Owens, David W.

from: **Owens, David W.** SOG.UNC.edu

to: L. A. Tony Kovach at MHProNews/MHLivingNews

cc: Scott Dixon at DAGLawyers.com

date: Sep 10, 2021, 3:48 PM

subject: RE: David Owen, media outreach for comment about Ayden Racial Bias and Manufactured Housing Placement Controversy - DBN

Mr. Kovach,

The School of Government provides nonpartisan, nonadvocacy information and education. We are not advocates for policy positions, but rather seek to provide unbiased analysis and education. Our role is not to advise local governments and their staff and officials as to what the law should be, but rather provide our best assessment of what the law is.

The query I had from Mr. Dixon was simply whether in my view federal law preempted a local zoning regulation as to where within a city manufactured housing can be located. My assessment is that federal law preempts local or state construction standards for manufactured housing. It does not preempt local locational standards, even with the 2000 amendments to the law. A local government may, for legitimate land use considerations, allow manufactured housing in some zoning districts while prohibiting their placement in other zoning districts. I have attached an excerpt from the 2020 edition of my book, Land Use Law in North Carolina, that sets out the state statute and the state and federal case law that is the foundation for this assessment. You may of course disagree with this assessment, but that is the way the law has consistently been viewed in this state by our legislature, the courts, and local governments for the past several decades.

Racial and ethnic discrimination is indeed illegal, but that is a different question from the scope of the federal preemption for manufactured housing as is set out in the current law.

David W. Owens
Professor of Public Law and Government
School of Government
The University of North Carolina at Chapel Hill
CB 3330, Knapp-Sanders Building
Chapel Hill, N.C. 27599-3330

The following was the document provided by David Owen, which may look impressive for the uninformed. But the reason that this is arguably little more than a head fake is this. All of the relevant legal references are to cases prior to the passage of the Manufactured Housing Improvement Act of 2000 (MHIA). For that reason, it is inapplicable. See the postscript in the report linked below for more.

Link

Excerpt from document provided to MHProNews David W. Owens, Land Use Law in North Carolina (3d ed., 2020)

Manufactured and Modular Housing

Manufactured housing is an important component in North Carolina's overall housing market. Mobile homes account for about 13 percent of the state's housing stock.[1] Despite the importance and widespread use of manufactured housing, there has been some degree of citizen antipathy toward mobile homes.[2] Many local governments in North Carolina have long included special restrictions on manufactured housing in their development regulations.[3] By 1960, a familiar land use–regulatory approach for manufactured housing had emerged: manufactured-home-park standards, floating zoning

1. Am. Cmty. Survey, Physical Housing Characteristics for Occupied Housing Units: 2011–2015 American Community Survey 5-Year Estimates, Census.gov (2015), http://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t (data retrieved by specifying dataset as "2015 ACS 5-year estimates"; selecting "topic or data name" field and entering "physical housing characteristics for occupied housing units"; and entering "north carolina" in the "state, county, or place" field before searching). In some North Carolina counties, mobile homes are nearly a third of the housing stock. In 2010 the census reported 604,286 mobile homes and a total of 4,327,528 homes (14 percent). In 2000, over 16 percent of the state's housing units were manufactured homes (577,323 mobile homes of a total 3,523,944 housing units in the state). The comparable figure in 1970 was 98,474 mobile homes and an overall total of 1,641,222 (6 percent). Estimates were that 6.5 percent of the national housing stock were manufactured units in 2011. U.S. Bureau of the Census, American Housing Survey for the United States: 2011, at 3–4 (2013).

2. Noting that there had been some improvement in attitudes toward mobile homes in the previous decade, one author reported in 1971 that, according to a national survey of planning officials, 82 percent of planning officials had a favorable view of mobile homes as housing, compared to 64 percent for planning boards, 54 percent for elected boards, and only 20 percent for the public at large. The same national survey reported that 28 percent of surveyed jurisdictions prohibited mobile-home parks, while another 13 percent limited them to industrial areas. Frederick H. Bair, Mobile Homes Are Here to Stay, Popular Gov't, Apr. 1971, at 20, 22.

