. We've had thirteen families attempt to close on houses and have sold to nine: 5

White purchasers, 2 Black purchasers, 1 Hispanic, 1 Asian and 4 Black families who attempted to purchase but were unable to qualify for loans. The demographic we are selling to is, therefore, approximately the same demographic as in the City at large which is about what I expected. We are getting a lot of inquiries from Black viewers as to whether we would be willing to rent the homes, do a lease purchase, or do some other type of financing that would help them get into the homes.

What this tells me is that Black families are very interested in moving into this area. The people who did not qualify financially for the homes in our development, the ones who tried to buy but could not get loans and the ones who are inquiring about rental and lease purchase, would have been candidates for the 781 Group development if it had been built, since the 781 Group housing was going to be subsidized rental housing which would make it suitable for the Black families who want to be in the area but cannot afford Roundhill. This would have tilted the 78 1 Group toward serving a Black demographic. Also, the population looking for rental property in the Gulfport area tends to include a higher percentage of Black people than the population looking to purchase property. So if the traffic looking to purchase at Roundhill is 60% Black, this points to the conclusion that the group of people looking to become tenants at the 78 1 Group site, if the MEMA cottage development had been built, would be more than 60% Black.

To sum up, if the 781 Group development had been built in fall 2009, the demographic breakdown of the tenants would have been Black majority (60% Black or greater) although with a substantial White minority. The City of Gulfport as a whole was and is majority White and the neighborhood in which the 781 Group development would have been located was and is majority White.

I, Larry Mitrenga, declare under penalty of perjury that the foregoing is true and correct. Executed on [May 4, 2012].

[/s Larry Mitrenga]
Larry Mitrenga

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA PLAINTIFFS

v. CIVIL ACTION NO.:1:10CV387HSO-JMR

CITY OF GULFPORT, MISSISSIPPI DEFENDANT

TABLE OF EXHIBITS – CROSS-REFERENCED

This is not a complete table of all pertinent documents but may be helpful in locating key documents.

FEDERAL DOCUMENT NUMBER – DESCRIPTION

DEPOSITIONS (COMPLETE COPY OF EACH DEPOSITION)

620-29 through 620-47

781 GROUP

620-6 will serve letter (2-1-08)

620-52 Mr. Riemann's testimony at 781 Group preliminary injunction hearing (November 2009)

620-51 partial transcript of testimony of other witnesses at 781 Group preliminary injunction hearing (November 2009)

620-49 May 20, 2010 hearing before Harrison County Planning and Zoning Commission

620-47 June 18, 2010 hearing before Harrison County P & Z

620-40 June 24, 2010 hearing before Harrison County P & Z

ROUNDHILL – 2006

620-2 "will serve" letter (3-14-06)

620-7 Heinrich affidavit describing design and installation of water system

635-1 Wastewater Service Agreement and will serve letter as these documents appear in sequence in City Council minutes

668-2 12-18-06 letter from City (Mr. Powell) to Mr. Pahlavan approving design of Roundhill water system design Roundhill water system design

ROUNDHILL – 2007

620-8 Ladner email

620-46 Ladner deposition

620-7 Heinrich affidavit page 2 – observations indicating water system active, connected to pressurized water source

641-27 Cavanaugh affidavit

620-9 Mitrenga affidavit and photographs

641-18 SouthWest Water subpoena response

641-16 Utility Partners subpoena response

641-17 Utility Partners subpoena response – 2nd letter

ROUNDHILL – 2009-2010

1-2 notice of claim

10-1 verification of notice of claim

620-11 Elrod affidavit

620-12 punch lists

601-1 February 22, 2010 denial of water service (also 620-13)

641-25 emails re hearing

10-2 GH to GS

10-3 LM to RD

ROUNDHILL – 2011

641-24 June 8, 2011 injunction prohibiting use of HCUA water line

MR. ELLIOTT

601-3 January 29, 2010 letter to Kris Riemann

601-4 January 8, 2010 letter to Mr. Schwartz
January 26, 2010 letter to Mr. Schwartz

601-12 January 2012 report (verified, 601-12 page 18)

601-16 March 21, 2012 affidavit

601-17 March 21, 2012 supplementary report (verified, 601-12 page 18)

601-6 Engineering ethics regarding public safety issues

TESTING – 2010

601-7 March 19, 2010 Mr. Kelly's letter to 781 Group stating that City has fully tested the water lines for obstruction or closed valve and there is no possibility that reduced fire flow is caused by obstruction or closed valve

68-3 pp. 17-22 (also Exhibit 4 appended hereto) 781 Group's state court motion to compel the City to allow inspection and testing of the water line, filed in April 2010

641-23 plaintiffs' request for permission to inspect and test the water line, emailed in April 2010

620-26 letters and emails requesting opportunity to test water system

641-26 October 8, 2010 letter requesting opportunity to test and inspect water system

TESTING – 2011

601-10 plaintiff's proposed testing protocol

601-11 defense response to plaintiff's proposed testing protocol.

