Public Law: Local Government Law

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The legal problems of local governments appear in Louisiana appellate opinions with surprising frequency. To reduce this mass to manageable size for a survey treatment has required the use of several selection principles: withholding comment on cases that were pending before the supreme court at the time this article was being written, bypassing numerous opinions that essentially apply general legal principles to litigation involving local governmental units as parties, avoiding issues more appropriately addressed in the broader context of state administrative or constitutional law, ignoring cases that have limited significance, and

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1. Foster v. Hampton, 343 So. 2d 219 (La. App. 1st Cir.), aff'd, 352 So. 2d 197 (La. 1977) (neither sheriff nor parish liable for negligent operation of motor vehicle by deputy sheriff); Landry v. East Baton Rouge Parish, 343 So. 2d 207 (La. App. 1st Cir.), rev'd, 352 So. 2d 656 (La. 1977) (paving assessment invalid for lack of evidence that each property owner was benefited to the extent of the assessment). Because of the supreme court's review of Landry, this article also foregoes analysis of the unappealed decision of the Third Circuit that raised a similar issue. See Butaud v. City of Lake Charles, 338 So. 2d 358 (La. App. 3d Cir. 1976) (paving assessment of thirty-five dollars per frontage foot affirmed as within legislative discretion of city council when appraiser estimated that all property owners were benefited by an amount of at least twenty-eight dollars per frontage foot).

2. Many of the tort cases are of this genre. E.g., Taylor v. Broom, 345 So. 2d 1267 (La. App. 1st Cir. 1977) (inmate fails to sustain burden of proof in action against sheriff); Partin v. Vernon Parish School Bd., 343 So. 2d 417 (La. App. 3d Cir. 1977) (teacher not negligent in supervising playground); Picou v. Terrebonne Parish Sheriff's Office, 343 So. 2d 306 (La. App. 1st Cir.), writ refused, 345 So. 2d 506 (La. 1977) (police officer did not use excessive force in making arrest). Some public contract cases are also of this type. E.g., Caddo Parish School Bd. v. Cotton Baking Co., 342 So. 2d 1196 (La. App. 2d Cir. 1977) (bakery company liable for damages resulting from failure to provide bread needs of school board).

3. Most of the challenges to dismissals of employees and other adverse personnel actions involve general questions of state administrative law. E.g., Wall v. Community Improvement Agency, 343 So. 2d 229 (La. App. 1st Cir. 1977) (unsatisfactory personnel rating upheld as supported by substantial evidence); Cook v. Natchitoches Parish School Bd., 342 So. 2d 702 (La. App. 3d Cir.), writ refused, 345 So. 2d 52 (La. 1977) (dismissal of tenured teacher upheld against challenges based on procedural errors and lack of substantial evidence). Constitutional issues with implications for state as well as local governments have frequently arisen in litigation with respect to the abolition of the defense of sovereign immunity. E.g., Wilder v. Thrower, 337 So. 2d 304 (La. App. 3d Cir. 1976) (abolition of governmen-
reserving discussion of decisions that raise issues that are too involved for meaningful discussion in a survey format. This article has then organized the remaining opinions to reflect what appears to be a dominant theme of the cases as a whole: the discordant nature of contemporary law relating to local governments.

**Utility Services**

Louisiana authorizes parishes and municipalities to own and operate public utilities. Two separate sections of the Revised Statutes expressly

4. *E.g.*, Williamson v. Village of Baskin, 339 So. 2d 474 (La. App. 2d Cir. 1976), *writ refused*, 341 So. 2d 1126 (La. 1977) (abolition in Constitution of 1974 of village residency requirement for office of chief of police precluded village from ousting incumbent after effective date of constitution even though incumbent had failed to meet valid residency requirement prior to effective date); Rodriguez v. City Civil Serv. Comm'n for New Orleans, 337 So. 2d 308 (La. App. 4th Cir. 1976) (abolition of veteran's civil service preference by the Constitution of 1974 required commission to replace promotion list, in existence on effective date of constitution, that reflected the preference); Graham v. Marshall, 333 So. 2d 707 (La. App. 2d Cir. 1976) (board of aldermen rather than elected police chief had authority to fire police officers under a statutory provision that has since been repealed); Butler v. Board of Trustees of Elec. Workers Pension & Relief Fund, 333 So. 2d 676 (La. App. 2d Cir.), *writ refused*, 337 So. 2d 515 (La. 1976) (statute governing pension fund for electrical workers of the city of Monroe allows offset of workmen's compensation benefits against disability retirement benefits).

5. The most recent chapters in the seemingly endless litigation over Louisiana's local option statutes fall within this category. See Nomey v. Jackson Parish Police Jury, 343 So. 2d 315 (La. App. 2d Cir. 1977); Wyatt v. Vernon Parish Police Jury, 341 So. 2d 468 (La. App. 3d Cir.), *writ refused*, 342 So. 2d 677 (La. 1977); Stewart v. Livingston Parish Police Jury, 340 So. 2d 1045 (La. App. 1st Cir. 1976). Although the local option cases raise issues of great practical significance, the statutory intricacies and abundant jurisprudence suggest a lead article format as a more appropriate forum for a discussion of this area.

6. *See generally* LA. R.S. 33:4161-4169 (1950). The statutory scheme permits the ownership and operation of “revenue producing public utilities” and broadly defines the terms as follows:

[A]ny revenue producing business or organization which regularly supplies the public with a commodity or service, including electricity, gas, water, ice, ferries, warehouses, docks, wharves, terminals, airports, transportation, telephone, telegraph, radio, television, drainage, sewerage, garbage disposal, and other like services; or any project or undertaking, including public lands and improvements thereon, owned and operated by a municipal corporation or parish . . . , from the conduct and operation of which revenue can be derived.