3. See, e.g., City of Raleigh v. Morand, 247 N.C. 363, 100 S.E.2d 870 (1957), appeal dismissed, 357 U.S. 343 (1958) (upholding ordinance prohibiting trailer parks within residential districts in the city's one-mile extraterritorial area). One of the earlier North Carolina ordinances on the subject was adopted when mobile homes were in fact mobile. The City of Durham amended its zoning ordinance in 1949 to "put an end to the indiscriminate parking of the portable dwellings within the city limits," requiring all inhabitable mobile units to be located in trailer parks. Trailer Camps, Popular Gov't, Dec. 1949, at 4.

districts for manufactured-housing parks, special use permits for manufactured-home placement, and standards on buffers and other aspects of the design of manufactured-home parks.[4]

State law allows local governments to regulate the location, appearance, and dimensions of manufactured housing but prohibits the total exclusion of manufactured housing from a jurisdiction. These restrictions are generally applied to units constructed in a factory and built to the uniform national standards for manufactured homes promulgated by the U.S. Department of Housing and Urban Development.[5] Federal law preempts local construction and safety standards for manufactured housing.[6]

Many zoning ordinances establish subcategories of manufactured housing and apply differential standards to each (e.g., Class A manufactured homes are allowed in some districts, Class B in other districts).[7] Any such distinction must have a rational basis. Typical distinctions that are used are those based on the size of the units[8] or the construction standards in effect at the time of manufacture.[9]

---

4. Philip P. Green, Jr., Regulating Mobile Homes Through Zoning, Popular Gov't, Mar. 1961, at 10. See also Michael B. Brough, Legal Constraints upon the Regulation of Mobile Homes, Popular Gov't, Summer 1975, at 20; Michael B. Brough, State Laws and the Regulation of Mobile Homes, Popular Gov't, Summer 1975, at 12.

5. National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401–5426. Federal construction and safety standards preempt the construction and safety-standard authority of states and local governments. 42 U.S.C. § 5403(d). The federal construction standards, generally referred to as the HUD Code, are at 42 C.F.R. § 3280.1. See generally Schanzenbach v. Town of Opal, 706 F.3d 1269 (10th Cir. 2013) (ten-year age limit for manufactured homes in local ordinance not preempted); Schanzenbach v. Town of La Barge, 706 F.3d 1277 (10th Cir. 2013) (ten-year age limit not preempted); Ga. Manufactured Hous. Ass'n v. Spalding Cty., 148 F.3d 1304, 1306 (11th Cir. 1998) (roof-pitch requirement not preempted); Tex. Manufactured Hous. Ass'n v. City of Nederland, 101 F.3d 1095 (5th Cir. 1996), cert. denied, 521 U.S. 1112 (1997) (city restriction on location of manufactured housing not preempted); Scurlock v. City of Lynn Haven, 858 F.2d 1521 (11th Cir. 1988) (local building and electrical-code requirements preempted); Colo. Manufactured Hous. Ass'n v. Bd. of Cty. Comm'rs, 946 F. Supp. 1539 (D. Colo. 1996), later proceeding sub nom. Colo. Manufactured Hous. Ass'n v. City of Salida, 977 F. Supp. 1080 (D. Colo. 1997) (ordinance requiring manufactured home to comply with building code preempted).

6. See generally Daniel R. Mandelker, Zoning Barriers to Manufactured Housing, 48 Urb. Law. 233 (2016); S. Mark White, State and Federal Planning Legislation and Manufactured Housing: New Opportunities for Affordable, Single-Family Shelter, 28 Urb. Law. 263 (1996).

7. See N.C. League of Municipalities et al., Manufactured Housing: Zoning Alternatives to Address North Carolina Housing Needs (1988) for an example of such classification.

8. For example, many ordinances have more restrictive locational standards for single-wide units than for double-wide units.

9. The most commonly used distinction is to have more restrictive requirements for those units constructed before the imposition of federal minimum construction standards that became effective on

Cities and counties may not employ factors other than appearance, dimension, and location in land use regulation of manufactured housing. The court in *White v. Union County*[10] reviewed an ordinance that limited the use of mobile homes as residences to those built after 1976 (when federal construction standards became applicable) or valued at more than $5000. The court expressed doubt about the county's statutory authority for the monetary-value requirement. In *Five C's, Inc. v. County of Pasquotank*, the court invalidated an age standard used as the basis for regulation of manufactured homes. The county had adopted an ordinance under its general police power to prohibit bringing manufactured homes into the county that were more than ten years old at the time of setup. The rationale offered by the county was protection of the county tax base, noting that manufactured homes rapidly decline in value and at the ten-year point have little more value than a motor vehicle, providing insufficient tax revenue to support the need for county services generated. The court held that G.S. 160D-910 [160A-383.1] limits regulation of manufactured housing to appearance and dimensional criteria and thus prohibits regulation based solely on the age or value of the unit.[11] G.S. 160D-910 was amended in 2019 to codify this restriction on exclusion of manufactured homes based on the age of the home.[12]

