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Two Years and Counting: Land Use and Louisiana's Post-Katrina Recovery

John J. Costonis*

I. INTRODUCTION

Louisiana has now passed the second anniversary of the Katrina-Rita onslaught, the most punishing natural disaster in the nation’s history. The severity of the state’s hurricane-driven losses has stimulated unprecedented receptivity to fresh ideas and fresh solutions for problems that the hurricanes mercilessly exposed, but did not create. This report addresses selected legal issues in the state’s land use and coastal management system that will inevitably surface in any post-recovery scenario. The report’s modest but essential goal is to identify why these issues are important, and what legal and structural challenges must be addressed to resolve them.¹

They derive from pre- and post-Katrina sources. The major pre-Katrina source is Louisiana’s land use governance system, which is largely the same today as when its governing statutes were adopted some seventy years ago.² Excepting the latitude

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1. One purpose of this report is to serve as a point of departure for subsequent white papers sponsored by the Louisiana Recovery Authority Support Foundation as well as for the deliberations and February 2008 report of a legislatively created task force. See H.R. Con. Res. 229, Reg. Sess. (La. 2007) (directing the task force to study and advise the Office of State Planning on implementing the recommendations of the Louisiana Speaks Plan); LA. SPEAKS, LA. RECOVERY AUTH., LOUISIANA SPEAKS REGIONAL PLAN: VISION AND STRATEGIES FOR RECOVERY AND GROWTH IN SOUTH LOUISIANA (2007) [hereinafter LOUISIANA SPEAKS PLAN]. It is hoped that the report will also prove useful for the Coastal Protection and Restoration Authority as it takes on the expanded duties assigned it in conjunction with its establishment by Act 8. See 2005 La. Acts No. 8.

2. For a detailed review of the glacial evolution of the state’s land use enabling legislation, see ROD E. EMMER, ANNE RHEAMS, & F. WAGNER,
enjoyed by Louisiana's home rule parishes and cities, Louisiana's current zoning and planning legislation is a child of the era of speakeasies, Huey Long, and Herbert Hoover. Unfortunately, this state of affairs is as much a consequence of Louisiana's ingrained antipathy to planning as it is a cause of the freeze. Absent a reversal of this posture, the path to land use reform will be difficult to navigate.

But dramatic post-Katrina developments signal that the state's policymakers now appreciate that planning conducted within the framework of a well-conceived system of land use law is one of the missing links in the state's recovery program. Driving these developments is the determination to encourage, if not demand a greater role for regional and state engagement in land use decisions

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3. For a discussion of the relationship between local land use powers and the Louisiana Constitution's home rule provisions, see id. at 24–26. A number of Louisiana's home rule cities and parishes have implemented land use measures that substantially outpace their entitlements under the state's general land use enabling legislation.


5. See Stephen D. Villavaso, Planning Enabling Legislation in Louisiana: A Prospective Analysis into the Next Millennium, 48 LOY. L. REV. 229, 250 (2000) (observing that a "vast number of localities have made no allowance for future growth and a number of parishes still do not have any of the most rudimentary of planning tools, such as a land use plan, a zoning map, a zoning ordinance, or, in some cases, subdivision regulations"). Writing eight years earlier on the status of Louisiana's regulation of the destructive impacts on Louisiana's coast of offshore petroleum development, a study team concluded that "planning" was in reality a "reactionary process," and that, beyond federal and state guidelines, "little coordinated planning was actually accomplished and most communities still lacked comprehensive plans and the ability to formulate them." See EMMER, RHEAMS, & WAGNER, supra note 2, at 43. Commenting on the results of its polling of citizens and stakeholders, Louisiana Speaks observed that there was "little faith in major political institutions," and that the "lack of confidence in all levels of the political system posed significant challenges for the planning recovery efforts." LOUISIANA SPEAKS PLAN, supra note 1, app. A at 6 and 23.
of multi-parish significance. This determination undergirds the formation of Louisiana’s Coastal Protection and Restoration Authority (CPRA) and the Louisiana Recovery Authority (LRA), authorship of the CPRA Master Plan and an LRA-affiliated Louisiana Speaks Regional Plan, levee board regionalization and consolidation, and, derivatively, the renewed interest and initiatives of the flood-impacted parishes and cities in upgrading their land use planning and governance practices.

Complementary, sharply contrasting models of regional planning undergird the CPRA and LRA legislation and master plans. The CPRA has been endowed with assets as impressive as those enjoyed by any of the nation’s regional planning bodies: a defined territory, broad regulatory and restoration/flood protection powers, extensive funding, key state development and conservation agency representation on its governing board, and most important, unprecedented public support for its charge to integrate hurricane protection and coastal restoration in its planning, regulatory, and infrastructure location missions.

The CPRA Plan describes its mission as comprehending one of “the largest public works programs our nation has ever undertaken,” and the project itself as one whose costs will run into the “tens of billions of dollars.” “Aggressive state leadership and direction” is pledged, as is the commitment that the “full

8. COASTAL PROTECTION AND RESTORATION AUTH., INTEGRATED ECOSYSTEM RESTORATION AND HURRICANE PROTECTION: LOUISIANA’S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST (2007) [Hereinafter CPRA MASTER PLAN].
9. See generally LOUISIANA SPEAKS PLAN, supra note 1.
10. LA. CONST. art. VI, § 38.
11. These developments are monitored at www.louisianaspeaks.org.
12. Commenting on the results of its citizen and stakeholder polling, Louisiana Speaks observes that the “issue of coastal and wetlands restoration is perhaps the most unifying long-term planning issue of all, as it enjoys near-universal support across the region.” LOUISIANA SPEAKS PLAN, supra note 1, at 16.
13. CPRA MASTER PLAN, supra note 8, at 15.
14. Id. at 92.
police power of the state shall be exercised to meet immediate and compelling necessity."16

To accomplish its expanded mission, the CPRA will need these resources and at least two others. The first is to plug in a planning/land use law module as the third component of a flood protection/coastal conservation/planning law core. Without it, the CPRA’s selection and location of flood protection and restoration projects and parish/municipal land use policies will likely undermine rather than support one another.17 The second is institutionalizing within the CPRA’s leadership and staff structure the confidence and capability to address the difficult land use planning and legal issues that “aggressive state leadership and direction” will require.18

Through its Louisiana Speaks affiliate, the LRA has offered a model of state-to-local land use planning overseen by a revamped Office of State Planning endowed with powers to reinforce CPRA initiatives, to coordinate planning and capital facility endeavors, to provide technical planning assistance at the state, regional, and local governmental levels, and to implement the Louisiana Speaks Regional Plan.19 Implementation of these initiatives will take a different path than the one considered for the CPRA Plan because the LRA is expected to be sun-setting at the time the CPRA is ramping up.20 Louisiana Speaks and its LRA adherents face the burden, therefore, of persuading the legislature to establish a new governmental custodian of the Louisiana Speaks Plan. The legislature’s Concurrent Resolution calling for a task force to study the Plan’s Office of State Planning proposal is a milestone in this effort.21

Many of Louisiana’s coastal parishes and cities have likewise embraced dramatic planning initiatives, as the Louisiana Speaks

17. The risk, if not certainty, of the incompatibility of the two levels of activity is recognized in the CPRA plan. See CPRA MASTER PLAN, supra note 8, at 105.
18. The need for a “structure to support implementation of the Master Plan” is also identified by the CPRA. Id. at 112.
19. See LOUISIANA SPEAKS PLAN, supra note 1, at 79–91.
20. Interview with Sean Reilly, LRA Board Member (April 16, 2007).
website details. Updating their land use powers will assist them in securing their goals. The Louisiana Speaks Plan, which is as much a compendium of current "best practices" in land use affairs as a physical development plan for South Louisiana, affords an excellent point of departure for state legislative consideration.

But the signs are not all positive. A throwback to the state's deep-rooted distrust of government and planning reappeared in a set of 2006 amendments to article I, section 4 of the Louisiana Constitution, which addresses the scope of permissible uncompensated public regulation (the "taking issue") and the conditions governing the state's use of its eminent domain power. The amendments seek to tame the United States' Supreme Court's approval in *Kelo v. City of New London* of eminent-domain based economic development projects.

A reasonable interpretation of their purpose is to achieve the elimination of "economic development" as a public purpose supporting article I, section 4 expropriations, thereby bringing Louisiana in line with the position argued by Justice O'Connor in her *Kelo* dissent. But the amendment's ambiguous language is open to interpretations that could cripple eminent domain's use on behalf of Louisiana's recovery.

