Public Law: Local Government Law

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LOCAL GOVERNMENT LAW

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As has been true in the past, litigation regarding local governments consumed a significant portion of the dockets of Louisiana’s appellate courts. Decisions which involved local governments arose in a variety of contexts including litigation concerning the constitutional prohibition against local and special laws,1 election controversies,2 the state’s local option law,3 the requirements for adopting municipal ordinances,4 the options available to utilities owned by local governments,5 the reach of the police power,6 land use planning,7 taxing

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2. See, e.g., Roe v. Picou, 361 So. 2d 874 (La. 1978) (candidate for school board seat substantially complied with the statutory requirement that he designate “the office he seeks” despite his erroneous designation of the ward number of the seat for which he was qualifying); Staton v. Hutchinson, 370 So. 2d 106 (La. App. 1st Cir. 1978) (candidate may contest an election on grounds that nonresidents of the local government were allowed to vote in the election when the candidate challenged the voters at the polls but was overruled by the election commissioners).

3. Kelly v. Village of Greenwood, 363 So. 2d 887 (La. 1978) (the mere holding of a local option election on the wrong date does not render the election void in the absence of evidence that the result of the election would have been different had it been held on a different date); Boykin v. Desoto Parish Police Jury, 359 So. 2d 239 (La. App. 2d Cir.), cert. denied, 360 So. 2d 199 (La. 1978) (local option election is upheld where there was substantial compliance with the applicable statutory procedures).

4. Compare Rue Lafayette Mortgage Corp. v. Wenger, 366 So. 2d 1059, 1060-61 (La. App. 1st Cir. 1978) (neither failure of mayor to sign ordinance nor failure of town to maintain an ordinance book in accordance with statutory requirements renders the ordinance invalid), with Merchant v. Fuselier, 365 So. 2d 854, 856 (La. App. 3d Cir. 1978), cert. denied, 368 So. 2d 137 (La. 1979) (resolutions that are not signed by the mayor are invalid). See also Merchant v. Fuselier, 365 So. 2d 852, 854 (La. App. 3d Cir. 1978) (unless there is a certified copy of a city ordinance that complies with statutory requirements, it “must be proved like any other fact”).

5. Board of Comm’rs v. All Taxpayers, 360 So. 2d 883 (La. 1978); Perry v. City of Monroe, 360 So. 2d 1352 (La. App. 2d Cir.), cert. denied, 362 So. 2d 583 (La. 1978). See notes 32-112, infra, and accompanying text.

6. Eudy v. Jefferson Parish Council, 363 So. 2d 1235 (La. App. 4th Cir. 1978) (parish council is not required to conduct a hearing or provide notice to affected citizens before adopting an ordinance banning the sale of shrimp from trucks).

7. E.g., City of New Orleans v. State, 364 So. 2d 1020 (La. 1978). See notes 113-29, infra, and accompanying text. See also Rue Lafayette Mortgage Corp. v. Wenger, 366 So. 2d 1059 (La. App. 1st Cir. 1978) (prior use of land as a park for recreational vehicles did not constitute the operation of a trailer camp as that term was used...
authority,\textsuperscript{8} public contracts,\textsuperscript{9} tort liability,\textsuperscript{10} the open meeting law,\textsuperscript{11}

in city zoning ordinances; Old Jefferson's Civic Ass'n v. Planning Comm'n, 364 So. 2d 193 (La. App. 1st Cir. 1978) (planning commission must hold hearings prior to approving subdivision plats submitted by developers); State v. City of New Orleans, 360 So. 2d 624 (La. App. 4th Cir. 1978) (highway department does not have to pay compensation when it condemns city property that has been dedicated to public use).

8. Ouachita Parish School Bd. v. Ouachita Parish Supervisors Ass'n, 362 So. 2d 1138 (La. App. 2d Cir. 1978) (school supervisors were not authorized to participate in raises funded by sales tax approved at a special election); Giraud v. City of New Orleans, 359 So. 2d 294 (La. App. 4th Cir. 1978) (suit for refund was the sole remedy for challenges to changes in tax rolls that increased taxes on vacant property in New Orleans).

9. See, e.g., Haughton Elevator Div. v. State Div. of Administration, 367 So. 2d 1161 (La. 1979) (governmental authority awarding bids under the public bid law must provide notice and hearing to the low bidder on a contract before disqualifying the bidder as nonresponsible); Arnold v. Board of Levee Comm'rs, 366 So. 2d 1321 (La. 1978) (broad grant of authority allowing the Orleans Levee Board to dispose of its property by the methods it deems proper operates to exempt the board from the requirements of the Public Lease Law); College Assoc. v. City of Baton Rouge, 369 So. 2d 1066 (La. App. 1st Cir.), cert. denied, 371 So. 2d 1341 (La. 1979) (even though no contract existed between city and developers because of the lack of a meeting of the minds on price, developers are nonetheless entitled to recover the full cost of constructing a sewer line on a theory of unjust enrichment); Lorenz v. Plaquemines Parish Comm'n Council, 365 So. 2d 27 (La. App 4th Cir.), cert. denied, 365 So. 2d 1374 (La. 1978) (city can waive the requirement of the public bid law that a bidder furnish a bid bond with his bid when the omission was inadvertent and the bond was furnished on the same day as the bids were opened). Haughton Elevator is probably the most significant of the contract decisions. Although it involves the state as a defendant, its rationale also covers local governments that award contracts under the public bid law. For a more detailed discussion of the decision, see Note, Shaping Specific Procedural Requirements for Disqualification Under Louisiana's Public Bid Law, 40 LA. L. REV. (1980).