It is also common for local governments to have detailed standards for mobile-home parks, such as standards for road width and paving, minimum lot sizes, and provisions for waste disposal. These are sometimes incorporated into a zoning ordinance and sometimes adopted as a separate ordinance.[13]

G.S. 160D-910 [160A-383.1], which was added to the statutes in 1987,[14] directs local governments to consider allocating more land to manufactured-housing sites as a way of providing additional affordable housing in the state. Under the statute, local governments may regulate the location, the appearance,

---

June 15, 1976. Housing and Urban Development standards for wind load were substantially updated after Hurricane Andrew, with an effective date of July 13, 1994.

10. 93 N.C. App. 148, 377 S.E.2d 93 (1989).

11. 195 N.C. App. 410, 672 S.E.2d 737 (2009). The court noted that the fact that the county used its general ordinance-making power rather than the zoning power cannot be used to circumvent the clear legislative limitation on regulatory authority regarding manufactured homes.

12. S.L. 2019-111. While a restriction based on the age of the unit per se is impermissible, a local government can require that the unit be built to a particular federal standard, such as the original enactment of federal construction standards or a substantial modification of those standards. See footnote 135, above. Local governments often also adopt housing codes that regulate the habitability and condition of manufactured homes used as residences. These codes apply regardless of the age of the unit. Also, G.S. 130A-309.111 to .117 establishes a state grant and assistance program to assist local governments in dealing with abandoned manufactured homes.

13. A 2005 survey by the School indicated that 79 percent of the responding municipalities and 93 percent of the responding counties had adopted regulations on manufactured-home parks. Owens & Branscome, supra note 107, at 8.

14. S.L. 1987-805.

and the dimensions of manufactured homes but may not exclude such homes entirely from their zoning jurisdictions.[15]

Typical zoning requirements that have been adopted in North Carolina include limiting manufactured housing to specified zoning districts[16] or to manufactured-home parks[17] (which often can be located only in special overlay zoning districts).[18] Other ordinances only allow units of at least a certain size to be located in specified districts.[19] It is also common for ordinances to include special provisions regarding replacement and repair of nonconforming manufactured-housing units.[20]

---

15. In Town of Conover v. Jolly, 277 N.C. 439, 177 S.E.2d 879 (1970), the court invalidated an ordinance that completely barred mobile homes for residential use within the town. The court ruled that the mobile-home ordinance, which was not part of the zoning ordinance, was beyond the town's delegated police powers, for mobile homes were neither a nuisance per se nor a detriment per se to public health, morals, comfort, safety, convenience, or welfare.

16. Koontz v. Davidson Cty. Bd. of Adjustment, 130 N.C. App. 479, 503 S.E.2d 108, review denied, 349 N.C. 529, 526 S.E.2d 177 (1998) (upholding zoning amendment that removed manufactured housing as a permitted use in a particular zoning district); City of Asheboro v. Auman, 26 N.C. App. 87, 214 S.E.2d 621, cert. denied, 288 N.C. 239, 217 S.E.2d 663 (1975) (upholding injunction to prohibit continued use of a mobile home that had been moved into a zoning district that did not allow mobile homes, even though the wheels and tongue had been removed and the unit had been placed on a permanent foundation); Town of Mount Olive v. Price, 20 N.C. App. 302, 201 S.E.2d 362 (1973) (upholding injunction compelling removal of a mobile home located in violation of the zoning ordinance).

17. Cty. of Currituck v. Upton, 19 N.C. App. 45, 197 S.E.2d 883 (1973) (upholding an order to remove a mobile home from a zoning district that did not permit individual units outside a park); State v. Martin, 7 N.C. App. 18, 171 S.E.2d 115 (1969) (upholding conviction for violation of an Ahoskie ordinance limiting the location of mobile homes to mobile-home parks). See also Tex. Manufactured Hous. Ass'n v. City of Nederland, 101 F.3d 1095 (5th Cir. 1996), cert. denied, 521 U.S. 1112 (1997) (upholding prohibition of "trailer coaches" that meet Housing and Urban Development standards from locations outside of approved parks).