LA. R.S. 33:4161 (1950). The 1974 constitution protects municipally-owned utilities
permit these local governmental entities\textsuperscript{7} to provide utility services outside their boundaries. One authorizes a municipal corporation or parish to "sell and distribute the commodity or service of the public utility within or without its corporate limits."\textsuperscript{8} Another allows a municipality or parish "operating a gas, water, or electric light system, sewerage plant, or transportation system," to "extend such services to persons and business organizations located outside its territorial bounds, or to any other parish or municipality."\textsuperscript{9} Two additional requirements limit this latter authorization. The extramural extension must be in accordance with the terms of a service agreement between the government supplying the service and "the persons, business organizations, parishes, or municipalities receiving the service."\textsuperscript{10} Moreover, no parish may extend utility services "into the bounds of another parish without the consent of such parish," and no city, town, or village may extend utility services "into another city, town, or village without the consent thereof."\textsuperscript{11}

In two recent cases, competing utility systems unsuccessfully attempted to imply additional limits on the power of municipalities to offer services outside their corporate boundaries. \textit{Pointe Coupee Electric Corp. v. Town of New Roads}\textsuperscript{12} involved a dispute between the private cooperative serving the unincorporated areas of PointeCoupee Parish and the municipal utility of the Town of New Roads. The cooperative sought to restrain the town's municipal utility from initiating services in unincorporated areas of the parish that the cooperative was already serving. It relied on a statutory prohibition forbidding a utility from furnishing electric-

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\textsuperscript{7} The provisions authorizing the ownership of public utilities do not express-
ly define the term municipality. Presumably, they refer to the three classifications of municipali-
tytes recognized by title 33: cities, towns, and villages. LA. R.S. 33:101(3)(1), 341 (1950); cf. LA. CON-
ST. art. VI, § 44(3). Other sections of title 33 define the term municipality more broadly. E.g., LA. R.S. 33:1321 (Supp. 1954) (municipality includes cities, towns, villages, and "special districts . . . created to perform one or more public functions or services").

\textsuperscript{8} LA. R.S. 33:4163 (1950).

\textsuperscript{9} Id. 33:1326 (1950). Note that this section covers a narrower category of public utilities than does the other provision governing "revenue producing public utilities." See note 6, supra.

\textsuperscript{10} LA. R.S. 33:1326 (1950).

\textsuperscript{11} Id. 33:1328 (1950). In addition, the fees charged by the municipalities for service extensions must be "reasonable and non-discriminatory." Id. 33:1327 (1950).

\textsuperscript{12} 343 So. 2d 261 (La. App. 1st Cir.), \textit{writ refused}, 345 So. 2d 507 (La. 1977).
city to any point that is served by an electric line of another electric utility without securing the consent of the utility already serving the area. It argued that this statute barred the city's attempt to extend service.\textsuperscript{14}

The difficulty with the cooperative's argument was the inclusion of the following proviso in the statutory prohibition: "'The provisions of this section shall not apply to any municipally-owned or operated utilities . . . .''\textsuperscript{15} The cooperative attempted to circumvent the proviso by arguing "that a municipal utility operating outside of the municipality's boundaries is not municipally-owned within the meaning of the statute," but the First Circuit properly rejected this contention as "without merit."\textsuperscript{16} The statutory authorizations for municipalities to provide utility services permit service within or without corporate boundaries, and they give no indication that a municipal utility sheds its characteristic of municipal ownership when it passes the corporate borders.

\textit{City of Houma v. Terrebonne Parish Police Jury}\textsuperscript{17} presented a similar conflict between a municipal utility and one owned by the parish. The parish utility served all unincorporated areas of the parish, and when the city sought to extend its gas lines to serve a subdivision in an area of the parish outside its corporate boundaries, the parish sought to stop the extension.\textsuperscript{18} The parish relied on the statutory requirement that the exten-

\begin{itemize}
\item \textsuperscript{13} LA. R.S. 45:123 (Supp. 1970):
\end{itemize}

\begin{quote}
No electric public utility shall construct or extend its facilities, or furnish, or offer to furnish electric service to any point of connection which at the time of the proposed construction, extension, or service is being served by, or which is not being served but is located within 300 feet of an electric line of another electric public utility, except with the consent in writing of such other electric public utility . . . .

The provisions of this section shall not apply to municipally-owned or operated utilities of the State of Louisiana or to the parish of Orleans.
\end{quote}

\begin{itemize}
\item \textsuperscript{14} 343 So. 2d at 263.
\item \textsuperscript{15} LA. R.S. 45:123 (Supp. 1970). See note 13, \textit{supra}.
\item \textsuperscript{16} 343 So. 2d at 263.
\item \textsuperscript{17} 345 So.2d 1206 (La. App. 1st Cir. 1977).
\item \textsuperscript{18} After the city agreed to provide gas service to the subdivision, the subdivider sought approval from the police jury. This approval was "necessary in order for the developer to obtain Police Jury maintenance of the streets and drainage in [the] subdivision." 345 So. 2d at 1207. At first, the parish refused to approve the subdivision because the city had not sought parish permission to supply gas service within the subdivision. Subsequently, the parish relented and approved the subdivision although it continued to insist that the city could not legally provide the service without the consent of the police jury. The city then filed suit alleging that "[a]s a result of this controversy, the City fears that the Police Jury will cut, tap, attach or in some way connect its gas distributing system into the lines installed by the city in [the subdivision]." \textit{Id}. 
\end{itemize}
sion of a municipal utility system conform to a service agreement. It contended that this requirement implicitly required the city to seek parish approval before extending its gas lines into the unincorporated areas of the parish.

The First Circuit correctly rejected the parish's contention. Analysis of the statutory language indicates that the service agreement to which it refers is between the municipal utility and the receiver of the utility service. The extraterritorial service agreements of a municipal utility must include the parish only if the parish is a receiver of the service. The language affords no basis for a declaration that the parish into which utility service is extended is a necessary party to the agreement between the municipal utility service and private parties who wish to receive municipal service.