10. See Segura v. Louisiana Architects Selection Bd., 362 So. 2d 498 (La. 1978); Romero v. Town of Welsh, 370 So. 2d 1286 (La. App. 3d Cir. 1979); Whatley v. State, 369 So. 2d 1125 (La. App. 1st Cir. 1979); Durbin v. City of Baton Rouge, 366 So. 2d 1029 (La. App. 1st Cir. 1978); Honeycutt v. Town of Boyce, 366 So. 2d 640 (La. App. 3d Cir. 1978), cert. denied, 369 So. 2d 154 (La. 1979). These cases are discussed at notes 130-58, infra, and accompanying text. See also Williams v. London, 370 So. 2d 518 (La. 1979) (statute requiring that a plaintiff furnish bond for the attorney's fees when he sues an elected official for any matter arising out of the performance of his public duties is inapplicable to a suit based on an assault allegedly committed by a member of a police jury during a police meeting); Guillotte v. Houston Gen. Ins. Co., 368 So. 2d 1026 (La. 1979) (jury did not draw an unreasonable inference when it concluded that the plaintiff did not assume the risk of injury when she stepped over a string of Christmas lights that were stretched across a public sidewalk); LaFleur v. City of Ville Platte, 367 So. 2d 121 (La. App. 3d Cir.), cert. denied, 368 So. 2d 124 (La. 1979) (city is liable for injuries plaintiffs suffered when the leg of a table at the city's community center collapsed and the plaintiffs fell from the table top); Capers v. Orleans Parish School Bd., 365 So. 2d 23 (La. App 4th Cir. 1978) (school board not liable for injury child suffered on school playground in the absence of negligence on the part of school employees).

11. State v. Guidry, 364 So. 2d 589 (La. 1978) (court refuses to decide the constitutionality of the state open meeting law when all parties concede on appeal that the
and public officers and employees. The breadth of the issues raised in these decisions required considerable selectivity to allow careful analysis within reasonable space limitations. Accordingly, this article focuses on the decisions in four areas: the constitutional prohibition against local laws, the options available to local governments that provide utility services, the ability of local governments to control the state's use of state-owned land, and the tort liability of local governments.

LOCAL LAWS

During the 1978-79 term, the Louisiana Supreme Court continued its recent trend of strictly enforcing the constitutional provisions pertaining to local or special legislation. State ex rel. State conduct of the defendants did not violate the statute; Morial v. Guste, 365 So. 2d 289 (La. App. 4th Cir.), cert. denied, 365 So. 2d 1375 (La. 1978) (district court may issue a declaratory judgment that a proposed gathering does not violate the open meeting law).

12. Bellon v. Deshotel, 370 So. 2d 221 (La. App. 3d Cir. 1979) (statutory prohibition against holding two elective public offices simultaneously is constitutional); Montelepre v. Edwards, 359 So. 2d 1311 (La. App. 4th Cir. 1978) (minimum age established for the offices of municipal court judge requires that candidate reach the age when he assumes office, not when he qualifies as a candidate).

13. E.g., Stevens v. Board of Trustees of Police Pension Fund, 370 So. 2d 528 (La. 1979) (statute that precludes former employees from withdrawing contributions they were required to make to police retirement system does not take private property without due process of law nor deny the former employees equal protection of the law); Buras v. Board of Trustees of Police Pension Fund, 387 So. 2d 849 (La. 1979) (Administrative Procedure Act does not authorize the district court to conduct a de novo hearing when pension board fails to comply with the procedural requirements of the Act; proper remedy is remand to agency for further proceedings); City of Kenner v. Lawrence, 365 So. 2d 1301 (La. 1978) (city civil service board can appeal judgment reversing its reinstatement order even though the employee ordered reinstated fails to perfect a timely appeal); City of New Orleans v. Police Ass'n of La., 369 So. 2d 188 (La. App. 4th Cir. 1979) (district court can enjoin strike by municipal police officers despite the absence of a statute declaring such strikes to be unlawful); Frazier v. Allen, 363 So. 2d 542 (La. App. 2d Cir. 1978) (member of police civil service board satisfied residency requirement of statute while he was temporarily living outside the city while on active duty service with the military); Branighan v. Department of Police, 362 So. 2d 1221 (La. App. 4th Cir.), cert. denied, 365 So. 2d 247 (La. 1978) (civil service commission may not reduce the dismissal of a police officer to a suspension where the behavior leading to the dismissal provided sufficient legal cause to sustain a dismissal); Johnson v. Baton Rouge Mun. Fire & Police Civil Serv. Bd., 361 So. 2d 1857 (La. App. 1st Cir. 1978) (to establish his eligibility to take a promotion examination, the applicant must show that he will meet the qualifications for the job he is seeking when the position will become vacant, not at the time he applies to take the examination).

Banking Department v. Acadiana Bank and Trust Co. invalidated a provision in a 1976 Act that had prohibited banks in nine named parishes from opening on Saturdays. The per curiam opinion ruled that the challenged provision violated article III, section 12(6) of the 1974 constitution, which prohibits the legislature from enacting local laws regulating trade. The court’s brief opinion adds little gloss to the definition of what constitutes a local law except to cite State v. LaBauve and to emphasize that the vice in the banking legislation stemmed from the “specific designation” of the parishes to which the provision applied. Despite its limited doctrinal importance, Acadiana Bank is significant because it confirms that the court is giving close scrutiny to laws applicable to a single locality or a small group of localities—especially when the localities are specified by name rather than by the characteristics of a class to which they belong.

State v. Slay is a second opinion reflecting the new scrutiny that the court is displaying with respect to local laws. In Slay the court reversed a conviction for violating the criminal provisions of Louisiana Revised Statutes 56:322, which regulates the use of mesh nets.

15. 360 So. 2d 846 (La. 1978). In a footnote, the court also stated that “[t]he trial court correctly held that the defendant bank was denied the equal protection of the law”; but it professed “not [to] reach this issue.” Id. at 847 n.2 (emphasis added).