Resolution of the land use powers and eminent domain questions will shape the legal and, quite likely, policy framework for Louisiana's post-Katrina land use system for years to come. Confirmation that they merit our attention appeared throughout my interviews with twenty-five public officials and civic leaders.

All agreed that the foremost issue now confronting the recovery effort is the establishment of a land use structure muscular enough to preserve and implement the outcomes envisaged by the CPRA and Louisiana Speaks Plans. Likewise, all were apprehensive that the marriage of pre-Katrina uncertainties

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22. The amendments were presented to and approved by Louisiana voters as Amendments 5 and 6 on September 30, 2006. Act 851 amended article 1, section 4(B)(1)-(6) and article VI, section 21. Act 859 added a new section 4(G)(1)-(4) to article I, section 4. The amendments are discussed *infra* Part III.
24. *Id.* at 494 (O'Connor, J., dissenting).
25. *See infra* Part III.
26. *See infra* app.
over the "taking issue" with the now unsettled status of eminent
domain threatens the evolution of land use measures capable of
meeting Louisiana's recovery needs.

II. REGIONALISM IN LAND USE: ITS VARIANTS AND ITS CHALLENGES

A. Realism About Regionalism

Strategies for reforming outdated land use legislation must
begin with an understanding of how individuals and local
governments behave, not how reformers would like them to
behave. Richard Babcock, my zoning mentor of forty years ago,
upset the reformers of his time on this score with his classical
article, "Let's Stop Romancing Regionalism."27 Dick's thesis—
that so long as legal and political power is anchored at the local
and the state levels, regional values are unlikely to take root—is, I
fear, as valid in Louisiana today as when Dick announced it.

Property owners are loathe to surrender freedom to use their
property as they wish. Local governments jealously guard their
land use powers from intrusion from above. Proposals to shift land
use powers upwards, therefore, must confront both sources of
resistance.

These objections explain the paucity of successful regional
programs throughout the United States. But they seem to have an
even sharper bite in Louisiana. The deep-seated libertarianism of
many of the state's citizens—a throwback perhaps to a time in the
South when the population was largely rural and wealth was
founded predominantly in and from the land—abhors public
restriction of private land use. The profound distrust with which
many Louisianans regard government, the would-be author of
these limitations,28 intensifies this resistance.

In an economically stressed but land-rich and sparsely
populated state eager to attract development, moreover, reluctance
to impose demanding land use restrictions—whether local or
regional—is not surprising. These factors probably help explain
the rudimentary nature of rural Louisiana land use controls. They

27. Richard F. Babcock, Billboards, Glass Houses and the Law 11

28. See supra note 5.
certainly figure in the on-going eleventh-hour scramble of parishes in the St. Tammany to East Baton Rouge quadrant to armor themselves with master plans, zoning, and subdivision ordinances in the face of their sudden urbanization.

Louisiana’s geographic and cultural fragmentation undoubtedly enters the picture as well. The state’s general land use statute is criss-crossed with countless local and special laws designed to tailor generic practices to local taste, custom, and tolerance of land use controls. The patchwork evidences, in turn, the power in the state legislature of local delegations, keen to resist any regional initiative that threatens local control. When addressing such matters, in fact, the legislature often seems more a clamor of local duchies than a body unified in the pursuit of state or regional values.

These obstacles can be overcome, particularly in the auspicious post-Katrina atmosphere that now prevails in Louisiana. But it will not be a walk in the park. I would venture that the elements leading to success are likely to be political leadership, especially from the governor’s office, prudent selection of the powers necessary to implement the regional values, and a strong case, honestly and patiently presented.

B. Land Use Powers and Local Governments

Regionalism adherents often fail to acknowledge that local governments should enjoy broad local land use powers. The fact is that most parish/municipal land use decisions do not address problems rising to the level of regional or state import. In fact, distinguishing between issues of “local” versus “regional” or “state” concern, and leaving the local issues to the locals is the path to legal, no less than to political wisdom. Louisiana is a home rule state whose courts will not respond kindly to legislative intrusions into local affairs.29

Equally important is assessing ways in which regional or state agencies can assist local governments short of preempting local governance through mandates. While sometimes overstated, the claims that local government is closest to those impacted by land

29. See infra Part II.C.4.
use decisions and subject to their wrath (or praise) are both true and worthy. Nor should the healthy role that local determination of a community's land use character plays in nourishing community identity and solidarity be ignored.

But Katrina and Rita demonstrated that regional and state agencies can assist local planning and land use management of local matters without themselves managing or preempting local control. One route is providing or facilitating the provision of funding for such local infrastructure needs as schools, police, and fire stations.

A second is providing the technical assistance required by many Louisiana parishes and smaller communities for the most conventional of truly local land use controls—comprehensive master plans, zoning and subdivision ordinances, and the like. Interviews with regional planning commission directors revealed that despite the "local" focus of these activities, local governments eagerly sought and willingly accepted the assistance that the "regional" commissions provided to them. Local governments often cannot afford planning staffs or other local sources of expertise. Even when both are present, regional observers commented, regional entities often served to untangle political stalemates among local groups that would otherwise block desirable land use programs or actions.

Closely related to the second route is a third in which the technical assistance encourages local governments to adopt "best practices" in their land use systems. Again, "best practices" may cover "local" issues as well as regional matters. Illustrative of this genre of assistance is Louisiana Speaks' goal of aiding local governments to incorporate "smart growth" and "new urbanist" principles in their land use codes, and its proposal that a State Planning Office, along with existing regional planning bodies, undertake a similar function.

30. See LOUISIANA SPEAKS PLAN, supra note 1, at 40–41, 47–76.
31. Id. at 90–91.
C. "Regionalizing" (Some) Land Use Powers and Values: Three Complementary Models

1. The "Regional Dimension" in Land Use Control

When does a land use problem become "regional"?

Two classical formulations define land use's regional dimension in relation to regulation of "areas of critical state concern" (ACSC) and of "developments of regional impact" (DRI). Illustrative of an ACSC is the Florida Everglades, which is as ecologically embattled as Louisiana's coastal areas, and the focus of a restoration program bearing notable parallels to the CPRA program. DRI's include airports and other growth generating mega-projects of the kind eagerly sought for the state by the Department of Economic Development.

This report's working definition of "regional" land use activity, which encompasses ACSC's and DRI's, is one that

a. generates substantial land use impacts that extend beyond the boundaries of a single parish;
b. requires the participation of the state or of political subdivisions beyond the parish alone for balanced and effective management of these impacts; and
c. affects public health, safety and welfare with sufficient intensity to justify the state's direct or delegated use of its police power to mandate the utilization of regional values in management of the activity.32

The CPRA and Louisiana Speaks Plans set forth land use initiatives meeting these criteria. CPRA's coastal restoration and hurricane protection goals are shoo-in candidates. The coastal zone sweeps along and upland from the Gulf from Mississippi to Texas. Absorbing the restoration/protection project costs or engaging in effective and balanced management of this vast area would obviously overwhelm any of the constituent parishes. The intensity of Louisiana's custodial obligations to the region is evident in the briefest sampling of the Plan's goals: protecting area

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32. See infra note 35 for the relationship between this criterion and the risk that indiscriminate regionalization of land use powers may run afoul of home rule units' constitutional immunities.
residents and the coast’s multiple economic assets; nurturing the area’s ecologically stressed fisheries and wildlife habitats; and preserving the unique culture and folklore of the coastal population.\(^{33}\)

The Louisiana Speaks Plan aims for a more diffuse set of regional values. But the Plan’s transportation initiative, which among other elements envisages light rail connections between New Orleans and Baton Rouge, is a model of a “regional” land use initiative. It envisions high-cost, high-impact linear resources the construction of which obviously exceeds the financial or management capabilities of any of the individual parishes through which they cross.

Louisiana policymakers have available no less than three complementary models for implementing regional values which are here labeled the Italian City-State, the Functional, and the Aspirational Models. They find their parallels, respectively, in the Councils of Government, CPRA and Louisiana Speaks formats.

2. The Italian City-State Model: Intergovernmental Cooperation

From the fall of the Roman Empire to the founding of the Italian nation in 1860, “Italy” was an area whose regions were dominated by city-states. The city-states engaged one another either through warfare or cooperative agreements negotiated among sovereigns with occasional oversight of the Holy Roman Emperor or the Pope.

A variant of the city-state model is found today in Louisiana in the use of regional venues afforded by a region’s multi-parish Regional Planning Commission, Metropolitan Planning Organization (MPO), or similar council-of-governments entity. Depending upon the venue, the role of Pope or Emperor might fall to a state development agency such as the Louisiana Department of Transportation and Development in the case of MPO’s. It might also be left vacant, as in the case of the state’s eight regional planning commissions (when not acting as MPO’s).