Although both decisions are defensible on analytic grounds, even the First Circuit recognized that the results in the Houma case were questionable. The current statutes allow a parish or its franchisee to avoid competitive invasion from another parish, but provide them no protection against competitive inroads from a municipally-owned utility. Conversely, a municipality can preclude another municipality from offering

20. 345 So. 2d at 1209.
21. Id. The statutory language is discussed in the text at notes 9-11, supra.
22. Since a parish that operates a utility can also serve areas outside the parochial boundaries, LA. R.S. 33:1326, 4163 (1950), a parish could also be a party to a service agreement as a supplier.
23. 345 So. 2d at 1209 (quoting opinion of trial court):
   It may well be better public policy to limit the activity of a municipality since competition between public bodies in a situation of this kind perhaps may not be in the best interest of either public entity or the public who must ultimately suffer the consequences of any damage or loss which may occur. But public policy is not a matter which addresses itself to the court in a controversy of this kind. Rather, it is a matter to be resolved by the legislature of our state. The question of whether or not public bodies should compete or be allowed to compete against each other in utility service is a matter that addresses itself to the discretion of the legislature and not to the court. Apparently the legislature has not seen fit to restrict the activities of the municipality since the above cited statutory law satisfies this court that there is no such restriction against the city expanding its utility lines into the parish domain, and the city may do so without the consent or permission of the police jury. (Emphasis in original).
24. LA. R.S. 33:1328 LA. (1950). Presumably, the parish could also withhold consent to protect a franchisee as well as a utility it owned directly.
25. City of Houma v. Terrebonne Parish Police Jury, 345 So. 2d 1206 (La. App. 1st Cir. 1977); Pointe Coupee Elec. Corp. v. Town of New Roads, 343 So. 2d 261
ing services within its boundaries, but apparently it cannot stop the parish in which it is located from offering services within the municipal boundaries. The rational policy that produces these inconsistent results is difficult to discern, but the duplications in the statutes addressing the problem of extraterritorial service suggest that the piecemeal development of the statutes may be an important reason for the lack of harmony in the statutory scheme. Regardless of the causes, the situation calls for a new legislative framework that applies a coherent policy to all problems of extraterritorial service.

PUBLIC CONTRACTS

The Revised Statutes set forth rules applicable to public contracts in chapter 10 of title 38. Section 2189 of the title establishes a special prescription rule for suits against contractors or sureties "in connection with the construction, alteration or repair of any public works let by the state or any of its agencies, boards or subdivisions . . . ." Prior to September 12, 1975, the section established a three year prescriptive

26. LA. R.S. 33:1328 (1950). Presumably, the city could withhold its consent to protect a franchisee as well as a utility it owned directly.

27. The only limit placed on a parish utility is that it may not enter the boundaries of another parish without the consent of the parish. Thus, the same analytical rationale that refused to imply additional limits on the expansive authority of municipalities would seem to permit a parish utility to offer services in municipalities that are within its borders regardless of whether the municipality consents.

Note, however, that only a parish-owned utility can invade the municipality. A parish franchisee cannot serve areas within the municipality unless it obtains a franchise from the municipality. Town of Coushatta v. Valley Elec. Membership Corp., 139 So. 2d 822, 827 (La. App. 2d Cir. 1961). Moreover, if a municipality annexes an area served by a parish franchisee, the franchisee may not serve new customers in the annexed area without the permission of the municipality. See Town of Kinder v. Beauregard Elec. Co-op., Inc., 339 So. 2d 891 (La. App. 3d Cir. 1976).


30. Id. 38:2189 (Supp. 1975).
period for such contracts; the passage of Act 250 of 1975 has extended the prescriptive period to five years.

In City of New Orleans v. Mark C. Smith & Sons, Inc., the Louisiana Supreme Court held the section 2189 prescriptive period inapplicable to an action based on a contractor’s failure to install sidewalks in a New Orleans subdivision. The parties had stipulated that the contractor’s duty to construct the sidewalks was a contractual one. However, the contractor’s bond indicated that the origin of this contractual duty was a requirement imposed by the subdivision regulations of the New Orleans City Planning Commission.

The court conceded that a contractor’s agreement to construct sidewalks in exchange for approval of his subdivision plat constitutes a contract. Nonetheless, it held that this agreement was not a contract to which section 2189 applied. Construing section 2189 in its statutory context, the court ruled that it applied only to contracts “let” in accordance with chapter 10 of title 38. Since the other provisions of the chapter did not apply to this contract, the court held that the prescriptive period is likewise inapplicable.

31. Id. (Supp. 1962) (as it appeared prior to 1975 amendment).
32. Id. (Supp. 1975).
33. 339 So. 2d 321 (La. 1976). The trial court had ruled that the statute establishing the prescriptive period was unconstitutional. Because of this ruling, the defendants appealed directly to the Louisiana Supreme Court. See La. Const. art. V, § 5(D)(1). The supreme court did not reach the constitutionality issue because of its holding that the prescriptive period of section 2189 “does not apply to the type of construction agreement here at issue.” 339 So. 2d at 321.
34. The case involved the three year statute of limitations because the contract was signed prior to the 1975 amendment of section 2189. 339 So. 2d at 322 n.1. See text at notes 31-32, supra.
35. [T]he stipulation simply states that Smith “entered into a contract with the City of New Orleans to perform sidewalk and street paving” in a named subdivision. There was no stipulation with respect to the terms of this contract other than that the work was to be performed within two years.
339 So. 2d at 321.
36. Id. at 322.
38. 339 So. 2d at 322.
39. Other sections of chapter 10 cover such matters as awarding the contract to the lowest responsible bidder (La. R.S. 38:2211 (Supp. 1977)), requiring security by statutory bond (id. 38:2213 (Supp. 1958)), requiring registry of an acceptance (id. 38:2241.1 (Supp. 1964)), and permitting registry of notice of a contractor’s default (id. 38:2242 (Supp. 1966)).
40. The city first asserted the inapplicability of the prescriptive period in section 2189 during oral argument on appeal. 339 So. 2d at 321-22. Thus the
The supreme court's opinion merits commendation. A developer's failure to comply with subdivision regulations raises different problems than the failure of a contractor hired by a local government to finish the work he has been hired to complete. For example, a city might be willing to tolerate lengthy delays by a subdivider in the absence of substantial sales in the subdivision in reliance on the anticipated completion of the sidewalks. On the other hand, the city itself normally has an immediate desire to complete sidewalk construction for which it directly contracts. The supreme court was wise, therefore, to avoid engrafting the prescriptive period of section 2189 onto contracts that raise different problems than it was designed to address.