18. The creation of a zoning district to allow location of manufactured-home parks can be challenged as unlawful spot zoning. See Alderman v. Chatham Cty., 89 N.C. App. 610, 366 S.E.2d 885, review denied, 323 N.C. 171, 373 S.E.2d 103 (1988); Stutts v. Swaim, 30 N.C. App. 611, 228 S.E.2d 750, review denied, 291 N.C. 178, 229 S.E.2d 692 (1976). See Chapter 12 for a discussion of spot zoning.

19. Currituck Cty. v. Willey, 46 N.C. App. 835, 266 S.E.2d 52, review denied, 301 N.C. 234, 283 S.E.2d 131 (1980). In this case the court upheld a provision prohibiting mobile homes with dimensions of less than 24' × 60' in a single-family zoning district. The court ruled that mobile homes were sufficiently different from other types of housing that a rational basis existed for differing requirements, such as this dimension standard.

20. See, e.g., Forsyth Cty. v. York, 19 N.C. App. 361, 198 S.E.2d 770, cert. denied, 284 N.C. 253, 200 S.E.2d 653 (1973) (upholding requirement that changes in nonconforming use and mobile-home use in certain districts be authorized by special use permits). Care is necessary in drafting the precise terms of

Many ordinances also include various appearance standards to integrate the units aesthetically into surrounding neighborhoods with site-built homes. These standards typically include requiring a pitched roof, requiring either skirting around the underside of the unit or location on a permanent foundation, and orienting the unit to the front of the lot. Such appearance standards were upheld in *CMH Manufacturing, Inc. v. Catawba County*. The county required lap siding, minimum roof pitch, and shingled roofs for single-wide manufactured homes. Other county requirements that were not challenged included installation of a deck or porch, removal or screening of travel hitches, orientation on the lot, and brick underpinning or skirting for double-wide units. The court held that these were permissible "appearance" standards rather than "construction and safety" standards that are preempted by federal law.[21]

Regulations on manufactured housing may not be based on the ownership of the unit, for example, allowing owner-occupied but not rental manufactured housing.[22] Nor may zoning restrictions be based on the "type of people" presumed to be residing therein.[23] Only legitimate land use–related factors may be considered in framing such regulations.

Most zoning ordinances do not apply the requirements for manufactured housing to factory-built housing that is built to State Building Code standards.[24] The latter units are referred to as "modular"

---

such limitations. See In re Hensley, 98 N.C. App. 408, 390 S.E.2d 727 (1990), a case involving the Town of Cramerton's zoning ordinance. The court ruled that where the ordinance provided that a nonconforming use might not be reestablished after it had been discontinued for 180 days, a nonconforming use could be reestablished if done in less than that time. In this instance, a mobile home had been removed from a lot in a zone that did not allow mobile homes; however, the petitioner was entitled to a permit to replace the mobile home if that were done within 180 days. By contrast, in Williams v. Town of Spencer, 129 N.C. App. 828, 500 S.E.2d 473 (1998), the court upheld an ordinance provision explicitly prohibiting replacement of units on vacated lots in a nonconforming manufactured-home park.

21. 994 F. Supp. 697 (W.D.N.C. 1998). The court further held that the challenged standards did not violate the commerce, due-process, or equal-protection clauses. See also Ga. Manufactured Hous. Ass'n v. Spalding Cty., 148 F.3d 1304 (11th Cir. 1998) (holding roof-pitch requirement for manufactured housing a permissible aesthetic regulation rather than a preempted construction standard); King v. City of Bainbridge, 276 Ga. 484, 577 S.E.2d 772 (2003) (ordinance restricting location of manufactured housing not preempted); Bibco Corp. v. City of Sumter, 332 S.C. 45, 504 S.E.2d 112 (1998) (locational restricting of manufactured housing not preempted).

22. Graham Court Assocs. v. Town Council of Chapel Hill, 53 N.C. App. 543, 281 S.E.2d 418 (1981).

23. Gregory v. Cty. of Harnett, 128 N.C. App. 161, 493 S.E.2d 786 (1997). See Chapter 25 for discussion of legitimate objectives for development regulation.