\(^{33}\) See CPRA MASTER PLAN, supra note 8, at 37–39.
Regional interests enter into the picture principally through negotiations among the region's city- (or parish-) states, if I may, premised on common interests in particular land use policies or projects. Their negotiations are facilitated by the regional organization's staff and representatives of the state agency, who may double as Pope or Emperor if the agreement requires funding or planning approvals provided by that agency, the legislature, or the federal government.

This is lowest common denominator, unromantic regionalism, the kind that calls for negotiations as tough as those between divorcing spouses. But it is one form of regionalism nonetheless. Its downside is the necessity that the agreement be voluntary. There will be desirable regional policies that the city-states will not be prepared to support, and that must be managed, therefore, under other regional models or not at all. Viewed through the prism of Louisiana's localist tradition, however, the model's downside could be its upside. It promises to capture those areas of potential agreement among the city-states that might otherwise go begging, and it is likely to assure that what was agreed to will in fact happen. Purists should not snort at these advantages.

When agreement can be reached, the model is more efficient than other alternatives. Assuming consent to an intergovernmental land use initiative requiring the legislature's approval, for example, the multi-parish legislative delegations will find it easier to secure this approval than if called upon to sponsor or support a state-wide land use reform bill lacking the prior negotiated consent of the state's parishes. Also auguring the likely success of the agreement will be the blessing of pertinent regional planning authorities/MPO's and business groups.

The trick, of course, is to identify policies or projects that will move the city-states to voluntary agreement. Such opportunities do arise from time to time, however, particularly when outlined in such documents as the Louisiana Speaks Plan. The Plan is rich in planning/land use projects such as those linking Baton Rouge and New Orleans on one axis, and I-12 Corridor city-states (Hammond, Baton Rouge, Lafayette and Lake Charles) on another. The emergence of similar opportunities can be anticipated for the city-states of Central and North Louisiana if the Louisiana Speaks’
proposal that these areas also formulate a regional plan or plans is adopted.\textsuperscript{34}

The Louisiana Constitution's intergovernmental provision, article VI, section 20, affords a generous predicate for the city-state model in its statement that "[e]xcept as otherwise provided by law, political subdivisions may perform any authorized power or function jointly or in cooperation with other political subdivisions or the United States."\ A companion statute\textsuperscript{35} amplifies the provision's generous scope through the imposing breadth of its sanctioned activities and projects.

3. The Functional Model: The CPRA in Present (and Prospective) Action

The functional model features three components: designation of a territorial area, a rationale that supports the designation and establishes a land-use based mission for the area, and a custodial agency endowed with planning, regulatory, and development powers.

\begin{itemize}
\item \textsuperscript{34} See \textit{Louisiana Speaks Plan}, supra note 1, at 84.
\item \textsuperscript{35} \textit{LA. REV. STAT. ANN.} § 33:1324 (2007). It enables political subdivisions to employ intergovernmental agreements for the "promotion and maintenance of any undertaking or exercise of any power," so long as at least one of the parties to the agreement is authorized by a special or general law to perform the activity or exercise the power or function. \textit{Id.} Matters that may be addressed in these agreements include police and fire protection, health care, public utility services, roads and transport, recreation, education, and flood and navigation control. \textit{Id.} Another statute allows the cooperating governments to appropriate funds, levy taxes and issue bonds to finance the jointly pursued activity or project. \textit{LA. REV. STAT. ANN.} § 33:1331 (2007). Article VI, section 15 of the state constitution provides that local governing authorities enjoy broad powers over any agency created by it; article VI, section 16 enables governing authorities, upon public vote, to merge or consolidate any special district, local public agency, or similar entity. \textit{See also} \textit{LA. REV. STAT. ANN.} § 33:9021(6) (2007) (allowing local governments to engage in cooperative ventures with one another). Useful, if somewhat outdated, studies of the permissible scope of intergovernmental arrangements include Kathleen W. Marcel & Joseph T. Bockrath, \textit{Regional Governments and Coastal Zone Management in Louisiana}, 40 \textit{LA. L. REV.} 887 (1980); Marc J. Hershman & Marsha M. Mistric, \textit{Coastal Zone Management and State-Local Relations Under the Louisiana Constitution of 1974}, 22 \textit{LOY. L. REV.} 273 (1975).
\end{itemize}
The CPRA, its founding statute,\footnote{LA. REV. STAT. ANN. § 49:213.1–12 (2007).} and its Master Plan fit neatly within this model. The area addressed in the CPRA Plan is the Coastal Zone and contiguous areas subject to storm surge.\footnote{See § 49:213.2(2).} The Plan’s coast-wide objectives are reduction of economic losses from storm-based flooding, promotion of a sustainable coastal ecosystem, provision of habitats suitable for an array of commercial and recreational activities, and maintenance of the region’s unique cultural and historic communities.\footnote{CPRA MASTER PLAN, supra note 8, at 37–39.}

The CPRA, strategically located in the Office of the Governor, is led by the director of the Governor’s Office of Coastal Activities. State development agencies and levee boards are well-represented on CPRA’s seventeen member board. Coastal restoration and coastal zone management responsibilities fall to the Department of Natural Resources (DNR), while flood protection infrastructure is managed by the Department of Transportation and Development (DOTD)\footnote{§ 49:213.1(D).}.

The regionalism of the Functional Model begins at a different level, and is more expansive than the City-State Model’s regionalism. The latter, as earlier noted, works up from and is limited by its lowest common denominator perspective of local interests. Its local governmental participants neither create a jurisdiction nor exercise power as jurisdictional representatives. Under the functional model, the legislature does create a jurisdiction for regulatory and development purposes and appoints the custodial body that will exercise planning, regulatory, and developmental powers within it.

The regional values are the model’s raison d’être and, in fact, may and usually do engage state and federal dimensions as well. In addition to overseeing coastal restoration and flood protection within the Coastal Zone’s boundaries, for example, the CPRA also coordinates an array of state-level development and conservation programs as well as those of such federal agencies as the Corps of Engineers, the Environmental Protection Agency, and the Department of the Interior. These state and national values may alternatively be labeled “regional,” where that term denotes supra-
municipal/parish values, or "state" or "national" values that the CPRA coordinates and infuses into its geographically regional activities.

The CPRA challenges of "aggressive state leadership," of fully exercising the police power to meet "immediate and compelling needs," and of administering the nation's largest public works program are not for the timid. They will call for additional legislation, the highest priority of which will be to furnish the planning/law element to the CPRA's existing coastal restoration and hurricane protection capabilities.

The CPRA Plan wisely anticipates the need to transform the transitional team that prepared the Plan into a permanent staff, fully endowed with the professional expertise to address all three functions. The Plan also worries about how to align the parish and municipal land use plans and decisions with the CPRA's program. Finally, it is aware that its future will be one of continuing judgment calls concerning private property rights, the scope of the police power, and the role of appropriation and eminent domain (quick take or otherwise) in its land management and acquisition program.

How these tasks should be managed is a question that exceeds the scope of this introductory paper. But several preliminary comments may prove useful.

An adept and knowledgeable land use planning and law presence must be created within the restructured staff. I am less sanguine than the Plan's authors that, left to themselves, coastal parishes will zone as a "means of protecting coastal wetlands" or that they will "enact region-wide zoning." Louisiana's coastal values, or "state" or "national" values that the CPRA coordinates and infuses into its geographically regional activities.

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| 40. CPRA MASTER PLAN, supra note 8, at 112. |
| 41. Id. at 105. |
| 42. Id. at 107. |
| 43. Id. at 107-08. |
| 44. Id. at 105. Reference to "zoning" alone severely understates the complexity of the land use challenges associated with CPRA/local government planning and land use coordination and the CPRA's vital role in shaping this coordination. Despite contrary popular perception, zoning is simply one, and hardly the most influential, of a variety of tools used to implement comprehensive master plans when contrasted with the powers of the CPRA over the formulation of the coastal Master Plan and the selection, financing, and location of key elements of the coastal zone's infrastructure. For example, the |
crisis has been headline news for at least three decades now, and the parishes haven’t legally addressed it yet. As the Plan acknowledges and as the New Orleans East flooding debacle confirms, constructing new hurricane protection systems will “encourage unwise development into high risk areas.”  Even parishes that possess the political will to adopt such zoning, moreover, will lack the technical skills to do so.