Justice Summers dissented without opinion, and Justice Marcus filed a concurring and dissenting opinion that Chief Justice Sanders joined. Justice Marcus agreed with the footnote statement that the law denied the bank equal protection of the law, but he dissented from the holding that the act was a local or special law. 360 So. 2d at 847 (Marcus, J., concurring & dissenting in part). He would apparently limit the reach of the constitutional provisions on local and special laws to encompass only laws that are “directed to secure some private advantage or advancement for the benefit of private persons or private property within a certain locality.” Id. at 848. He did not explain why the bank law would not fall within that definition. At first glance it would seem to satisfy the test since its purpose appears to protect private banks that wanted to close on Saturday from the competition of other banks that wanted to remain open.

18. 360 So. 2d at 847.
19. 370 So. 2d at 508 (La. 1979).
20. The trial court convicted Slay on two different charges: using nets of an illegal size in violation of Revised Statutes 56:322(D) and using nets that had not been tagged by the Department of Wildlife and Fisheries as required by Revised Statutes 56:322(A)(5). Although the court’s opinion addresses only the validity of subsection D, it concludes with the assertion that “the statute R.S. 56:322 must therefore be considered a local law which violates Article 3, § 12 of the Louisiana Constitution.” 370 So. 2d at 511. The court made no attempt to explain why the invalidity of subsection D, which is an exception to the general rule of subsection A, also invalidated subsection A, which draws different geographical designations than subsection D; nor did it explain why the invalidity of subsection D also nullified the conviction under subsection A(5), which applied to all gill nets used in the state “except approved devices for taking of bait.”
nets in the fresh water areas of the state. "In brief, the statute prohibit[ed] the use of nets with mesh less than two inches square or four inches stretched except in [specifically designated areas], where mesh of one inch square or two inches stretched is permitted." The court held that the statute violated the constitutional ban against enacting local or special laws defining any crime because the legislature lacked any rational basis for distinguishing the areas in which smaller nets were permitted from those in which larger nets were required.

The court's analysis of the statute challenged in Slay began with the premise that a "statute is suspect as a local or special law if its operation is limited to certain parishes or designated areas unless the limitation results from a reasonable classification such as population or physical characteristics." The statute contained no explanation for the classifications it established, but the Department of Wildlife and Fisheries tried to defend the statutory scheme in an amicus brief; it contended "that the smaller mesh is permitted [in certain areas] to promote efficient management of fishery resources in southern areas of the state where the great confluence of waters gives rise to a large fish population." The court rejected this rationale because it did not have factual support. Relying on "a standard map of the state" and "expert testimony adduced at trial," the court concluded that the statutory scheme was not consistent with the purpose that the Department claimed it served, especially "since large expanses of waters in the southern part of the state are not included in the areas [where smaller mesh is allowed]."

Although Slay largely relies on LaBauve, it goes beyond the earlier decision in one important respect. It demonstrates that the mere assertion of a rationale for choosing the particular localities will not suffice; one must be able to offer evidence showing that the

21. 370 So. 2d at 510-11.
22. LA. CONST. art. III, § 1(10).
23. 370 So. 2d at 511.
24. Id.
25. Id. The court used the following examples to explain why it rejected the Department's rationale:

It is difficult to believe that the fish population is significantly greater in St. Mary Parish, where the one inch mesh is permitted, than in Vermilion Parish or the western part of Iberia Parish, where using the smaller mesh entails criminal liability. It also appears anomalous that fishermen may use the one inch mesh in the Ouachita River within the boundaries of Caldwell Parish, but must fish with the larger mesh once the river flows into Catahoula Parish. Certainly it strains logic to assume that the fish population is significantly smaller in the downriver parish, especially in light of the expert testimony adduced at trial that most fish in the state spawn in the southern waters and migrate to the north.
rationale is one that offers a reasonable basis for the statutory scheme.26 Taken in conjunction with Acadiana Bank, it reiterates the LaBauve message that the Louisiana Supreme Court is increasingly unwilling to uphold, as general laws, statutes that limit their applicability to a few specifically named localities.

Unfortunately, recent statutes suggest that LaBauve's warning, now reinforced by Acadiana Bank and Slay, has had little impact on the legislative process in the state. During its last two sessions, the Louisiana legislature has passed a number of acts that limit their applicability to particular localities. Some were advertised as article III, section 13 requires for all local bills.27 Others, however, contain no notice of publication even though they specify the localities to which they apply,28 and no apparent pattern distinguishes those that are advertised from those that are not. Moreover, advertising does not render a local law valid if it concerns a subject on which local laws are prohibited. At least one recent law seems to violate the ban in article III, section 12 against local laws defining a crime,29 and other statutes might arguably be construed as falling within the list of prohibited subjects. For example, does a law changing the debt limit of school districts "regulat[e] the raising of money for the management, building, or repairing of parish or city schools" in violation of section 12(A)(8)?30 Finally, even in those cases in which the legislature has legislated by classification rather than enumeration of the localities to which the act applies, it has often drawn the classes so narrowly that they can apply only to a single locality.31

26. Id. The inquiry into the reasonableness of the classification when the legislature has designated the areas by name rather than by designating the class to which the area belongs suggests that the court will continue to allow legislation for specifically named localities when the legislature has a reasonable basis for its choice. See Davenport v. Hardy, 349 So. 2d 858 (La. 1977); 1977-1978 Term, supra note 14, at 847-50. The 1979 revision to the section invalidated in Slay appears to satisfy that test since it distinguishes between freshwater and saltwater areas in establishing the types of nets that are permissible. 1979 La. Acts, No. 226, § 1, amending LA. R.S. 56:322 (Supp. 1978).


29. See 1979 La. Acts, No. 432 (authorizing permanent registration for homestead exemption in specified parishes and making it a misdemeanor in those parishes for anyone to fail "to notify the assessor in writing that the property on which he has claimed a homestead exemption under this Section no longer qualifies for that exemption").


31. See, e.g., 1979 La. Acts, No. 214 (applicable to municipalities "with a population in excess of five hundred thousand persons on the effective date of this Act," a
so far as these classifications are overly restrictive, they may be treated as local laws under the test established by LaBauve.