Louisiana has also established special procedures governing the leasing of public lands. These provisions form chapter 10 of title 41 of the Revised Statutes. Section 1211 of the chapter indicates that the leasing authority conferred by the chapter covers any "municipal or parochial subdivision of this state, . . . or other unit or institution, deriving its authority and powers from the sovereignty of the state."1 Section 1212 authorizes these units to lease "for trapping, grazing, hunting, agricultural and any other legitimate purposes whatsoever, . . . any lands of which the lessor has title, custody or possession."2 Sections 1213 through 1215 establish bidding procedures applicable to these leases of governmental land,3 and section 1215 allows the governmental units to "accept only the highest bid submitted but [they] shall have the right to reject all bids."4

In State ex rel. Cuccia v. French Market Corp.,5 the Fourth Circuit considered the applicability of these provisions to a nonprofit corporation created by the City of New Orleans to manage city property in the French Quarter. The city authorized the corporation to lease its property in the French Quarter, although the city had to approve all leases.6 The city evidentiary record concerning the nature of the underlying obligation was extremely sketchy. Consequently, the supreme court remanded the case to the district court "for further proof of the nature of the contractual obligation secured by the performance bond, as well as to permit the defendants to raise other defenses available, if any, to this suit upon the performance bond." 7

2. Id. 41:1211 (1950).
3. Id. 41:2112(A) (Supp. 1977). The section expressly excludes leases "for oil, gas or other mineral purposes and development" from the scope of its coverage.
5. Id. 41:1215 (Supp. 1967) (as it appeared prior to 1976 amendment). See text at note 71, infra.
7. Id. at 246-47.
exempted the corporation from its ordinance requiring the awarding of city contracts to the highest responsible bidder. Instead of merely trying to maximize revenues, the corporation was to give great weight to maintaining the integrity of the French Quarter tradition.

The corporation solicited bids in 1974 "to lease some 2600 square feet of space in the French Market for a coffee and doughnut establishment." It received bids from two experienced New Orleans businessmen, Masson and Cuccia, and Cuccia’s bid offered the higher rent. Notwithstanding the economic advantages of Cuccia’s bid, the corporation chose to lease the property to Masson, and the city council approved the lease.

The Fourth Circuit held the lease invalid for failure to comply with the bid provisions applicable to leases of public lands. The court rejected the corporation’s argument that the statutory lease provisions were inapplicable because of the corporation’s status as a private legal entity organized pursuant to state statutes governing nonprofit corporations. It reasoned that the concluding language of section 1211, which referred to any "unit or institution, deriving its authority and powers from the sovereignty of the state," was broad enough to encompass the French Market Corporation. The corporation, the court declared, "derived its authority from the City to lease the property owned by the City which in turn derives authority and powers from the state."

48. Id. at 247. See also Barreca v. City of New Orleans, 256 La. 43, 50-53, 235 So. 2d 87, 89-90 (1970).
49. 334 So. 2d at 243; Barreca v. City of New Orleans, 256 La. 43, 55-56, 235 So. 2d 87, 91 (1970).
50. 334 So. 2d at 243.
51. Although both men had business experience and solid financial backgrounds, the nature of their experience differed. "Masson is an acknowledged expert restaurateur with 25 years of experience in the restaurant business, while Cuccia is a successful candy manufacturer and merchant." 334 So. 2d at 244.
52. The rents were stated as flat fees plus percentages of gross sales, and the corporation contested the issue of which bid offered the higher rent. Cuccia’s bid would produce higher rents unless gross revenues exceeded $1,125,000. Since gross sales under the coffee house that had previously occupied the premises had never exceeded $315,000, and those of a similar coffee house had never exceeded $616,000, the court held that Cuccia’s bid was higher. Id. at 244, 249.
53. Id. at 244. The court’s opinion offers no explanation for the corporation’s choice of Masson. Perhaps one can best explain it by reference to Masson’s extensive experience in the restaurant business. See note 51, supra.
54. 334 So. 2d at 244.
56. 334 So. 2d at 246.
The court also rejected the corporation’s argument that the leasing provisions applied only to leases of land and not “to the kind of enclosed building space being leased in this case.” According to the court, the corporation’s distinction would lead to “absurd conclusions.” For example, the statute would govern the lease of a parking lot but not the lease of a parking building located on the same land.

The court acknowledged the apparent inconsistency of its decision with the Louisiana Supreme Court’s 1970 decision in *Barreca v. City of New Orleans*. In *Barreca*, the supreme court upheld a similar lease by the corporation. It denied a rejected bidder’s demand that he be awarded a lease and ruled that the corporation could consider other factors than price in making its lease decisions. The court of appeal distinguished *Barreca* because it concerned only the applicability of city bid ordinances and did not raise the issue of the applicability of the state statute.

The unfortunate result of the Fourth Circuit’s decision is manifest. It precluded the corporation from considering the very factor that is most important to it: the ability of the lessee to establish a business that will maintain the distinctive character of the city’s French Quarter. The Louisiana Supreme Court had recognized the validity of this factor in *Barreca*:

The record before us, including the provisions of the proposed leases, manifests the awareness of the officers of the Corporation of the importance to the City and its citizens of the continued operation and proper functioning of the French Market coffee stands. Their

57. *Id.*
58. *Id.* The court also noted that its decision on this point was consistent with an earlier decision involving property of the City of New Orleans, *Giles v. New Orleans City Park Improvement Ass’n*, 306 So. 2d 823 (La. App. 4th Cir. 1975), writ refused, 310 So. 2d 841 (La. 1976) (renewal of lease for concession in tennis buildings covered by statutory provisions governing leases of public lands). Although the court conceded that “defendant’s argument does not appear to have been raised” in *Giles*, the court apparently took some comfort in reaching the “same result” in both cases. 334 So. 2d at 246. The court’s reliance on *Giles* is difficult to understand since it distinguished the supreme court decision in *Barreca v. City of New Orleans*, 256 La. 43, 235 So. 2d 87 (1970), because the issue of the applicability of the state bidding statute had not been litigated in that case. See notes 59-61, *infra*, and accompanying text.
59. 256 La. 43, 235 So. 2d 87 (1970).
60. *Barreca* also concerned the lease of space to be used for a coffee shop.
61. 334 So. 2d at 248. The court also stated that *Barreca* was distinguishable on its facts because it involved a lease to the existing proprietor of a going concern. It did not explain why this factual distinction was legally significant.
concern in leasing this particular property is not limited to receiving as high a return as possible in renting, as is most often the principal concern in leasing operations. Also of prime importance is that the coffee shops continue to be operated without interruption on a high standard and in a manner satisfactory and pleasing to its citizens and the touring public.  