The CPRA now faces a path-breaking challenge to re-center land use around a risk management axis, and to share the fruits of this novel and complex task with the coast’s local governments. To do so, it requires the capacity to construct a matrix of land use values into which risk management considerations are factored. This matrix would then provide a basis, on the front end, for selecting among the various conservation and flood protection projects that it conceives or that are proposed to it in the coastal zone. Subsequently, the matrix will serve to insure that parish and municipal land use plans and decisions comport with the hydrological and other requirements of the projects, as built.

The coastal zone’s local governments should be welcomed as key stakeholders in this process by, for example, incorporating a Council of Coastal Zone Governments as an integral part of the planning process. Local voices must be heard. But the scope and costs of the coastal restoration and protection mission that lies ahead preclude a process in which they, rather than the CPRA, zoning powers of local governments are (or, at least, should be viewed as) significant, but certainly not the dominant tool shaping the area’s development patterns. To achieve its legislatively declared goals, the CPRA Master Plan cannot simply be an engineering or public works document; rather, it must be a blueprint for coastal conservation and flood protection and for coastal area development patterns that are driven by and reinforce both.

45. Id.

ultimately determine the restoration, protection, and land use parameters that shape Louisiana’s coast of the future.

No one should minimize the political, eco-scientific, engineering, land use planning, and legal difficulties attending this charge. It is indeed unprecedented. But the state does not have any other choice if it truly intends to exercise the “aggressive leadership” to which its legislature and Governor have committed it as a basis for attracting the equally unprecedented national support required to meet “immediate and compelling needs.” If consensus fears about global warming prove out, moreover, how Louisiana manages this mission can serve as a model for all of the globe’s estuaries or seacoast areas. Absent an expanded CPRA land use planning capability, neither achievement is possible.

The CPRA will also need an internal legal capability to manage the complex private and public property law issues that await its attention.47 Private land law in the coastal areas is a complex patchwork of principles, many still unsettled, scattered throughout the Louisiana Constitution, Civil Code, statutes, and jurisprudence. Included are topics as varied as accretion, dereliction, alluvion, rights of reclamation, riparian servitude, public trust lands, and the division of surface and mineral rights.48

The principal public law issues derive from two sources: regulatory controls and physical public access to, occupation, or disturbance of private property. At stake in both instances is whether the CPRA may conduct these activities on a non-compensated basis under the state’s police power. If not, the activity will be deemed a compensable “taking” or “damaging” under Louisiana Constitution article I, section 4, or a taking under the Federal Fifth Amendment.


I anticipate that the taking/damaging issue as it arises in the regulatory context will prove considerably less troublesome than generally assumed. Louisiana Constitution article I, section 4 makes clear that private land use is expressly subject to the state's police power. Article IX, section 1 as written,\footnote{49. The article states that the "natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety and welfare of the people. The Legislature shall enact laws to implement this policy." LA. CONST. art. IX, § 1.} and as construed by the Louisiana courts,\footnote{50. \textit{See} State v. McHugh, 630 So. 2d 1259 (La. 1994); Am. Waste & Pollution Co. v. State, 588 So. 2d 367 (La. 1991); Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152 (La. 1984).} stresses the priority due environmental/conservation values and the state's public trust obligations when the legislature has adopted legislation in furtherance of both, as it most vigorously has done in CPRA's founding statute.

The Louisiana Supreme Court's joinder of police power and public trust reasoning in \textit{Avenal v. State},\footnote{51. \textit{See John J. Costonis, Avenal v. State: Takings and Damagings in Louisiana}, 65 LA. L. REV. 1015 (2005).} I have suggested elsewhere,\footnote{52. \textit{See} Avenal, 886 So. 2d at 1107–08 n.28. Justice Victory's conclusions might be dismissed as peripheral to \textit{Avenal}'s outcome which, viewed narrowly, turned on other considerations, including a hold harmless clause in the oystermen's lease and prescription of the damaging claim. I am disinclined to agree. Not only did Justice Victory write for the majority, but a concurring opinion of Justice Weimer supported Justice Victory's views regarding the application of the "imminent peril" doctrine to the case's facts. \textit{Id.} at 1115 n.8 (Weimer, J., concurring). The case was decided prior to the Katrina and Rita disasters, moreover. If Justices Victory and Weimer felt it appropriate to invoke the police power's imminent peril doctrine prior to these hurricanes, it would be astonishing indeed if they would refuse to do so after them.} presages a sea-change in Louisiana land use and coastal management law. Justice Victory's majority opinion invoked the joinder in concluding that a water diversion project that largely destroyed the value of area oyster leases was not a "taking" or "damaging" under article I, section 4.\footnote{53. \textit{Avenal}, 886 So. 2d at 1107–08 n.28. Justice Victory's conclusions might be dismissed as peripheral to \textit{Avenal}'s outcome which, viewed narrowly, turned on other considerations, including a hold harmless clause in the oystermen's lease and prescription of the damaging claim. I am disinclined to agree. Not only did Justice Victory write for the majority, but a concurring opinion of Justice Weimer supported Justice Victory's views regarding the application of the "imminent peril" doctrine to the case's facts. \textit{Id.} at 1115 n.8 (Weimer, J., concurring). The case was decided prior to the Katrina and Rita disasters, moreover. If Justices Victory and Weimer felt it appropriate to invoke the police power's imminent peril doctrine prior to these hurricanes, it would be astonishing indeed if they would refuse to do so after them.} The public trust doctrine, Justice Victory stated, sustains the "right of the state to disperse fresh water . . . over saltwater marshes incident to
forestalling coastal erosion.”\textsuperscript{54} The police power’s actual necessity doctrine, he added, permits severe intrusions on private property interests when necessary to offset grave public harm.\textsuperscript{55} He concluded that even if a measure prohibits all economically beneficial uses of land,

compensation is not owed if the state action is in accord with a “background principle” [such as the public trust or actual necessity doctrine] of the state’s property law that already prohibits the landowner from the use he claimed was taken, or is undertaken in the exercise of the state’s police power.\textsuperscript{56}

The physical access or occupation context could present an insuperable test if the occupation is permanent\textsuperscript{57} and a stern test if temporary\textsuperscript{58} because the judiciary places a premium on the private landowner’s right to exclude the personal property or the presence of others from his property. The CPRA’s wisest course in the physical invasion context will often be acquisition either of the property’s full ownership or of its surface rights if some kind of negotiated trade-off between the owner and CPRA cannot be struck. The opportunity for these trade-offs will be frequent, as acknowledged in Louisiana’s constitution\textsuperscript{59} and statutes,\textsuperscript{60} because

\textsuperscript{54} Id. at 1108 n.28 (majority opinion).
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} See Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419 (1982) (statute authorizing a permanent physical occupation of plaintiff’s property is a per se taking). But even the Loretto result might be vulnerable to Justice Victory’s public trust/actual necessity reasoning, as presented immediately above, and as reinforced by the Louisiana statute discussed infra notes 59–60.
\textsuperscript{58} See Kaiser Aetna v. United States, 444 U.S. 164 (1979) (temporary encroachments upon a bay within a private subdivision are takings).
\textsuperscript{59} See LA. CONST. art. IX, § 4(A) (permitting separation of surface and mineral rights, and permitting the state and landowner to agree to the disposition of the mineral rights in accordance with the conditions and procedures provided by law).
\textsuperscript{60} Louisiana Revised Statutes section 41:1702, a statute paralleling article IX, section 4(A) of the state constitution, permits the state to allow former riparian owners to retain mineral rights in any restored or recovered land.
the CPRA’s restoration/flood protection program typically will increase rather than destroy land values.

The world will not end when trade-off opportunities cannot be found under circumstances that would otherwise leave the state vulnerable to credible inverse condemnation challenges. Systematic acquisition of private property will be as inevitable a component of the CPRA’s multi-billion dollar program as it is of the nation’s highway programs. Government could do worse than compensating a landowner for suffering the presence on his land of construction teams, physical installations, or other intrusions under circumstances in which the owner incurs a genuine loss not offset by a betterment of his land’s value.61

But there are considerations in play other than avoidance of compensation. Public agencies are reluctant to force landowners to surrender their land either through direct expropriation or through inverse condemnation.62 This sensitivity calls to mind in a rural setting unhappiness with the City of New London’s use of eminent domain for urban renewal in the Kelo case.

The CPRA Plan recognizes, however, that Louisianans cannot have it both ways: a massive national and state financial commitment to save the state’s coast, land, and communities on the one hand, and undiminished autonomy over private land use on the other. With decided reluctance, it anticipates the need for conventional eminent domain to ensure the timely completion of large projects,63 and requests that, like the state’s Department of Transportation and Development, it too be granted “quick take” powers.64

61. Florida Everglades project management officials actually prefer outright acquisition of title or of various types of flowage or conservation easements to a shared public/private presence on ecologically sensitive lands. Telephone Interview with Larry Gerry, Director, Department of Everglades Restoration Planning (July 9, 2007).