Utility Services

The energy crisis of recent years has had a severe impact on Louisiana local governments whose utility departments provide electrical service. In the past, many of them have used natural gas to generate their electricity, and the skyrocketing cost of natural gas has resulted in a rapid rise in the cost of electricity. In addition, shortages of natural gas during periods of peak usage in the last several years have exacerbated the cost pressure by requiring local governments to substitute other fuels, which are less efficient and even more expensive. The cumulative effect of these pressures has forced local governments to search for new ways to contain utility costs. Recent decisions of the Louisiana appellate courts have reflected sensitivity to this effort by giving an extremely sympathetic reading to state statutes authorizing two methods for municipalities to handle the rising cost of generating electricity—combined action by groups of local governments and the substitution of a private franchisee for the local government, but these decisions also demonstrate the continuing need for a comprehensive revision of the statutes governing utilities owned by local governments.

Joint Action by Local Governments

One possible alternative for local governments to contain rising utility costs is to build new generating facilities that operate more efficiently by utilizing the latest technology. Under the 1974 constitution, the legislature can authorize the state’s political subdivisions to issue bonds to construct revenue-producing public


33. The constitutional definition of “political subdivision” includes parishes, municipalities, and any other units of local government “authorized by law to perform governmental functions.” LA. CONST. art. VI, § 4(2).
utilities, and the legislature has implemented this provision in chapter 10 of title 33 of the Revised Statutes. Both the constitutional provision and the statute limit the security of the bonds to the assets and income of the utility and the constitution specifically precludes them from constituting "a charge upon the other income and revenues of the political subdivision."

Economies of scale often make combined action by various local governments desirable. In recognition of this fact, the constitution allows local governments to perform "any authorized power or function, including financing, jointly or in cooperation with one or more political subdivisions, either within or without the state," and the legislature has passed Louisiana Revised Statutes 33:1321-37, the "Local Services Law," one of the purposes of which is to allow political subdivisions to make agreements for the joint "construction . . . of public projects or improvements, . . . including but not being limited to, . . . electric systems." To facilitate the development of these agreements among local governments, the Local Services Law permits local governing bodies that conclude an agreement to create "a joint commission as an agency and instrumentality of such [political subdivisions] to administer the terms of such agreement"; and a 1975 addition to the law, Louisiana Revised Statutes 33:1334(D), declares every such joint commission "to be a body politic and political subdivision of the state . . . with all rights, powers, and authority granted to political subdivisions of the state under the constitution and general laws of the state."

Moreover,

34. LA. CONST. art. VI, § 37.
37. LA. CONST. art. VI, § 37(A).
38. See Board of Comm’rs v. All Taxpayers, 360 So. 2d 863, 865 (La. 1978).
39. LA. CONST. art. VI, § 20 (emphasis added).
41. The statutory grant of authority extends to “a]ny parish, municipality or political subdivision of the state, or any combination thereof.” LA. R.S. 33:1324 (Supp. 1978). Moreover, the statute defines “municipality” to “include cities, towns, villages, or other special districts or other political subdivisions created to perform one or more public functions or services.” LA. R.S. 33:1321 (Supp. 1954).
43. Id.
subsection A of section 1334 specifically permits the parties to an agreement to authorize a joint commission "to issue in its corporate name, any revenue bonds of such commission to finance the cost of the construction . . . of such public projects or improvements." It further provides that the joint commission bonds may be the joint and several obligation of the parties to the agreement, but stipulates that the bonds shall be payable "solely from the revenues derived from the operation of the public project constructed or acquired with the proceeds of such revenue bonds." Subsection C reiterates that the political subdivisions that create the joint commission are not liable for payment of the principal or interest of the joint commission's bonds except as provided in Subsection A of this Section and, in addition, the [political subdivisions] may contract for services furnished by any joint facility constructed by the commission and the [political subdivisions] may obligate themselves to make payments for such term, not exceeding forty years, and in such manner as may be provided in such contract.

Finally, the 1975 amendment added Louisiana Revised Statutes 33:1337, which directs the liberal construction of the provisions governing joint financing "to the end that, through the use of arrangements and agreements provided for herein between one or more [local governments] and/or joint commissions, . . . greater economy and efficiency in the providing of electrical and energy services to the citizens may be achieved." As authorized by the Local Services Law, four Louisiana cities agreed to construct a new electric generating plant jointly, and they created a joint commission, the Louisiana Municipal Power Commission (LAMPCO), to administer the agreement and to build the proposed $90,000,000 plant. Once the plant is constructed, "each city will be entitled to purchase a percentage of the project's capability

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46. Id.
47. LA. R.S. 33:1334(C) (Supp. 1976).
48. LA. R.S. 33:1337, added by 1975 La. Acts, No. 597. This direction appears redundant in view of section 1323, which provides that all of part VII of chapter 2 of title 33 of the Revised Statutes "shall be construed liberally, to the end that, through the use of the arrangements provided herein, greater economy and efficiency in the operation of local services may be encouraged, and the benefits of such services may be extended." LA. R.S. 33:1323 (1950).
49. The four cities were Morgan City, Franklin, Opelousas, and Natchitoches. Board of Comm'rs v. All Taxpayers, 360 So. 2d 863, 864 (La. 1978). According to the decision of the court of appeal, the city of Thibodeaux had originally planned to participate in the LAMPCO project but later withdrew. 355 So. 2d 578, 579 n.2 (La. App. 3d Cir.), rev'd, 360 So. 2d 863 (La. 1978).
... and also will be compelled to do so under a 'take or pay' contract, although it is contemplated that unneeded capacity will be sold to outsiders or adjusted between the cities. Each city’s contract calls for it to pay a proportionate share of LAMPCO’s “monthly power costs” (which include items such as maintenance, renewal, or replacement of the facility; all costs of production; and any uninsured liability for damages) plus a ten percent surcharge. These payments are payable as an operating expense of each city’s existing municipal utility system, and the cities are obligated to make their payment regardless of whether the LAMPCO project is completed or they receive the anticipated power and energy from LAMPCO.