One can appropriately criticize the opinion of the court of appeal for not seeking a reasonable construction of the statute to avoid this unfortunate result. The court should have given more sympathetic consideration to the corporation's claim that its leases were not among the types that the legislature meant to cover in the statute. The statutory examples convey the distinct impression that the legislature was primarily aimed at leases involving the uses of unimproved land rather than improved building spaces. Moreover, the court's reasons for reading the language to include the leases of the French Market Corporation do not justify its harsh result. Although the court was certainly correct in stating that lands are immovable and immovables include permanent structures on the land, that statement falls far short of requiring a conclusion that legislative use of the term "land" in a statute must include all structures that might be classified as immovable. Similarly, the court's "absurd conclusions" example is unpersuasive. In fact, one might reasonably argue that the application of the leasing provisions to govern a lease of a parking lot and not of a parking garage is less absurd than the practical effect of the court's own result. For in Cuccia, the court used leasing provisions designed for

63. Contrast this approach with the supreme court's careful consideration of the statutory context of the prescriptive period applicable to public contracts in City of New Orleans v. Mark C. Smith & Sons, Inc., 339 So. 2d 321 (La. 1976). See notes 33-39, supra, and accompanying text.
64. Barreca seems to foreclose the corporation's other argument: that it was not a lessor within the meaning of section 1211. Barreca expressly states that, in the leases of French Market property, the corporation is merely acting as an agent for the city. 256 La. at 51 n.5, 253 So. 2d at 90 n.5; id. at 60, 235 So. 2d at 93 (Barham, J., concurring).
65. LA. R.S. 41:1212 (Supp. 1977) (examples of leases to which statute applies are those "for trapping, grazing, hunting, [and] agricultural" purposes). Note also the section's provision that a lease may be "on either a cash or share basis," a reference that seems peculiarly applicable to agricultural leases. Cf. id. 41:1217 (Supp. 1977) (lessee who makes improvements "to the land" that are worth at least $2000 receives preference for subsequent leases of land).
66. 334 So. 2d at 246.
67. Id.
“trapping, grazing, hunting, [and] agricultural” purposes to preclude the City of New Orleans from leasing its business property with a view to fulfilling a recognized public purpose; that is, to maintain the distinct heritage of the French Quarter. The court thus followed linguistic literalism to achieve a result that the statute never envisioned.

Nonetheless, the real blame lies not with the court but with the legislature. Once again, the lack of a unified approach to the legal problems of local governments has forced the courts to apply statutes that were not drafted with any significant concern for the problems of contemporary local governments. Fortunately, the particular mischief created by

68. LA. R.S. 41:1212(A) (Supp. 1977); but cf. Hall v. Rosteet, 247 La. 45, 169 So. 2d 903 (1964) (provisions governing leases of public lands applicable to leases of airport lands). In Hall, the supreme court refused to apply the maxim *ejusdem generis*, which limits general words to classes or things of the same general kind as those specifically mentioned, to the statutory provisions governing leases of land. The court held the doctrine inapplicable because it found that the statutory language manifested "a legislative intent to include all public land leases within the scope of its general provisions." *Id.* at 59, 169 So. 2d at 908. *Hall* does not foreclose the argument advanced above, however. In *Hall*, the court merely held that section 1212 applies to all leases of public lands. The court's opinion does not require a conclusion that the term "lands" must be given the broadest possible definition.

69. Barreca v. City of New Orleans, 256 La. 43, 55-56, 235 So. 2d 87, 91 (1970); cf. LA. CONST. art VI, § 17 (local governments given authority to establish regulations for "land use, zoning, and historic preservation, which authority is declared to be a public purpose") (emphasis added).

70. The United States Supreme Court has recognized the dangers of an excessively literal approach to statutory construction. See, e.g., *Church of the Holy Trinity* v. United States, 143 U.S. 457 (1892). In *Church of the Holy Trinity*, the Supreme Court held that a congressional ban against importing foreigners under contract to perform labor in the United States was not applicable to a church's contract with an English clergyman to come to America to serve as its rector and pastor. The Court offered the following explanation for not giving effect to the literal wording of the statute:

It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to [believe] that the legislator intended to include the particular act . . . . The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit.
the decision in *Cuccia* was short-lived. Less than two months after the court denied a petition for rehearing, the legislature passed (and the governor signed) an amendment to section 1215 that was palpably designed to exempt the French Market Corporation from the coverage of the statute.  

However, this legislative tinkering with the specific difficulties of the corporation should not obfuscate the underlying problem: the lack of a comprehensive approach to the special contracting needs of local governments.

**TORT LIABILITY**

Louisiana’s abolition of the defense of sovereign immunity has not

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Id. at 459-61. Cf. *Gremillion v. Louisiana Pub. Serv. Comm’n*, 186 La. 295, 301, 172 So. 163, 165 (1937) ("[I]n order to give effect to the legislative intent, courts have often found it necessary to give words the meaning the legislators intended rather than their literal meaning."). In *Gremillion*, the court ruled that the word "corporation" included a natural person. *See generally* Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947). The Civil Code includes rules of construction both favoring and rejecting a strictly literal approach. *Compare* LA. CIV. CODE art. 13 ("When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit."), with id. art. 18 ("The universal and most effective way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it."). As Professor Llewellyn demonstrated over a quarter century ago, canons of construction often come in such pairs of opposites. *See* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).


72. A further indication of the impractical nature of the current provisions governing the leasing of public lands is the list of special exceptions that the legislature has engrafted to section 1212. *See* LA. R.S. 41:1212(B)-(E) (Supp. 1976).