62. See CPRA MASTER PLAN, supra note 8, at 108 (“To date, DNR has never entertained the idea of using either form of condemnation [conventional or quick-take] and considers both to be options of last resort.”).

63. Id. at 107.

64. Id. at 108.
There is the further complication of determining which of various standards afford the correct measure of compensation, and the danger, of course, of runaway eminent domain awards. The Louisiana Constitution identifies no less than four standards for expropriation or appropriation, three of which are further specified by a parallel statute. Louisiana Constitution article I, section 4(B) sets forth the basic and least predictable standard: The owner shall be compensated “to the full extent of his loss.”65 Section 4(F), on the other hand, authorizes the legislature to “place limitations on the extent of recovery” for losses associated with coastal restoration activities, a limit the legislature has fixed as that of the Fifth Amendment’s “just compensation.”66 Section 4(G) specifically selects the Fifth Amendment standard for flood protection and hurricane projects, a position reiterated in statute.67 Lands appropriated for levee purposes “shall be paid for as provided by law,” according to Louisiana Constitution article VI, section 42(A); the parallel statute sets that payment at “fair market value to the full extent of loss.”68

Perhaps the most theoretically intriguing of these provisions is Louisiana Revised Statutes section 49:214.5, which excludes any compensation whatsoever for claims arising under leases or permits on state lands or water bottoms from diversions of fresh water or sediment deposited on the site for coastal conservation purposes. On its face, the statute would appear to conflict with the United States Supreme Court’s physical occupation jurisprudence.69 Or it might hark back a century earlier to a United States Supreme Court opinion that conferred extraordinary powers and duties on government in its administration of public trust lands.70

65. LA. CONST. art. I, § 4(B)(5).
67. See § 49:213.10(G).
69. See cases cited supra notes 57–58.
4. The Aspirational Model: The Louisiana Speaks Regional Plan

The Louisiana Speaks Regional Plan is, in fact, a number of plans, or better yet, of plans and plan types. It is a regional geographical plan for the physical, social, and economic development of a thirty-five parish region of Louisiana that includes the state's nineteen coastal parishes. It is a process plan that unveils a planning and land use implementation system premised upon coordination by the Office of State Planning (OSP) of a network of state, regional, and local actors. It is an advocacy plan that seeks public and private support for implementing legislation and for adoption of the plan's sixteen strategies, 100-plus action items, and a host of performance benchmarks associated with Plan recommendations.

It is an educational plan that seeks in one fell swoop to close the gap between the rudimentary land use legislation of the Huey Long era and a comprehensive inventory of current best land use and planning practices ranging from a "smart growth" toolkit to the creation and maintenance of a statewide GIS database.

It is a state plan. It envisages the preparation of geographical regional plans for Central and North Louisiana, which will constitute an entire geographical state plan when joined with the current South Louisiana Plan. It empowers the OSP to coordinate capital plans and budget requests of state agencies. The OSP is conceived as an autonomous public/private board of commissioners intended to be insulated from politics. An independent, non-profit group with members across the state will monitor and support the plan and join with the OSP's board as "the conscience of the Louisiana Speaks Regional Plan."

The Louisiana Speaks Regional Plan also merits status as a "state" plan because it locates the OSP at the top of a planning hierarchy. Not only will this body engage its fellow state agencies, but it will provide direction, oversight, and financial and technical assistance to the state's various regional and local bodies. At the bottom of the pyramid, local governments link upward to regional

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71. See LOUISIANA SPEAKS PLAN, supra note 1, at 82–91.
72. Id. at 83.
agencies and the OSP through state-mandated, 20-year local comprehensive plans. In addition to including elements addressing community growth, transportation, public facilities, housing, economic development, and conservation, these plans must also be consistent with state protection and restoration plans.

Finally, the plan is a regional plan. Louisiana Speaks champions CPRA's Master Plan for the South Louisiana coast by encouraging or requiring consistency between the plans and policies of the state, regional, and local actors. The state geographic plan, as earlier noted, is a composite of the regional geographic plans of South, Central, and North Louisiana. The Plan also envisages that the legislature will consolidate various regional entities into a single agency that will integrate local government comprehensive plans and capital facilities programs through a combination of "Regional Strategies" and "Regional Infrastructure Improvement Plans."

Pervasive throughout the Louisiana Speaks Plan is hostility to sprawl. Many of its anti-sprawl prescriptions derive from studies in the 1970's and 80's analyzing the costs of sprawl, the pioneering work of such scholars as Robert Freilich on the orderly phasing of growth within downtown, suburban and exurban rings, and the incorporation or reworking of these efforts in contemporary "smart growth" dress. The Plan also advocates growth-channeling policies that allocate federal and state infrastructure and services funding for development in locations previously determined to merit this preferential treatment through a matrix of anti-sprawl, smart growth planning values.

The title "aspirational plan" is surely appropriate for the Louisiana Speaks Regional Plan, particularly as it compares with the Italian city-state and CPRA functional models. The gap between what it proposes and Louisiana's traditional land use practice far outpaces the distance between current practices and those proposed under the other two models. The gap is barely perceptible under the City-State model, in fact. While the gap is substantial under the CPRA functional model, potential opposition

74. See ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH (2000).
75. See LOUISIANA SPEAKS PLAN, supra note 1, at 81, 86–88.
to the CPRA's effort has already been blunted by the public's embrace of the Plan as its best hope against storm surges to come.

The Louisiana Speaks Plan is aspirational as well in the transformative vision it projects both of the physical character of South Louisiana and, more sweepingly, of the upward reallocation of land use powers. Plans, it bears re-emphasis, serve many different purposes, only one of which is the spatial display of the planned area's intended physical character.

In its aspirational mode, the Louisiana Speaks Plan calls to mind the dictum of Daniel Burnham: "Make no little plans; they have no magic to stir men's blood." Whether or not the Louisiana Speaks Plan will "stir men's blood" sufficiently to render it politically acceptable to a state with Louisiana's localist tradition is a question for the future.

On the legal side, it is clear that two orders of new legislation will be required to implement the Plan. The first, addressed below, is foundational: Will the Plan's upward powers shift run afoul of the home rule powers possessed by many Louisiana parish and municipal governments? The second concerns the legal issues posed by each of the Plan's sixteen strategies and 100-plus action items. Responding to the second question is a work for the future that initially will engage the legislative study team and, should the OSP proposal be adopted, the OSP itself over what no doubt will be a lengthy period.

Reserving the home rule question for discussion below, redistribution of the land use powers as proposed by the Louisiana Speaks Plan should not prove to be legally problematic. Louisiana Constitution article III, section 1 vests the state's legislative power in its Senate and House of Representatives. We can assume that legislation redistributing these powers will both serve and be drafted to reasonably advance a valid public purpose. If so, the conclusion is patent that the "state legislature may enact any law it sees fit which is neither expressly nor impliedly restricted by the state or federal constitutions in any area coextensive with the state's police powers." 77

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77. Marcel & Bockrath, supra note 35, at 891.
Home rule objections may not be so easily dismissed. Opponents will insist that the state’s power to limit the land use autonomy of home local governments has been severely limited by article VI of the Louisiana Constitution. They will note, in particular, that pre-1974 home rule units may adopt any legislation that is not inconsistent with the constitution and that post-1974 home rule units may exercise powers that are not denied by general law or inconsistent with this constitution. Opponents will also call into play article VI, section 17, which expressly confers upon local governments the power to “adopt regulations for land use, zoning, and historic preservation.”

The opposition of all but the pre-1974 home rule governments might perhaps be countered in two ways. First, if the legislature wished, it could neutralize the arguments of post-1974 home rule units and all non-home rule units by expressly denying them the power to exercise zoning powers in a manner inconsistent with the legislation proposed by Louisiana Speaks.

Second, the article VI, section 17 argument may possibly be rebutted by invoking the section’s introductory language, “[s]ubject to uniform procedures established by law.” This direction to the state legislature, it might be contended, is intended to ensure that foundational land use legislation “uniformly” defines the land use playing field for all local governments. The argument is not without substantial appeal. But it will be met with the response that the records of the 1974 Constitutional Convention “clearly indicate that the intent of . . . [this language] was to provide for due process hearings as established by the Legislature,” not to grant the legislature authority to withdraw land use powers from local governments or to shape the power’s substantive use.