To finance the plant, LAMPCO proposed to issue $90,000,000 in revenue bonds, and it initiated an action to obtain judicial validation of the bonds and the power contracts of the various cities. Opponents of the proposal lodged two principal objections to the LAMPCO scheme—that the bonds and power sales contracts were not authorized by the statute and that the power sales contracts and bonds violated the constitutional provision prohibiting bonds issued in connection with revenue-producing public utilities from being charged against the “other income and revenues” of a local political subdivision. In Board of Commissioners v. All Taxpayers, Justice Marcus was the sole dissenter. He accepted both arguments advanced by the opponents: that the statutes did not authorize the bonds and power sales contracts and that the bonds violated the constitutional prohibition precluding bonds from constituting a charge against the “other income and revenues” of a political subdivision. To the contrary, he argued, they were “payable from the combined municipal utility system of each member city” and thus were not “authorized by La. R.S. 33:1334(A).” Id. This analysis of the language of section 1334(A) is impeccable, but the argument of the dissent is ultimately unpersuasive because it ignores subsection C of that same section, which recognizes “contracts for services” as an additional form of security for the bonds. See text at notes 61-62, infra.

Equally unconvincing is the dissent’s argument that the bonds violate the constitutional provision prohibiting the bonds from constituting a charge against the “other income and revenues” of the political subdivision because the power sales contracts make the bonds payable from the combined utility revenues of the cities. In the first place, the dissent’s analysis suffers from the same imprecision as the majority opinion because it fails to identify the applicable political subdivision to which it applies. See text at notes 62-64, infra. Moreover, assuming LAMPCO is the political subdivision to which the provision applies, the dissent fails to give any explanation of its rejection of the majority’s view that the funds that LAMPCO will derive from the power sales contracts are revenues from the LAMPCO project. See text at note 52, infra.

50. 360 So. 2d at 866.
51. 360 So. 2d 863 (La. 1978), rev’g 355 So. 2d 578 (La. App. 3d Cir.). Justice Marcus was the sole dissenter. He accepted both arguments advanced by the opponents: that the statutes did not authorize the bonds and power sales contracts and that the bonds violated the constitutional prohibition precluding bonds from constituting a charge against the “other income and revenues” of a political subdivision. 360 So. 2d at 872 (Marcus, J., dissenting). In arguing that the bonds and power sales contracts were not authorized by the statute, he found that the failure to condition the cities’ obligations under the power sales contracts on the receipt of electrical service made the bonds violate the requirement of section 1334(A) that they be “payable ... solely from the revenues derived from the operation of the public project.” To the contrary, he argued, they were “payable from the combined municipal utility system of each member city” and thus were not “authorized by La. R.S. 33:1334(A).” Id. This analysis of the language of section 1334(A) is impeccable, but the argument of the dissent is ultimately unpersuasive because it ignores subsection C of that same section, which recognizes “contracts for services” as an additional form of security for the bonds. See text at notes 61-62, infra.
siana Supreme Court rejected both arguments and gave LAMPCO the declaration of validity that it sought.

With respect to the contention that the bonds and contracts were not authorized by the statute, the key issue was whether funds derived from the power sales contracts of the cities were revenues derived from the operation of the proposed LAMPCO project. Since the contracts were enforceable against all of the utility revenues of the cities, the opponents contended that the effect of the arrangement was to make the bonds payable out of the combined utility revenues of the various cities and that the bonds were not, therefore, payable solely out of revenues from the LAMPCO project. Relying on the statutory direction to construe the statutory provisions liberally to promote "greater efficiency in the providing of electric and energy services," the supreme court rejected that argument and concluded that the phrase "revenues derived from the operation of the public project" included "all LAMPCO revenues, including those derived from the power sales contracts." The court also held that the statute authorized the power sales contracts because they were contracts for services as that term was used in section 1334(C), even though they obligated the cities to make payments "irrespective of completion of the project or ultimate delivery of project power." Relying again on section 1337's rule of liberal construction as well as "the purposes of the statute," the court declared "that the contract for service contemplated by R.S. 33:1334(C) includes one under the terms of which LAMPCO, the agent/instrumentality of the four member cities, obliges itself to construct a $90,000,000 plant and, assuming successful completion thereof, to furnish electric power in accordance with the terms of the agreement." Finally, the supreme court ruled that the power sales contracts and the proposed bonds did not violate the constitutional provision precluding bonds issued in connection with revenue-producing utilities from constituting "a charge upon the other income and

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52. 360 So. 2d at 867. The majority also relied on the authority granted cities by section 1337 "to adopt such other ordinances and resolutions, take such other actions and charge and collect such fees as may be contemplated or necessary by the said Contract, all for the purpose intended," but that reliance appears to have been misplaced. The "said contract" in that clause refers to an "Energy Resource Contract as authorized by R.S. 33:1335," La. R.S. 33:1337 (Supp. 1975); and the energy resource contract is, in turn, defined as an agreement between a political subdivision or joint commission and a privately owned utility. La. R.S. 33:1335 (Supp. 1975). Since LAMPCO had entered into no such contract with a privately owned utility, this authority conferred by section 1337 is irrelevant.

53. 360 So. 2d at 867.

54. Id. at 867-68.
revenues of the local political subdivision." That prohibition did not, the court declared, limit the bonds to the income produced from the specific project; it merely precluded the bonds from being a charge upon the income and revenues "other than utility revenues" of the political subdivision. Even though the power sales contracts required the city to pay if the project were not completed or the project power furnished, they made the debts "payable only from the revenues and receipts of the respective combined municipal utility systems of the four cities" and did not, therefore, constitute a charge against "other income and revenues."

The court recognized that "conceivably customers of the utility may be exposed to increased charges, in the event the project fares worse than the feasibility studies suggest," but concluded that this possibility did not make the bonds payable from the "cities' entire revenues and assets" when the non-utility income could "in no way be charged or burdened with payment of the revenue bonds at issue." Similarly, although the court acknowledged that the possible loss to the cities' general funds of net utility revenues might affect the solvency of the cities, it nonetheless found that this possibility did not "convert a charge against utility revenues to a charge against other income and revenues." According to the court, concern for the project's "overall effect upon the cities' general revenue picture" might well be legitimate, but it was a policy determination that was appropriate for "the governing bodies of the cities, rather than the courts."