The First Circuit has recently displayed a greater sensitivity to the contracting needs of local governments. *Sullivan v. City of Baton Rouge*, 345 So. 2d 912 (La. App. 1st Cir. 1977) (state highway specifications requiring bid performance bond to be stated in "dollars and cents" inapplicable to road construction project that was a joint effort of the city and a federal agency). Note that sensitivity to the contracting needs of local governments does not require a court to ignore the legitimate interests of those who contract with local governments. *See* Parish of East Baton Rouge v. Industrial Enterprises, Inc., 340 So. 2d 367 (La. App. 1st Cir. 1976) (no valid contract existed between parish and paving contractor when parish mailed contract ten months after receiving bids and nine months after contract award).

73. LA. CONST. art. XII, § 10. The Louisiana Supreme Court had abolished the sovereign immunity defense prior to the adoption of the 1974 constitution. *Board of Comm’rs v. Splendour Shipping & Enterprises Co.*, 273 So. 2d 19 (La. 1973) (state boards and agencies are not immune from suit); *cf. Hamilton v. City of Shreveport*, 247 La. 784, 174 So. 2d 529 (1965) (statute authorizing the City of Shreveport to sue...
provided injured parties with a certain remedy for torts committed by officers and employees of local governments. Recent decisions demonstrate that this question of vicarious liability is one of the major areas of doctrinal disharmony in Louisiana local government law.

The most obvious problem is the inability of successful litigants to force local governmental entities to pay judgments. In *Foreman v. Vermilion Parish Police Jury*, the Third Circuit held that a successful tort plaintiff could not execute his judgment against any of the property owned by a local government. Thus, as a practical matter, Louisiana law apparently leaves the judgment creditor at the mercy of the government that is his debtor. A recent casenote has explored the inequities of this


From a historical standpoint, one can distinguish between sovereign immunity, which applied to the state and its agencies, and governmental immunity, which applied to most local governmental entities. See, e.g., *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 215-16, 359 P.2d 457, 459, 11 Cal. Rptr. 89, 91 (1961); *Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 588-89, 305 A.2d 877, 879 (1973). The distinction has no practical significance in contemporary Louisiana law because the 1974 constitution provides that “neither the state, a state agency, nor a political subdivision shall be immune from suit and liability . . . for injury to person or property.” *La. Const.* art. XII, § 10(A); cf. id. art. VI, § 44(1) (as used in article VI, political subdivision includes “a parish, municipality, and any other unit of local government”).

75. The court refused to follow those cases antedating the 1974 constitution that had distinguished between property a local government held in a proprietary capacity and property it held in a governmental capacity. 336 So. 2d at 989; see generally A. Yianopoulos, *Property* §§ 29, 30 in 2 *Louisiana Civil Law Treatise* 77-86 (1966). In rejecting the contention that property held in a proprietary capacity was subject to seizure, the court relied on the statute providing that judgments against political subdivisions “shall be paid only from funds appropriated for that purpose.” 336 So. 2d at 989 (emphasis in original); see *La. R.S.* 13:5109(B) (Supp. 1977).
76. The constitution requires the legislature to provide for the effect of judgments against governmental bodies. *La. Const.* art. XII, § 10(C). Query whether, in light of this mandatory language, a court would construe the current statutory
result and the possible constitutional problems raised, so there is no need for an extended analysis of Foreman here. However, the unconscionable result permitted by Foreman is important as a reminder that any legislation addressing the problem of the tort liability of local governments should include provisions requiring the payment of judgments.

Other decisions of the past year illustrate the need for legislation with respect to another aspect of the tort liability of local governments: clarifying what governmental unit is responsible for the conduct of specific individuals. In Honeycutt v. Town of Boyce, the plaintiffs were the widow and children of one Merlin Honeycutt. They alleged that the marshal of the town of Boyce shot Honeycutt without provocation as the marshal was serving an arrest warrant on him. They also alleged that the marshal had previously threatened Honeycutt's life and that the mayor and board of aldermen of Boyce knew of the marshal's misconduct and should have relieved him of his duties.

The district court sustained an exception of no cause of action filed by the town. The court found that the marshal was an elected official who was carrying out functions authorized by a state statute. Since the mayor and board of aldermen of the town could not control the marshal's
conduct, the trial court held that the town was not liable for the marshal's misconduct in performing his law enforcement duties.

The Third Circuit ruled that the district court should not have sustained the exception. The court declared that the test was not whether the town had control over the marshal's actions, but "whether the employee was in the scope of his employment at the time the damage occurred." Since the marshal was acting within the scope of his duties as an elected town official at the time of the shooting, the town was liable, under a theory of respondeat superior, for his misconduct.

The Louisiana Supreme Court affirmed the Third Circuit's decision on this point. The supreme court, however, chose not to examine the vicarious liability issue in any depth. Instead, the opinion simply summarized the holding of the court of appeal and declared that the result was correct.

Cosenza v. Aetna Insurance Co. concerned the liability of a parish government for a tort committed by the clerk of a city court. Mr. and Mrs. Cosenza sued the City of Pineville for damages resulting from a wrongful arrest authorized by the clerk of the City Court of Pineville and carried out by members of the Pineville Police Department. The city then

81. 327 So. 2d at 157-58. Nonetheless, the court of appeal sustained the district court's dismissal of the action. The appellate court held that the plaintiff's acceptance of a release executed by the marshal in his capacity as a parish deputy sheriff also released him in his capacity as town marshal. Since the town was only vicariously liable, the court reasoned that the release of the marshal released the town as well. The supreme court reversed the decision of the lower courts on the release issue. Honeycutt v. Town of Boyce, 341 So. 2d 327, 332 (La. 1976).
82. 327 So. 2d at 157-58. The court relied on cases limiting the applicability of the Civil Code provision that "responsibility only attaches when the masters or employers . . . might have prevented the act which caused the damage, and have not done it." LA. CIV. CODE art. 2320.
83. 327 So. 2d at 158, citing LeBrane v. Lewis, 292 So. 2d 216 (La. 1974). The court noted that this approach was consistent with article 2317 of the Civil Code which provides that "[w]e are responsible, not only for the damage occasioned by our own act, but that which is caused by the act of persons for whom we are answerable . . . ."
84. 341 So. 2d at 330.
85. Id. Most of the opinion concentrated on the release issue. See note 81, supra.
86. 341 So. 2d 1304 (La. App. 3d Cir. 1977).
87. The court's opinion merely states that the action was "against several parties, including . . . the City of Pineville." Id. Presumably, the other parties included the clerk who issued the warrant and the police officers who executed it.
filed a third party demand against Rapides Parish alleging that the parish and the city were “joint employers or masters of the said City Court.”