78. La. Const. art. VI, § 4.
79. La. Const. art. VI, § 5(E). Article VI, section 7(A) provides that electors in non-home rule jurisdictions may adopt measures granting the jurisdictions powers or functions so long as neither are “denied by . . . [their] charter[s] or by general law.”
Pre-1974 home rule governments can be expected to defend the retention of their current land use powers by invoking the reasoning of Justice Dennis, then of the Louisiana Supreme Court, in *City of New Orleans v. Board of Commissioners of the Orleans Levee District.* The court held that if New Orleans satisfied the conditions set forth in the opinion, it could invoke its home rule-based land use powers to require a state-chartered agency to submit to local land use controls. In an opinion expressly intended to shift the balance of power to home rule units, Justice Dennis reasoned that pre-1974 home rule units were constitutionally authorized to initiate land use powers in their charters and were constitutionally immune from the withdrawal of this power by the legislature. The only limitation on this home rule power is article VI, section 4's requirement that its exercise not be "inconsistent with this constitution."

The Levee District asserted that New Orleans' claimed home rule power was inconsistent with the constitution because it violated article VI, section 9(B)'s ban against abridgement of the state's police power. But Justice Dennis defined three criteria for claimed abridgements, and required the Levee District to establish each. The District must show that the local governmental measure "conflicts with an act of the state legislature that is necessary to protect the vital interest of the state as a whole"; that the "state statute and the ordinance are incompatible and cannot be

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81. 640 So. 2d 237 (La. 1994).
82. *Id.* at 252.
83. *Id.* at 245 ("The power to enact and enforce zoning and building laws plainly falls within the [City of New Orleans's] home rule power to initiate legislation and regulation. Zoning law and related land use regulations are based on, and constitute an application or exercise of, legislative power, and in particular, police power to enact laws for the safety, health, morals, convenience, comfort, prosperity, and general welfare of the people.").
84. *Id.* at 245–46 ("The [City of New Orleans] is immune from the power of the legislature to withdraw, preempt, or deny the city's power to enact and enforce zoning and building ordinances consistent with the constitution within its boundaries.").
85. *Id.* at 249. Article VI, section 9(B) of the state constitution provides that "[n]otwithstanding any provision of this Article, the police power of the state shall never be abridged."
86. *Id.* at 252.
effectuated in harmony";\(^\text{87}\) and that "the protection of such state interest cannot be achieved through alternate means significantly less detrimental to home rule powers and rights."\(^\text{88}\)

Will supporters of the Louisiana Speaks legislation prevail in their claim that the pre-1974 home rule units' retention of their current land use powers "abridges" the state's police power? The response is likely to depend upon two principal considerations. One is a showing that the matters addressed by the statute meet my earlier definition of a "regional" interest as one that "affects public health, safety and welfare with sufficient intensity to justify the state's direct or delegated use of its police power to mandate the utilization of regional values in management of the activity."\(^\text{89}\) The obvious purpose of this demanding language is to establish that the legislation, in Justice Dennis's terms, "is necessary to protect the vital interests of the state as a whole."\(^\text{90}\)

Of equal importance will be the manner in which the hypothetical legislation is drafted. Its preface should clearly establish the regional character of the problem being addressed, the intractability of the conflict between the statute and the current allocation of land use powers, and the absence of less intrusive alternatives for protecting the vital state interests at stake. When possible, moreover, governmental compliance should be secured through incentives, rather than mandates. The carrots over sticks approach engages difficult trade-offs, of course. Allowing local governments to opt out avoids the home rule problem altogether since those residual powers remain intact. Considering that East Baton Rouge, New Orleans, and Jefferson Parish are among the pre-1974 home rule local governments, however, a decision on their part to opt out could undermine the Regional Plan, unless a core set of provisions of indisputable state interest remain mandatory.

\(^{87}\) Id.

\(^{88}\) Id.

\(^{89}\) See supra text accompanying note 32.

\(^{90}\) Bd. of Comm'rs, 640 So. 2d at 251.
An Exchange between two Louisiana lawyers: How is the 2006 passage of the constitutional amendments to article 1, section 4 like the United States engagement in Iraq? Answer: Getting in was easy; living with it is hell; and getting out will test the wizardry of a Merlin.

The contradiction was stark.
Within hours after Katrina, Louisianans were venting justified outrage at the government’s failure to intervene vigorously on their behalf. Yet within relatively few months, they and their legislators voted to weaken one of the state’s most potent weapons in the uphill battle for recovery that lay ahead: the Louisiana Constitution’s article I, section 4 eminent domain power. The vote implemented three amendments that, depending upon their interpretation, could cripple the government’s use of eminent domain to reconfigure, resettle, and redevelop the wreckage visited by Katrina and Rita.

Whether and to what extent the state’s courts will interpret the amendments in this manner is another question for the future. What cannot be questioned is that the amendments have left a scarred, even schizophrenic document.

Economic development is now expunged as an article 1, section 4 “public purpose.” The ambit of the public purpose concept has been shrunk. Ambiguity shrouds not only article 1, section 4, but other constitutional and statutory provisions that find their measures either in “public purpose,” “economic development,” or both.

Juxtaposed against this retreat from economic development is Louisiana’s feverish and continuing pursuit of . . . economic development. State and local governments continue as before, pursuing an array of public/private partnerships, cooperative ventures, tax increment financing projects, and aggressive efforts

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91. See Jennie Jackson Miller, Comment, Saving Private Development: Rescuing Louisianans from Its Reaction to Kelo, 68 LA. L. REV. 631 (2008) for a detailed study of the impetus surrounding one of the amendments and the author’s recommendations for its interpretation.
to induce mega-projects to bring their promise of jobs and prosperity to the state.\textsuperscript{92}

The following narrative opens with a brief consideration of \textit{Kelo v. City of New London},\textsuperscript{93} which occupies a role in the eminent domain brouhaha not dissimilar to that played by the weapons of mass destruction misconception in Iraq. It then summarizes the amendments' changes and the possible legal issues they portend, and concludes with some preliminary observations that may prove useful in monitoring the inevitable legal warfare that lies ahead.

\textbf{A. Kelo: The Seven Words}

It is unnecessary to recount the \textit{Kelo} saga in depth because outstanding accounts are available elsewhere.\textsuperscript{94} If nothing else, however, the case reminds us of the power of a pithy phrase to stir the pot. The wordsmith in question is Justice Sandra Day O'Connor; the forum, her dissenting opinion in \textit{Kelo}. Dismayed by her colleagues' approval of New London's expropriation of unblighted private property, she despaired that as a consequence of their position nothing prevented the state from "replacing any Motel 6 with a Ritz-Carlton."\textsuperscript{95} With these seven words, Mrs. Kelo, the owner of the unblighted property, became the Poster

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\textsuperscript{92} These activities find their legal authorization in, among others, Louisiana Revised Statutes sections 33:9021–28 (authorizing local governments to enter into cooperative endeavors with public or private partners and to approve the establishment of economic development corporations to secure the "public purpose" of maintenance of the local economy) and Louisiana Revised Statutes section 33:9029.2 (permitting the state, in addition to its general authority to enter into cooperative endeavors under Louisiana Constitution article VII, section 14(C), to enter into cooperative endeavor agreements for maintenance of the state's economy). In further aid of economic development article VI, section 21 of the state constitution permits local governments and other political subdivisions and public port commissions, if authorized by the state, to expropriate private property and transfer it to private entities in order to attract industrial plant development.

\textsuperscript{93} 545 U.S. 469 (2005).


\textsuperscript{95} \textit{Kelo}, 545 U.S. at 503.
Woman for a national crusade to preclude the use of eminent domain solely for the community's economic development.

Assessed in the blander language of the law, *Kelo*’s issue was whether the Federal Fifth Amendment’s requirement that private property may only be expropriated for a “public use” was violated by a community redevelopment scheme in which unblighted property was taken for a project designed to advance the community’s “economic development.” In responding positively, the Court’s majority was simply following unambiguous precedent, including an opinion earlier penned by Justice

96. This is indeed the verbiage employed in the majority and dissenting opinions and by many commentators, and it has bled into Louisiana's amendment of article I, section 4 of the state constitution. See generally Miller, *supra* note 91. This report is not the place for confronting the tyranny of the phrase “economic development” for its utter lack of content and for the misconceptions its spawns of how urban renewal/public private partnerships of the type undertaken in New London actually function. For a knowledgeable account of both written by one experienced in such efforts, see Mihaly, *supra* note 94. One would never know from the *Kelo* opinions, public comment on them, or the Louisiana amendments that the City of New London was seeking to address the very same range of problems, exclusive of flooding, that beset New Orleans—pre- and post-Katrina—on all sides: population loss, poverty and unemployment, displacement of major employers and industry, inferior public education and health facilities and services, and a depressing array of other urban ills. To collapse the values associated with combating these ills into something called “economic development” is as callous as portraying the city as a behemoth running roughshod over its undefended citizens; hence the earlier suggestion in text aligning “economic development” in the urban redevelopment context with “weapons of mass destruction” in the Iraq context.