The court reached a desirable result in Board of Commissioners by implementing a statute designed to equip local governments to handle the energy crisis more effectively, but the court's opinion is not completely satisfying. Although it properly emphasized the legislative direction to construe the statute liberally, the opinion fails to complete the analytical process by demonstrating why the decision is consistent with the statutory language and purposes. This omission is unfortunate, because greater attention to the details supporting the court's decision would have made the opinion more persuasive.

The initial weakness in the court's opinion is its failure to analyze separately the two issues involved in its determination that

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55. La. Const. art. VI, § 37(A). See notes 33-37, supra, and accompanying text.
56. 360 So. 2d at 868 (emphasis in original).
57. Id.
58. Id.
59. Id.
60. Id.
the statute authorized the bonds and contracts—whether the bonds were to be paid solely from the revenues of the public project and whether the cities had authority to enter into their contracts with LAMPCO. As a result of this analytical imprecision, the court failed to focus on the statutory language. In particular, the court failed to discuss the critical language of Louisiana Revised Statutes 33:1334(C), although it did cite the subsection.61 As noted above, that subsection established two exceptions to the general rule that local governments are not liable for the revenue bonds of a joint commission: (1) "as provided in Subsection A," the local governments may be joint obligors on bonds payable solely from the revenues derived from the operation of the public project; and, (2) "in addition," the local governments may "contract for services" furnished by a joint facility for periods up to forty years. The location of the contractual authority in section 1334(C) seems significant. Placing the provision concerning contractual authority as an exception to the general rule that local governments are not liable for the bonds supports the inference that the legislature intended not only to grant local governments authority to contract with a joint commission, but to allow a local government's obligation under such a contract to serve as security for the bond as well. This inference, in turn, supports the court's conclusion that the legislature meant the funds produced from those obligations to be part of the revenues of the public utility out of which the bonds are payable.

This conclusion does not, of course, completely settle the question of whether the LAMPCO bonds could be secured by LAMPCO's power sales contracts with its member cities. Under the provisions of section 1334(C), the obligations incurred by the cities can secure the bonds only if the contracts were "contracts for services" within the meaning of the subsection. But since the providing of electricity was the "service" for which LAMPCO was created and the contracts called for LAMPCO to deliver electricity to the cities, the LAMPCO contracts would appear to be precisely the type of contract that section 1334 envisioned. Nor should the decision of the cities to obligate themselves even if LAMPCO failed to deliver electricity change this conclusion. Although this decision might be imprudent, it would not change the nature of the contract; the contract would still be one requiring LAMPCO to provide electrical services. Moreover, the statutory language contains no hint of any legislative intention to prescribe a limit on the type of obligation that a local government could assume under section 1334(C).62

61. Id. at 867. See also id. at 865.
62. Had the legislature merely intended to authorize contracts to purchase power, the more logical place to locate the authorization would have been Revised Statutes
Careful analysis of the statutory language thus supports the court’s conclusion that the statute authorizes the LAMPCO bonds and the contracts that secure them, but one issue still remains—whether the bonds violated the constitutional prohibition precluding the bonds of a revenue-producing public utility from constituting a charge against the “other income and revenues” of the political subdivision that issues the bonds. Here again, the court’s opinion is not as precise as one would like. The court correctly notes that the constitutional provision does not limit the security for bonds to a specific project, but allows the pledging of all utility revenues of the political subdivision as security. While that decision may be unwise, it is appropriately one for the legislative body of the local government.

The court fails, however, to explain how this provision applies to the LAMPCO bonds. Specifically, the court neglects to identify the “political subdivision” to which the provision applies. If LAMPCO is that subdivision because it issued the bonds, the inapplicability of the section is obvious because the court had previously determined that all of its income (including the funds derived from the power sales contracts) were revenues of the public project. The more difficult question is whether the cities that created LAMPCO are also subdivisions that have issued bonds within the meaning of the constitutional provision. The proper answer to this question should be that they are. Although the cities apparently failed to take advantage of the statutory authorization to serve as joint obligors on the bonds, they achieved the same practical result by allowing LAMPCO to use the power sales contracts as security for the bonds and by also making each city’s obligations under its contract enforceable against its total utility revenues. Thus, exempting them from the coverage of the constitutional prohibition would enable them to evade the constitution’s requirements by indirection.

But even if the constitutional provision covers local governments that issue bonds through a joint commission, the LAMPCO bonds should not be held to violate the substantive prohibition of the provision because the provision allows the pledging of all utility revenues of the political subdivision as security. Insofar as the member cities are covered by the provisions as bond-issuing political subdivisions, they may pledge all of their utility revenues to support

33:4164, which is entitled “Contracts for obtaining water or electricity from another political subdivision or private person.”
64. The supreme court opinion is silent as to whether the cities directly pledged their utility income to support the bonds, but the opinion of the court of appeal indicates that they did not. 355 So. 2d at 579.
the project, and that type of pledge is what the member cities of LAMPCO have offered. Not only does this interpretation satisfy the literal wording of the constitution, it is also consistent with the separate constitutional permission for local governments to perform financing functions with other political subdivisions because it grants LAMPCO's member cities the same authority, and imposes on them the same limits, as any one of them would have had if it had built the plant individually.

In sum, the court intuitively reached the right result in Board of Commissioners. Unfortunately, by its incomplete explanation of the rationale behind the result, the court missed an excellent opportunity to demonstrate and endorse an analytically precise approach to a complicated and ambiguous problem of statutory construction.