The trial court granted the parish’s motion for summary judgment, and the Third Circuit affirmed. The court’s analysis rested on prior decisions holding that the judge of a city court was a “state officer” and the statute providing that the city clerk was his employee. Although the court recognized that the parish paid part of the salaries of the judge and the clerk, it declared that “the relationship between the Parish and the Judge (and his clerk) terminates at that point.” Consequently, “the police jury of Rapides Parish or any other executive body at that level is powerless to interfere with or direct the activities of the court.”

In support of its conclusion that the city court was independent of parish control, the court cited cases holding that a city council cannot abolish the office of ward marshal by reducing its salary to a pittance and that a parish cannot interfere with the operations of the sheriff’s department within its boundaries.

Having decided that the parish exercises “no power or discretion in the functioning of the City Court of Pineville,” the court then held that

88. Id. at 1305.
89. Id.
92. 341 So. 2d at 1305. See LA. R.S. 13:1888 (Supp. 1968) (salary of city clerk paid in equal shares by the city and parish of the court’s domicile).
93. 341 So. 2d at 1305.
94. Id. The rationale logically applies to exempt the City of Pineville from liability as well. The Third Circuit expressly noted that “[t]he question of the City of Pineville’s liability or responsibility under the factual posture of this case is not before us at this time.” Id. at 1305 n.1.
95. See State ex rel. Bass v. Mayor of Oakdale, 204 La. 940, 16 So. 2d 527 (1944). This case is, of course, distinguishable from the issue in Cosenza. Refusing to permit a de facto abolition of the office re-enforces the legislative intent to require a local government to have such an office. A similar approach with respect to the issue of vicarious liability is justified only if the same statutory provisions manifest a legislative intent to protect local governments from liability for the torts of these officials.
96. See Wood v. Maryland Cas. Co., 322 F. Supp. 436 (W.D. La. 1971); State ex rel. Police Jury v. Davis, 120 La. 862, 45 So. 838 (1908); Nielson v. Jefferson Parish Sheriff’s Office, 242 So. 2d 91 (La. App. 4th Cir. 1970). The applicability of these cases to the situation of a clerk of a city court appears questionable. These decisions reflect, at least in part, the unique status of the sheriff as a separate fiscal entity whose functions are prescribed by the state constitution. See LA. CONST. art. V, § 27; id. art. VI, § 5(6); Hargrave, The Judiciary Article of the Louisiana Constitution of 1974, 37 LA. L. REV. 765, 839-43 (1977).
97. 341 So. 2d at 1306.
the parish was not vicariously liable for any of the torts committed by employees of the city court. The court then summarized its holding in the following syllogism:

Simply stated, the City Judge is a state officer, and the Clerk is his employee. The Parish of Rapides is not an employer or master of the City Court . . . . Ergo the Parish of Rapides is, under no theory, responsible for the actions of the Judge of the City Court of Pineville or those of his employees.98

Considered together, Honeycutt and Cosenza fail to offer a sound analytical approach to establishing governmental liability for torts committed by state officers performing local governmental functions. In Cosenza, the Third Circuit treated the status of state officer as determinative. It held that the clerk's status as a subordinate of a state officer over whom the parish had no control relieved the parish of liability for the clerk's torts. Honeycutt, however, bears the imprimatur of the Louisiana Supreme Court,99 and it held the town of Boyce liable for the town marshal's torts. Since the marshal satisfies the Cosenza test for defining a "state" officer,100 Honeycutt thus implicitly rejects the argument that a local government entity cannot be liable for the torts of a state officer.101

98. Id.
99. See the text at notes 84-85, supra.
100. Cosenza v. Aetna Ins. Co., 341 So. 2d 1304, 1305 (La. App. 3d Cir. 1977) ("a 'state office' is one created by the Legislature or the Constitution"); cf. La. R.S. 42:1 (1950) ("A public office means any state, district, parish or municipal office, elective or appointive . . . . when the office or position is established by the constitution or laws of this state.") (emphasis supplied). See id. 33:381 (1950), as amended by 1970 La. Acts, No. 594, § 1 (statute creating position of town marshal); La. R.S. 33:423 (Supp. 1970) (statute prescribing duties of town marshal). After the incident in Honeycutt, the Revised Statutes were amended to substitute "chief of police" for "marshal" in section 381. 1975 La. Acts, No. 790, § 1. No similar change was made in section 423, which still speaks in terms of the duties of the marshal. La. R.S. 33:423 (Supp. 1977). It is interesting to note that one of the cases cited in Cosenza was a decision holding that a town could not lower the salary of a city marshal to such low levels that the office would be abolished as a practical matter. See note 95, supra, and accompanying text.

It is clear that . . . [the marshal] was performing a duty incident to his employment at the time he shot Honeycutt. Although the Marshal of the Town of Boyce is an elected official . . . . whose functions are provided by statute . . . . the answer of Marshal Hillman admits that, at the time of Honeycutt's shooting, he was acting in his capacity as Marshal of the Town of Boyce, was dressed in some of the paraphernalia of the Marshal of the Town of Boyce and was serving a warrant of arrest as Marshal of the Town of Boyce.
Moreover, it explicitly rejects the notion that liability should depend on the amount of control that the local government unit exercises over the officer.\textsuperscript{102}

\textit{Honeycutt} appears to offer the better approach to the problem of vicarious liability because it requires that some local governmental entity respond for all damages committed by officers in the official performance of the responsibilities of local governments.\textsuperscript{103} Unfortunately, there is no clear indication whether the Louisiana courts will follow \textit{Honeycutt} or \textit{Cosenza} in deciding on vicarious liability for the remainder of the host of state officers who serve local governments.\textsuperscript{104} Once again, the basic need is less for piecemeal judicial patchwork than for a comprehensive legislative articulation of the principles that should govern the vicarious liability of local governments.\textsuperscript{105}

\textbf{CONCLUSION}

The decisions analyzed in this article reveal unfortunate gaps in the law applicable to Louisiana's local governments. Not all areas of local government law have produced recent decisions in irreconcilable conflict

\textsuperscript{102} \textit{Id.} ("The test for vicarious liability . . . is not whether the employer could have controlled or prevented the act causing the damage but whether the employee was in the scope of his employment at the time the damage occurred.").