97. The U.S. Supreme Court case of *Berman v. Parker*, 348 U.S. 26 (1954), sustaining the use of eminent domain for urban renewal, put this question to rest a half-century earlier by equating the Fifth Amendment’s “public use” with “public purpose,” the police power's expansive measure. Strikingly, the public use vs. public purpose question is absent in Louisiana because article 1, section 4 of the state constitution expressly measures the scope of the state’s eminent domain power on the basis of “public purpose,” not public use. The Louisiana courts have followed in the U.S. Supreme Court’s expansive Fifth Amendment reasoning. See, e.g., City of Shreveport v. Chance Gas Corp., 794 So. 2d 962 (La. App. 2d Cir. 2001); Town of Vidalia v. Unopened Succession of Ruffin, 663 So. 2d 315 (La. App. 3rd Cir. 1995); Bd. of Comm’rs New Orleans Exhibition Hall Auth. v. Mo. Pac. R.R. Co., 625 So. 2d 1070 (La. App. 4th Cir. 1993); see also Miller, *supra* note 91, at 647–51.
Although Justice O’Connor wished to shrink the ambit of the public use construct in her dissent, she certainly did not undertake to emasculate it. The fundamental difference between her position and that of the majority is easily stated. The latter finds a “public use” in the prospective benefits, such as economic development, anticipated in consequence of the expropriation exercise; she insists that there must be a pre-existing “affirmative harm on society,” the remedying of which affords the basis for the public use determination.

While not insignificant, this dispute moves within a narrow range that is easily defined and clearly bounded. The question for the Louisiana courts will be whether and to what extent they will interpret Louisiana’s 2006 constitutional amendments as respecting these bounds or, instead, as breaching them to undermine eminent domain’s use to enable the state to recover from the nation’s greatest natural disaster.

B. The Amendments

Quotations from the article I, section 4 and related amendments are set forth in italics below.

Section 4(B)(1): Property shall not be taken or damaged . . . (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.

As drafted, this provision dictates a restraint on the eminent domain power that is independent of the amendment’s subsequent narrowing of “public purpose” and its exclusion of “economic development” from that concept.

If “for” means “in order to secure,” then eminent domain is dead as a tool for the public/private partnerships, cooperative ventures, or the traditional government/private redeveloper urban renewal model. Under this interpretation, whenever government condemns property and transfers it to a private party for occupation or ownership, it violates the ban on taking property from A and


99. See Kelo, 545 U.S. at 500.
giving it to B that the United States Supreme Court proclaimed in its 1780 decision, *Calder v. Bull.*

The interpretation would also create the anomaly that "private" entities endowed with eminent domain powers for uses expressly approved in the amendments would not be able to exercise the power because doing so would result in the ownership, if not also the predominant use, of the condemned land by a "private . . . entity"—namely, themselves.

If the term "for" is descriptively neutral on the other hand, the way is opened for an interpretation that avoids *Calder v. Bull,* and, not incidentally, comports with a half-century of practice or more. No problem is posed by either "predominant use by" or "transfer of ownership" to a private entity when the goal of the program in which eminent domain is employed serves an independent and constitutionally recognized public purpose. The private entity's engagement becomes a mere instrument for achieving the goal, and hence the public purpose. Illustrative of a private entity in this context is the purchaser of a subsidized, formerly flooded but now rehabilitated New Orleans East cottage, or the developer to whom the New Orleans Redevelopment Authority transferred this and other properties in the neighborhood (after acquiring them through eminent domain) on the condition that they be rehabilitated on behalf of the purchaser.

100. 3 U.S. 386, 388 (1798).
101. Article I, section 4(B)(2)(a), for example, includes as a public purpose the so-called "common carrier" provision, which legitimates government's delegation of its eminent domain power to private entities such as railroads and other providers of public services or accommodations. A "public purpose" is served because, in the amendment's terms, it grounds "a general public right to a definite use of the property," even though this property is privately owned. See Miller, *supra* note 91 at 656–57, 668.
102. The hypotheticals in the text avoid references to the venues in which the CPRA is likely to be active because the eminent domain amendments will probably prove far less problematic, if problematic at all, for it than for urban redevelopment authorities. Article I, section 4(B)(2)(b)(iii) includes as serving a "public purpose" "drainage, flood control, levees, coastal and navigational protection and reclamation for the benefit of the public generally." Lands condemned by the CPRA will, I assume, remain in public ownership, thereby avoiding the problems arising under article I, section 4(B)(1) (private use or transfer to private ownership) and article I, section 4(G)'s constraints on the sale or lease of property within 30 years of its condemnation.
Section 4(B)(2): As used in Subparagraph (1) of this Paragraph and in Article VI, Section 23 of this Constitution, “public purpose” shall be limited to the following:

The term “public purpose” appears in various constitutional provisions other than article I, section 4 and article VI, section 23, including, among others, those addressing government’s power to control land use\(^\text{103}\), to tax\(^\text{104}\), to appropriate funds\(^\text{105}\), to pledge public funds, credit or property\(^\text{106}\), or to enter into cooperative ventures\(^\text{107}\). One of the amendments’ principal changes is the exclusion of “economic development” from the “public purpose” concept.

Is economic development also excluded as a predicate for government’s exercise of these other enumerated powers? If it is, must activities under these provisions that are supportive of economic development be discontinued? Or is the language “as used in Subparagraph (1) of this Paragraph and in Article VI, Section 23” intended to partition these sections off from the rest of the constitution and be applicable only to the purposes for which the article I, section 4 version of eminent domain may be employed?

How will courts deal, moreover, with a case in which government utilizes eminent domain as a direct component of a program enacted under one of these other provisions? Consider, for example, eminent domain’s use as a component of a public/private partnership envisaging a community’s economic development and structured as a cooperative venture under article VII, section 14(C)? Having walled off article 1, section 4 because its concept of “public purpose” excludes “economic development,” would the court imply a second source of eminent domain power that would be consistent with its use for economic development purposes?\(^\text{108}\)

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103. See LA. CONST. art. VI, § 17.
104. See LA. CONST. art. VII, § 1.
105. See LA. CONST. art. VII, § 10.
106. See LA. CONST. art. VII, § 14(B)(3).
107. See LA. CONST. art. VII, § 14(C).
108. The question is hardly fanciful. Note that while the article 1, section 4 version of the eminent domain power excludes its use for economic development, the article VI, section 21 version allows its use for this purpose.
If eminent domain is unavailable in such cases, we are still left with the anomaly that article VI, section 23 (which is mentioned thrice in the amendments and is the umbrella provision for local government’s acquisition of property) is not limited to acquisition by eminent domain and draws no distinction between movable and immovable “property.”

If economic development is ruled out as a “public purpose” under article VI, section 23, are Louisiana public agencies now precluded from buying pencils or computers if either are to be used by public employees in programs designed to stimulate economic development?

Section 4(B)(2)(c): [A public purpose includes] the removal of a threat to public health or safety caused by the existing use or disuse of the property.

On its face, this provision would appear to incorporate Justice O’Connor’s view that eminent domain’s purpose is to remedy an existing “harm to society,” rather than achieving a prospective benefit by acquiring and transferring ownership of property that, by itself, is not socially problematic.

What is encompassed within the amendment’s incorporation of the terms “public health” and “safety” and its perhaps significant exclusion of the term “general welfare”? This will be one of the amendments’ hard-fought battlegrounds in the future.

Those who push for the narrowest of interpretations will argue that the absence of the phrase “general welfare” demands that a “threat to public health or safety” calls for something akin to an outbreak of meningitis or the collapse of public order. Those

The more difficult question posed is whether the absence of a specific reference to eminent domain in article VII, section 14(C) implies both that this section lacks it own “paired” version of eminent domain, and that the power, if it is to be used at all, must be the article I, section 4 version. But the latter outcome is tantamount to saying that eminent domain cannot be used at all because article I, section 4 rules out its use for economic development purposes.

109. Article VI, section 23 provides that “[s]ubject to and not inconsistent with this constitution and subject to restrictions provided by general law, political subdivisions may acquire property for any public purpose by purchase, donation, expropriation, exchange, or otherwise.” (emphasis added).