24. Duggins v. Town of Walnut Cove, 63 N.C. App. 684, 306 S.E.2d 186, review denied, 309 N.C. 819, 310 S.E.2d 348 (1983), cert. denied, 466 U.S. 946 (1984). The ordinance prohibited a "mobile home" in a residential zoning district but allowed "modular" and site-built homes of similar dimensions to be used. The court upheld the ordinance as validly regulating the location of various types of structures, ruling that given the presumption of validity, the city had only to establish that the ordinance was rationally

rather than “manufactured” homes. Modular units[25] are often, but not always, treated as the equivalent of site-built homes for zoning purposes. State law does, however, set minimum design standards for modular units.[26] G.S. 143-139.1 requires modular units to meet these standards:

- The pitch of the roof must be no less than five feet of rise for every twelve feet of run for homes with a single, predominant roofline.
- The eave projections of the roof must not be less than ten inches (excluding roof gutters) unless the roof pitch is 8:12 or greater.
- The minimum height of the first-story exterior wall must be at least seven feet, six inches.
- The materials and texture of exterior materials must be compatible in composition, appearance, and durability to the exterior materials commonly used in standard residential construction.
- The modular home must be designed to require foundation supports around the perimeter.

There has also been considerable litigation in the state regarding the interpretation of private-restrictive-covenant provisions related to manufactured housing.[27] However, these covenants are

---

related to any legitimate government objective. The protection of property values was such a legitimate objective, and the council could determine that the method of construction affected the price of homes.

25. G.S. 160D-911. G.S. 105-164.3(21b) provides that a modular unit is a “factory-built structure that is designed to be used as a dwelling, is manufactured in accordance with the specifications for modular homes under the North Carolina State Residential Building Code, and bears a seal or label issued by the Department of Insurance pursuant to G.S. 143-139.1.”

26. These provisions were created by S.L. 2003-400.

27. In Young v. Lomax, 122 N.C. App. 385, 470 S.E.2d 80 (1996), there were covenants prohibiting “mobile homes.” The structure involved had two sections, each with a steel chassis, axles, and wheels. The axles and wheels were removed upon installation and the units were secured to concrete piers. The court held that the unit remained a mobile home as a matter of law and was distinguishable from the modular units addressed earlier in Angel v.
Truitt, 108 N.C. App. 679, 424 S.E.2d 660 (1993), wherein the court held that placement of a modular home on a lot did not violate a restrictive covenant prohibiting mobile homes. The court applied the

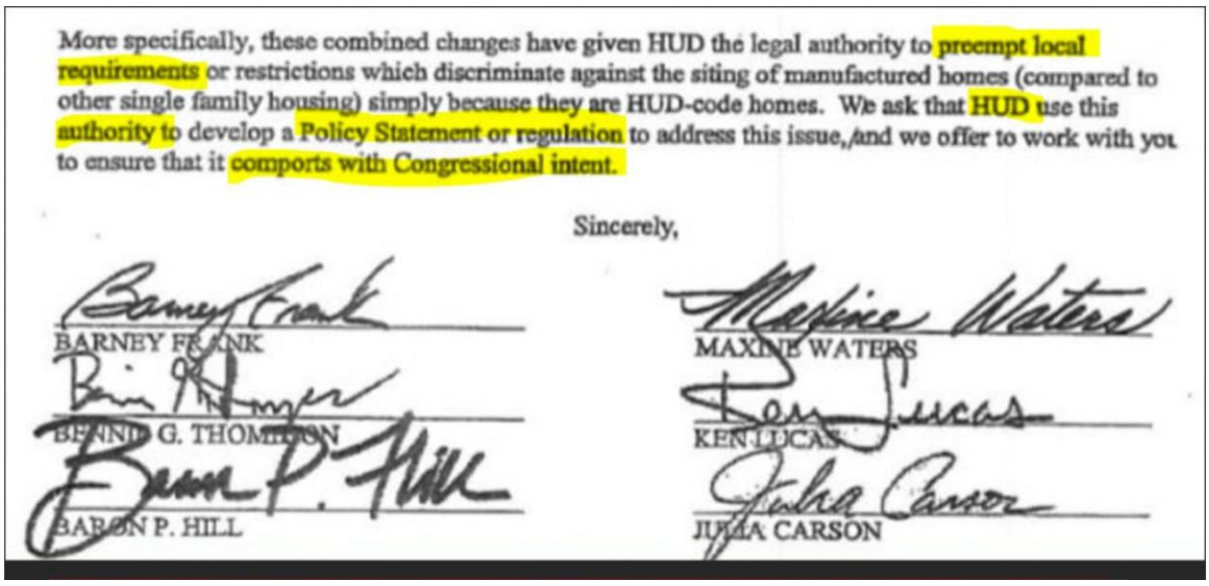
customary definition of mobile homes at the time the covenant was executed, using the dictionary definition of mobile home to mean a house trailer that is hauled by a truck. Since the modular unit involved in the case had no permanent chassis or axles and was placed on a permanent foundation, it was held not to be covered by the prohibition. In Forest Oaks Homeowners Ass'n v. Isenhour, a restrictive covenant prohibited trailers and "mobile homes" but permitted "modular or component homes or pre-built homes" if erected on a permanent foundation. 102 N.C. App. 322, 323, 410 S.E.2d 860, 861 (1991). The court applied the manufactured/modular distinction used in the State Building Code to allow a modular home to be placed on the plaintiff's lot. In Starr v. Thompson, the restrictive covenant at issue prohibited the use of "trailers or mobile homes." 96 N.C. App. 369, 370, 385 S.E.2d 535, 536 (1989). The court held that the restriction applied to a factory-built modular home consisting of two 8' x 40' sections that had been delivered to the site with a permanent chassis with removable axles.