Substitution of a Private Franchisee

The Revised Statutes permit a local government to sell its utility properties, "including all proper franchises to operate the same not to exceed sixty years," if a majority of the electors voting in an election held for that purpose approve the action. If the election vote is favorable, the local government's governing authority must pass an ordinance directing "the appropriate executive officer to make the sale, lease or other contract, submitted to the voters, including the franchise to operate the same, and to execute the deeds, conveyances, and contracts necessary to carry out and consummate the proposition submitted and voted on."

One major obstacle in persuading a private company to accept a franchise to operate government-owned utilities is the franchisee's reluctance to have the local government set the rates for the utility when it is privately operated. Louisiana local governments have traditionally set the rates for the utilities they owned, and the

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65. LA. CONST. art. VI, § 20. Curiously, the court's opinion ignores this provision entirely.
66. See LA. R.S. 33:4221 (1950) (political subdivision issuing bonds for improving a revenue-producing public utility may issue bonds secured by "pledge of the income and revenues of the public utility").
69. Prior to the passage of the 1974 constitution, the Revised Statutes authorized local governments to "establish rates, rules, and regulations with respect to the sale and distribution" of the commodity or service furnished by a governmentally-owned utility. LA. R.S. 33:4163 (1950). Under the 1921 constitution, local governments retained "the powers of supervision, regulation and control over any street railway, gas, electric light, heat, power, waterworks, or other local public utility" that were vested in
Revised Statutes expressly grant local governments authority to set the "fees and charges" for utilities that have been financed with revenue bonds. The same section that grants that authority also provides that "[n]o board or commission other than the governing body of the [local government] shall have authority to fix or supervise the making of these fees and charges."\(^{70}\)

For those public utilities owned by local governments as of the effective date of the 1974 constitution, the new constitution continues the local government's traditional authority to set utility rates. Although the constitution grants the Public Service Commission general regulatory authority over public utilities,\(^{71}\) it denies the Commission power over any public utility owned or operated by a local government on the date that the constitution became effective "except by the approval of a majority of the electors voting in an election held for that purpose."\(^{72}\) Moreover, even if a local government chooses to allow the Commission to regulate its public utility, the constitution permits the local government to "reinvest itself with such regulatory power in the manner in which it was surrendered."\(^{73}\)

The Revised Statutes contain two sets of procedures that a local government may follow when it desires to transfer regulatory jurisdiction over its public utility to the Public Service Commission. One is Louisiana Revised Statutes 33:4491-96, which was enacted in the special legislative session following the adoption of the provision of the 1921 constitution that first allowed local governments to transfer regulatory authority to the Public Service Commission.\(^{74}\) These sections permit a local government to call an election on the question of the surrender of regulatory jurisdiction either when the local government's governing body adopts an ordinance calling for

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70. LA. R.S. 33:4256 (1950).
71. LA. CONST. art. IV, § 21(B).
72. LA. CONST. art. IV, § 21(C).
73. Id.
74. LA. CONST. of 1921, art. VI, § 7. See note 69, supra.
an election or when ten percent of the local government's qualified electors sign a petition requesting an election. Following the adoption of the ordinance or the presentation of the petition, the governing body must call the election. If a majority of the votes cast favor surrender of regulatory jurisdiction, "the Louisiana Public Service Commission shall have the supervision and control of the public utility," and authority continues until the local government reinvests control in itself "by holding an election in the same manner and with all of the same formalities hereinabove provided."

In 1975 the legislature amended title 45 of the Revised Statutes, which governs the Public Service Commission, to establish another set of procedures for transferring regulatory jurisdiction to the Commission. "Notwithstanding any other law to the contrary," section 1164.2 requires a local government's governing body to call a "referendum election . . . to determine whether or not any public utility owned by [the local government] shall be under the jurisdiction and control of the commission" when it is presented with a petition signed by "not less that twenty-five percent of or seven thousand five hundred of the qualified electors residing within [the boundaries of the local government], whichever is less." The sections that follow established detailed rules concerning the petition and election, and section 1164.13 requires the local government to promulgate the election results by adopting a resolution or ordinance at its first regular meeting following the election. In addition, section 1164 provides that the statutory provision defining the Public Ser-

75. LA. R.S. 33:4491 (1950).
76. The proposition to be voted on in this election is to be submitted in the following form:
   Proposition No. 1. Shall______ (Name of town, city or parish) surrender its powers of supervision, regulation and control over______ (Name of the public utility service, such as, street railway, gas, electric light, power, heat, water works, or other local public utility.)
77. LA. R.S. 33:4494 (1950). To effect this transfer, the governing body of the local government calling the election must enter the results of the elections in its minutes, and its clerk must send certified copies of this order to the Public Service Commission. "Immediately" upon filing of this document with the commissioner, control over the utility vests in the Commission. LA. R.S. 33:4494 (1950).
78. LA. R.S. 33:4495 (1950).
81. LA. R.S. 45:1164.3 to .12 (Supp. 1975). The proposition to be voted on is supposed to be submitted in the following form:
   Shall the Public Service Commission regulate the ______(public utility) owned by ______ (the political subdivision)? Yes ___ No ___.
vice Commission's power to regulate rates and services do not apply to any public utility, the title to which is in ... [a local government], unless the electors of such [local government], and such other electors as are customers of the public utility, have manifested their approval of being under the jurisdiction of the public service commission" as required by the constitution "in the manner provided by R.S. 45:1164.1-45:1164.13." 

When a 1976 engineering study recommended that the city of Monroe sell its electric system to Louisiana Power and Light Company, the city entered into negotiations with the company that led to a proposed operating agreement whereby the company would take over operation of the city's electric utility system. The proposed agreement granted the company a sixty-year franchise to operate the utility with an option to purchase it when currently outstanding bonds are paid. The agreement called for the company to assume all operating liabilities and responsibilities of the system and to pay the city two percent of the system's monthly revenues. It also forbade the city from granting a competitive franchise, from selling additional electric revenue bonds, or from selling or mortgaging the electric system. In addition, the city agreed to surrender rate-making control to the Public Service Commission and promised not to seek to have the authority reinvested in the city so long as the operating franchise remained in effect. The agreement further provided that rates to be charged utility customers were those currently pending final approval from the Public Service Commission with future rates to be regulated by the Commission. Finally, it permitted, but did not require, the issuance of refunding bonds for the system.