601-5 Mr. Elliott's 7-14-11 affidavit explaining his reasons for wanting to test as per plaintiff's protocol (also 620-24)

196 defense memorandum in opposition to plaintiffs' motion to compel testing, explaining why testing should not be permitted

340 Judge Roper's order compelling defendant to permit testing

346 Judge Roper's supplementary order compelling defendant to permit testing

TESTING – MARCH 2012

601-14 emails regarding tests

601-15 BW to GH 3-15-12 re test

601-16 March 21, 2012 Elliott affidavit re request for permission to test fire flow after opening of gate valve

ENGLISH MANOR

620-5 will serve letter

AFFIDAVITS, CORRESPONDENCE, AND MEMORANDA BY CITY REPRESENTATIVES EXPLAINING DECISION TO DENY WATER SERVICE

601-7 March 19, 2010 Mr. Kelly's letter to 781 Group stating that lines had been fully tested for obstruction or closed valve and there was no obstruction or closed valve

601-2 The September 2010 affidavits and the April 2011 D'Aquilla affidavit

196 (incorporated by reference) defense memorandum explaining configuration of Landon Road water line makes it impossible for line to supply fire flow in excess of 1000 gpm

CITY COUNCIL VOTE ON DUANY PLAN

641-21 City votes to adopt part of Duany Plan, does not adopt portion relating to Roundhill area

FIRE FLOW – SEARCH FOR DOCUMENTS REFLECTING 2009/2010 TESTS

620-15 Ordinance 2501

641-52 2003 IFC Standards

641-53 2003 IFC Standards

641-57 2003 IFC Standards

620-17 fire flow tests (incomplete set)

641-4 Excerpt from City's discovery responses

641-5 follow up email requesting search for missing tests

641-6 follow up email requesting search for missing tests

DOCUMENTS RELATING TO TAX CREDIT DEVELOPMENTS

620-19 Schloegel letter

620-20 minutes/resolution imposing restrictions on tax credit developers

620-21 approval conditioned upon developer required to sign written agreement not to construct tax credit development

620-22 developer promises not to construct tax credit development

620-23 ordinance imposing restrictions on tax credit developments

PROCEDURAL DUE PROCESS

641-25 emails re hearing

10-2 GH to GS

10-3 LM to RD

620-28 certified letter requesting hearing before City Council

10-7 bill of exceptions filed in state court

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

L & F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES and LARRY MITRENGA — PLAINTIFFS

v. CIVIL ACTION NO.:1:10CV387HSO-JMR

CITY OF GULFPORT, MISSISSIPPI — DEFENDANT

PLAINTIFFS' EXHIBIT LIST IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT (DUE PROCESS) – PART 1 OF 2 PARTS

To avoid unnecessary duplication, plaintiffs incorporate by reference the other two partial summary judgment motions filed by plaintiffs herein (accuracy of explanation, equal protection) as well as the memoranda and all exhibits appended thereto.

This exhibit list consists of two parts: part 1, specific documents and key deposition experts [sic], identified as Exhibits A, B, C, etc.

Part 2 consists of a complete copy of every deposition taken in this matter identified as DEPO A, DEPO B, etc., in case having a complete deposition turns out to be useful to this Honorable Court.

This is Part 1 of 2.

A. Document 76-3 "will serve" letter;

B. Excerpt from City's November 1, 2011 30(b)(6) deposition (Kris Riemann testifying as representative of the City (deposition pages)

C. Excerpt from City's March 26, 2012 supplementary 30(b)(6) deposition (Kris Riemann testifying as witness) (deposition page 49)

D. English Manor "will serve" letter;

E. 781 Group "will serve" letter issued February 1, 2008;

F. Heinrich affidavit;

G. Ladner email;

H. Mitrenga affidavit; (Attachment: photograph of water meter);

I. Excerpt from Kris Riemann's testimony at the 781 Group preliminary injunction hearing in November 2009

J. Elrod affidavit;

K. Punch lists;

L. February 22, 2010 denial of service;

M. Water Service bill of rights;

N. City ordinance of November 1, 2006 adopting 2003 IFC standards;

L&F HOMES AND DEVELOPMENT, LLC d/b/a HYNEMAN HOMES AND LARRY MITRENGA
V.
CITY OF GULFPORT

DEPOSITIONS

EXHIBIT	DATE	DEPONENT	Job Title
DEPO A.	10/31/11 @9:07AM	30b6 of L&F Homes and Larry Mitrenga	
DEPO B.	11/1/11 @9:16AM	30b6 of City – David D'Aquilla	
DEPO C.	11/1/11 @10:17AM	30b6 of City – Robert K. Riemann	
DEPO D.	11/3/11 @9:07AM	Patrick Sullivan	Harrison County fire chief
DEPO E.	11/3/11 @10:50AM	William Powell	Former City Engineer
DEPO F.	11/22/11 @9:16AM	Ben E Wolfe, Jr.	Former City Public Works director
DEPO G.	11/28/11 @9:05AM	30b6 of County – Patrick Bonck	
DEPO H.	11/28/11 @11:05AM	30b6 of County – Kelvin Jackson	

DEPO I.	12/19/11 @1:38PM	30b6 of County – Daniel Boudreaux	
DEPO J.	12/19/11 @2:59PM	30b6 of County – William Faulk	
DEPO K.	12/19/11 @3:26PM	30b6 of County – George Mixon	
DEPO L.	11/29/11 @9:02AM	Wayne Miller	Assistant City Engineer
DEPO M.	12/13/11 @9:12AM	Ricky Dombrowski	Gulfport City Counsel
DEPO N.	12/19/11 @9:00AM	Melvin Bullock	Former City employee
DEPO O.	1/5/12 @3:02PM	30b6 of Andersen-Wells, LLC	
DEPO P.	3/20/12	David Ball	City's Expert
DEPO Q.	3/21/2012 1:05:00 PM	30(b)(6) Of Fire Systems, LLC, – Samuel John Frazier	
DEPO R.	3/26/2012 9:01:00 AM	Sara Ladner	Water Department Former SWW
DEPO S.	3/26/2012 10:03:00 AM	30b6 of City – Robert K. Riemann	