\textsuperscript{103} The logical result of the \textit{Cosenza} reasoning would be to hold that neither the City of Pineville nor Rapides Parish is responsible for the torts of the clerk of the city court. See note 94, \textit{supra}. Query whether the state would be liable since the clerk is a state officer and not a local officer? A supreme court opinion issued after the preparation of this article indicates in dictum that the answer would be yes. \textit{See} Foster v. Hampton, 352 So. 2d 197, 202 n.7 (La. 1977).

Of course, there may be functional reasons for distinguishing between judicial officers and other state officials who serve local governments. The point in the text is simply that \textit{Cosenza} provides no rationale for such a distinction.

\textsuperscript{104} \textit{E.g.}, \textit{La. R.S. 33:383} (Supp. 1970) (municipal officers under Mayor-Alderman system include mayor, alderman, chief of police, tax collector, clerk, and street commissioner); \textit{id. 33:521} (Supp. 1958) (municipal officers under commission plan include mayor and councilmen); \textit{id. 33:1551-1567} (Supp. 1977) (duties of parish coroner).

\textsuperscript{105} A third area in which Louisiana is confused is the question of what types of actions by local government officers and employees will subject the local government to liability. \textit{See}, \textit{e.g.}, Dufrene v. Guarino, 343 So. 2d 1097 (La. App. 4th Cir.), \textit{writ refused}, 343 So. 2d 1069 (La. 1977) (negligent inspection of private business would not render city liable to patrons subsequently injured in a fire at the establishment); Foster v. Hampton, 343 So. 2d 219 (La. App. 1st Cir.), \textit{aff'd}, 352 So. 2d 197 (La. 1977) (neither sheriff nor parish that sheriff serves is liable for damages caused by deputy's negligent operation of motor vehicle); Evans v. Allstate Ins. Co., 340 So. 2d 634 (La. App. 2d Cir. 1976) (city liable for failure to enforce weed ordinance
or decisions with absurd practical consequences, but the phenomenon seems relatively common, and underlines the need for the legislature to adopt a comprehensive, functional approach to the legal problems facing local governments.

The reason behind the discord in the area is primarily historical. Local government law is a relatively new "field" of law. Traditionally, the law relating to local governments has developed as distinctive bodies of law applicable to particular offices or types of local government. In recent years, however, scholars have increasingly recognized the need for a more integrated approach that emphasizes the functional problems faced by local government units regardless of the particular form of government.\(^{107}\)

when failure caused automobile accident that injured plaintiff). Compare Frank v. Pitre, 341 So. 2d 1376 (La. App. 3d Cir.), rev'd, 353 So. 2d 1293 (La. 1977) (sheriff liable for damages caused by prisoner that was allowed to leave custody), with Fusilier v. Russell, 345 So. 2d 543 (La. App. 3d Cir.), writ refused, 347 So. 2d 261 (La. 1977) (neither sheriff nor deputies liable for damages caused by failure to arrest intoxicated individual who later was responsible for automobile accident); see also Comment, Municipal Liability for Negligent Inspection, 23 Loy. L. Rev. 458 (1977). Obviously any attempt to provide a statutory solution to the problems of tort liability of local governments should also address this problem. Cf. 28 U.S.C. § 2680(a) (1970) (Federal Tort Claims Act preservation of immunity with respect to discretionary functions); Dalehite v. United States, 346 U.S. 15 (1953). See also Van Alstyne, Government Tort Liability: A Decade of Change, 1966 U. Ill. L. F. 919, 923:

\[\text{[U]nlike the private entrepreneur, the public officer is ordinarily not free to terminate an unduly risky enterprise. Considerations of this sort suggest that governmental tort liability, considered as a whole, may tend to develop rationally grounded functional distinctions quite different from those which characterize private tort liability systems. (Footnotes omitted).}\]  

106. For example, recent zoning decisions have generally applied a reasonable and consistent approach to zoning problems facing local governments. E.g., Southside Civic Ass'n v. Guaranty Sav. Assur. Co., 339 So. 2d 323 (La. 1976) (party attacking zoning ordinance failed to rebut presumption that local government provided adequate notice); Tucker v. City Council for New Orleans, 343 So. 2d 396 (La. App. 4th Cir.), writ refused, 345 So. 2d 56 (La. 1977) (city council has authority to reverse decision of historic zoning commission that it established); City of Oakdale v. Benoit, 342 So. 2d 691 (La. App. 3d Cir.), writ refused, 344 So. 2d 670 (La. 1977) (zoning regulation proscribing trailers applies to a mobile home that has been placed on concrete blocks and had its wheels removed); Hargroder v. City of Eunice, 341 So. 2d 463 (La. App. 3d Cir. 1976), writ refused, 344 So. 2d 378 (La. 1977) (building restrictions limiting property to residential uses applicable to property rezoned into commercial district); Cook v. Metropolitan Shreveport Bd. of Appeals, 339 So. 2d 1225 (La. App. 2d Cir. 1976), writ refused, 341 So. 2d 1123 (La. 1977) (telephone properly granted a special exception use for its telephone exchange facility).

107. See, e.g., J. Fordham, Local Government Law (1975); W. Valentine,
The Constitution of 1974 lays the framework for such a functional approach to local government law in Louisiana by authorizing broad grants of power to various types of local governments. Unfortunately, the legislature has not reorganized the statutory provisions relating to local government in a similar fashion. By building on the foundation laid by the new constitution, the legislature could promote increased certainty about the law and greater local authority to handle contemporary problems. Until the legislature acts, the contributions of the courts to these goals will be limited. Although they can and should interpret existing statutes with an eye to their practical effect, they should not ignore or rewrite statutory language. Moreover, they cannot create a unified system from a statutory maze of overlapping and imprecise statutes.


108. See LA. CONST. art. VI, §§ 4, 5, 7, 20.
109. See notes 29-72, supra, and accompanying text.
110. See notes 6-28, supra, and accompanying text.