110. The classical formulation of the scope of government’s police power is that it extends to “health, safety, and general welfare.” Occasionally the term “morals” may also be included in the enumeration.
supporting a broader interpretation will be quick to point out that few terms are as malleable as “public health” or “safety.” Correctly, they will note, public health goals underpin most of the vast corpus of federal environmental law, while “safety” afforded the Eisenhower-era predicate for constructing the nation’s entire interstate highway system as an instrument of national defense.

It would seem difficult to deny that public health and safety occupy a substantial presence in blight removal statutes—a likely source of continuing controversy under Section 4(B)(2)(c). Justice O’Connor’s assault on economic development as the basis for eminent domain in *Kelo*, it merits emphasis, in no way impugned bona fide blight removal. On the contrary, her criticism of the expropriation of the plaintiff landowners’ property was largely premised on the fact that it was not blighted.

Section 4(B)(2)(c) contains a reference to “the” property. The question it poses is whether the expropriating agency must show that each individual parcel within the targeted assemblage presents a threat to health and safety, or whether it is sufficient that the threat derives instead from the aggregate state of the assemblage.

Justice O’Connor did not have to address this question because the *Kelo* assemblage was not blighted. The United States Supreme Court resolved essentially the same question in favor of the aggregate alternative in an opinion upholding acquisition of an unblighted property that was part of a blighted neighborhood.111 The Louisiana courts have utilized a similar “tout ensemble” rationale in the parallel context of permitting the regulation of a non-historic building in a historic district populated largely by historic structures.112

*Subsection 4(B)(3): [Excluded from the “public purpose” concept are] economic development, enhancement of tax revenue, or any incidental benefit to the public.*

This amendment could be an unproblematic application of Justice O’Connor’s objection to the use of eminent domain to generate prospective benefits (economic development and enhancement of tax revenue being the obvious candidates), rather

than to remedy an existing harm. Or it could comprehend a great deal more.

The obvious problem is that, like "public health" or "safety," "economic development" is a term of endless elasticity, particularly for the litigation-inclined or for the conservative bond attorney called upon to write an opinion letter. In fact, it can be argued that any activity undertaken on behalf of Louisiana’s pre- and, most certainly, post-recovery advances "economic development." Certainly, such has been the position of the state’s last two administrations, who have brought within the phrase’s mantra concerns as varied as improving citizen healthcare, public safety, highway construction, avoidance of metropolitan sprawl, workforce training and job creation generally, coastal restoration and protection, primary and secondary education, and an unlimited range of other public goods.

Will the courts divide the genus "economic development" from these multiple species and permit the use of eminent domain to support the latter? Or will they collapse the species into the genus and invalidate eminent domain’s use?

Section 4(H)(1): [T]he state or its political subdivisions shall not sell or lease property, which has been expropriated and held for not more than thirty years [without first offering it to the prior condemnee or its successor; if the offer is refused, the property can] only be transferred by competitive bid open to the general public.

Section 4(H)(1) may prove to be the most problematic of all the amendments. To illustrate, let us assume an exercise of eminent domain by the New Orleans Redevelopment Authority that does not run afoul of the limitations considered to this point. Let us assume further that under traditional urban renewal practice, the Authority has pre-selected a developer with a proven urban renewal track record. Finally, let us posit that through difficult and delicate negotiations, the Authority has agreed to write down the price of the condemned assemblage to a level enabling the developer to build housing priced for a low and moderate income population and to comply with the host of other redevelopment conditions serving the community’s recovery needs.

How will section 4(H)(1) impact the proposed project? On its face, it will impact the section in the same way a poison pill impacts
a corporate takeover attempt. In fact, the section renders the hypothetical improbable from the outset. Even if a transfer were otherwise possible, it would have to be accomplished by "competitive bid open to the general public," rather than by the Authority’s pre-selection of the developer. Likewise, it is difficult to see how, given the competitive bid requirement, a write-down price for the property could be established by the two. Absent a write-down in addition to any number of other concessions, it is equally difficult to see how the economics of the situation would permit the construction of a low/moderate or mixed income project.

Then, of course, there are the barriers posed by the thirty year duration of a right of first refusal in the condemnee or his successors. Will condemnees demand their property back as Mrs. Kelo would presumably have done? Will they instead threaten to exercise their rights of first refusal to extract from the developer a premium on top of the write-down price? If the latter becomes a widespread practice among condemnees, what impacts will it have on project delays and the inflation of land prices? These questions can be multiplied indefinitely.

We ought never to underestimate the ingenuity of the marketplace or of public/private partnerships in finding a way through barriers that seem impenetrable at first blush. Perhaps section 4(H)’s barrier can be made to yield. If not, there are other paths that may be worth exploring.

One is to explore avoiding section 4(G)’s sale or lease restrictions altogether by arranging the transfer of the condemned property as a donation. Louisiana Constitution article VII, section 14(B)(6) exempts from its ban on the “donation” of a political subdivision’s property the “donation of abandoned or blighted housing property... to a nonprofit organization which is recognized by the Internal Revenue Service as a 501(c)(3) or 501(c)(4) nonprofit organization and which agrees to renovate and maintain such property until conveyance of the property by such organization.” Perhaps this provision’s companion statute, Louisiana Revised Statutes section 33:4717.3, can be reworked to overcome the foregoing barriers although the constitutional provision’s restriction of donations to “housing property” will undoubtedly chafe.
A more aggressive approach that merits careful research and evaluation than is possible in this paper would seek to qualify the developer/redevelopment authority relationship as a "cooperative endeavor" under article VII, section 14(C). In truth, these community improvement arrangements may accurately be viewed as the precursors, if not the actual embodiments, not only of these endeavors but of the contemporary public/private partnerships generally. Perhaps the most difficult question that would arise in this investigation is the one raised, but not resolved in City of Shreveport v. Chanse Gas Corp.\textsuperscript{113}: under what circumstances, if any, may a local government expropriate private property and transfer it to a private party for non-industrial public purposes (that may include either economic development or blight removal-based urban renewal) within the framework of an article VII, section 14(C) cooperative endeavor?

IV. CONCLUSION

The term "conclusion" is the most inapt possible for a report that has set so many rabbits running. Rather than seeking to conclude a conversation barely begun, I am content simply to recall my introductory observation that the "hurricanes mercilessly exposed, but did not create" the planning/legal issues outlined in this report.

\textsuperscript{113} 794 So. 2d 962 (La. App. 2d Cir. 2001).
APPENDIX: PERSONS INTERVIEWED FOR THIS REPORT

Ed Blakeley
   Director, New Orleans Office of Recovery

James Brandt
   Executive Director, Public Affairs Research Council of Louisiana

Walter Brooks
   Executive Director, New Orleans Regional Planning Commission

Jack Caldwell
   Former-Secretary (1996–2006), Department of Natural Resources

Sidney Coffee
   Chair, Coastal Protection and Restoration Authority, Governor's Executive Assistant for Coastal Activities

Barry Erwin
   Executive Director, The Council for a Better Louisiana

Hal Cohen
   Director of Planning, Center for Planning Excellence

Tim Coulon
   Board Member, Louisiana Recovery Authority

Mark Davis
   Director and Senior Research Fellow, Institute on Water Resources Law and Policy, Tulane Law School

Rod Emmer
   Associate Professor of Coastal Communities Research, Louisiana State University Sea Grant Program

Donna Fraiche
   Board Member and Chair, Long-Term Community Planning Task Force, Louisiana Recovery Authority

Jeff Hebert
   Deputy Director of Planning, Louisiana Recovery Authority

Randy Hanchey
   Deputy Secretary, Department of Natural Resources and Member, Integrated Planning Team, Coastal Protection and Restoration Authority
Andy Kopplin
   Executive Director, Louisiana Recovery Authority

Walter Leger
   Board Member, Louisiana Recovery Authority

R. King Milling
   Board Member, Coastal Protection and Restoration Authority, and Chair, Governor’s Advisory Commission on Coastal Protection, Conservation and Restoration

Don Neisler
   Executive Director, Capitol Regional Planning Commission

Michael Olivier
   Secretary, Department of Economic Development

John Porthouse
   Integrated Planning Team, Coastal Protection and Restoration Authority

Sean Reilly
   Board Member, Louisiana Recovery Authority

John Spain
   Executive Vice President, Baton Rouge Area Foundation, and Executive Director, Louisiana Recovery Authority Research Support Foundation

Boo Thomas
   President, Center for Planning Excellence

James Wilkins
   Director, Louisiana State University Sea Grant Program

Joseph Williams
   Executive Director, New Orleans Redevelopment Authority