The wheels, axles, and tongue had been removed and the units placed on footings on the site. The court distinguished the definitions that were applicable for zoning from those to be used in enforcing private restrictive covenants. Starr, 96 N.C. App. 369, 385 S.E.2d 535. In Barber v. Dixon, a restrictive covenant prohibited the use of a "structure of a temporary character (including house trailers)." 62 N.C. App. 455, 302 S.E.2d 915, review denied, 309 N.C. 191, 305 S.E.2d 732 (1983). The court held that this prohibited the use of a structure consisting of two units transported to the site, even though the wheels, tongues, and axles had been removed two days after the units had been located on the lot. Barber, 62 N.C. App. 455, 302 S.E.2d 915. In Van Poole v. Messer, a restrictive covenant prohibited temporary structures and trailers. The court held that "trailer" included a mobile home. 19 N.C. App. 70, 198 S.E.2d 106 (1973). The restrictive covenant in Strickland v. Overman, 11 N.C. App. 427, 181 S.E.2d 136 (1971), prohibited trailers and temporary structures, categories that the court held to include a "prefabricated modular unit."

private agreements between the property owners involved. The interpretation, administration, and enforcement of these covenants do not affect government regulations. ##

###

There are several legal reasons why this argument, as impressive as it may look, falls short. Those are explored at length in the postscript of the article linked below.



More specifically, these combined changes have given HUD the legal authority to preempt local requirements or restrictions which discriminate against the siting of manufactured homes (compared to other single family housing) simply because they are HUD-code homes. We ask that HUD use this authority to develop a Policy Statement or regulation to address this issue, and we offer to work with you to ensure that it comports with Congressional intent.

Sincerely,

BARNEY FRANK

MAXINE WATERS

BENNIE G. THOMPSON

KEN LUCAS

BARON P. HILL

JULIA CARSON

"The term "enhancement" is consistent with my view that Congress probably considered the lack of a serious enforcement history of the preemption provision and therefore added language to the [MHIA of] **2000 Act directing HUD to take enforcement of** [enhanced] **preemption more seriously. This has always been my legal opinion."**

William "Bill" Matchneer, J.D.,
Former administrator HUD Office of Manufactured Housing Programs (OMHP)

https://www.manufacturedhomepronews.com/a-factory-built-manufactured-home-as-a-means-to-affordable-housing-washington-post-manufactured-housing-institute-ayden-leader-mewborns-plant-a-home-plus-sunday-weekly-headlines-review

4) HUD Must Implement and Enforce its Enhanced Preemption Authority...

MHI Proposes that HUD shall issue a revised and updated policy statement regarding the Department's position concerning preemption and state and local zoning, planning, or development restrictions that either several limit or outright prohibit manufactured housing."

- Lesli Gooch, Ph.D.
then EVP, now CEO of MHI