To attain the necessary popular approval to enter into the proposed

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83. Those provisions are Revised Statutes 45:1163, which provides the statutory grant of power for the Public Service Commission to regulate rates and service, and Revised Statutes 45:1164, which defines the extent of that power as to service.


86. The likely reason for delaying the ultimate sale and using a franchise agreement for the immediate future was to provide flexibility for the refinancing of the bonded indebtedness of the Monroe Utilities Commission. That indebtedness included bonds issued for improvements both to the electrical system, which was eventually to be conveyed to Louisiana Power and Light, and the water system, which was to remain under the control of the city. Id. at 1355-56. Proposition 3 authorized the commission to separate the debts attributable to each system when it issued refunding bonds. Id. at 1357 n.4. See note 91, infra.

87. 360 So. 2d at 1356. It also guaranteed the city a minimum annual payment of $700,000.
agreement, the city submitted four propositions to its voters at a special election called for July 9, 1977.

- Proposition 1 sought voter approval for the proposed operating agreement, including the company's right to acquire the system when the bonds are paid.
- Propositions 2 and 4 sought voter approval for the transfer of rate making jurisdiction to the Public Service Commission; Proposition 2 followed the format prescribed by title 33, while Proposition 4 followed the format required by title 45.
- Proposition 3 sought voter approval for the issuance of refunding bonds for the entire utility system of the city.

88. The proposition read as follows:
Proposition No. 1. Shall the City of Monroe, State of Louisiana (the "City"), accept the proposal and offer of Louisiana Power & Light Company (the "Company") to operate the City's electric power and light plant and system (the "Electric System"), separately from and independently of the City's waterworks plant and system, and pursuant to which the City will grant to the Company a 60-year franchise to operate the Electric System and the right and option to acquire the Electric System for the considerations resulting from the terms of the agreement thereby proposed to be entered into, all in accordance with a written and signed proposal dated April 26, 1977, on file and available for inspection in the office of the Secretary-Treasurer of the City in the City Hall?

Id. at 1356 n.1.

89. The second proposition read as follows:
Proposition No. 2. Shall the City of Monroe, State of Louisiana (the "City"), surrender its powers of supervision, regulation and control over all electric utilities, electric utility service and electric rates in the City, commencing at such time as Louisiana Power & Light Company's presently pending rate proceeding before the Louisiana Public Service Commission shall have been finally determined, but not before said Company shall have begun to operate the City's electric power and light plant and system and to be effective so long as any electric franchise from the City to said Company remains in effect?

Id. at 1356-57 n.2. See note 76, supra.

90. The fourth proposition read as follows:
Proposition No. 4. Shall the Louisiana Public Service Commission (the "Commission") regulate the electric power and light plant and system (the "Electric System") owned by the City of Monroe, Louisiana (the "City"), commencing at such time as Louisiana Power & Light Company's presently pending rate proceeding before the Commission shall have been finally determined, but not before said Company shall have begun to operate the City's Electric System and to be effective so long as any electric franchise from the City to said Company remains in effect?

360 So. 2d at 1357 n.3. See note 81, supra.

91. Proposition 3 read as follows:
Proposition No. 3. Shall the City of Monroe, State of Louisiana (the "City") under the authority of and pursuant to the provisions of Sub-Part C, Part 1, Chapter 10, Title 33 of the Louisiana Revised Statutes of 1950, issue its revenue refunding bonds to an amount not exceeding $33,133,250, to run not exceeding twenty-seven (27) years from date thereof, with interest at a rate not exceeding nine per centum (9%) per annum, for the purpose of refunding and unifying its outstanding
All four propositions were "overwhelmingly approved" by the electorate.

Opponents of the sale lodged a number of objections to the proposed sale. Among the contentions they raised were claims that the city lacked authority to prohibit its governing body from reinvesting itself with regulatory authority over the public utility; that the state law and bond covenants required the city to retain its rate-making authority and prohibited the city from transferring that authority to the Public Service Commission; and that the election was not adequate to authorize the city to enter into the agreement because it was not called and conducted in substantial compliance with the title 45 procedures. In Perry v. City of Monroe, the second circuit rejected all of the objections, and the supreme court declined to review the decision.

The objection to the transfer of rate-making jurisdiction to the Public Service Commission centered on the city's promise not to

Water and Electric Revenue Refunding Bonds and Water and Electric Revenue Bonds, Series 1966, Series 1967, and Series 1974, dated February 1, 1965, August 1, 1966, November 1, 1967, and August 1, 1974 (such outstanding bonds being payable solely from the income and revenues of the City's combined waterworks plant and system and electric power and light plant and system, and having been issued pursuant to resolutions adopted on March 1, 1965, as amended on June 21, 1966, December 12, 1967, and July 9, 1974), said revenue refunding bonds to be payable as to principal and interest solely from the income and revenues to be derived from the City's waterworks plant and system (the "Waterworks System") and electric power and light plant and system (the "Electric System") which may be operated as separate and independent utilities, with the governing body of the City being authorized to issue such revenue refunding bonds in two series, one series to refund that portion of the outstanding bonds attributable to the Waterworks System and to be payable solely from the income and revenues to be derived from the Waterworks System, and the other series to refund that portion of the outstanding bonds attributable to the Electric System and to be payable solely from the income and revenues to be derived from the Electric System.

360 So. 2d at 1357 n.4. See note 86, supra. The trial court dismissed the plaintiff's suit attacking this proposition on the ground that the plaintiff had failed to comply with the provisions of the Bond Validation Law, La. R.S. 13:5121-30 (Supp. 1972), as amended by 1975 La. Acts, No. 230, § 1. The plaintiff appealed from that judgment, but he made no specification of error on appeal. Consequently, the second circuit declined to consider the appeal on the merits. 360 So. 2d at 1357.

92. 360 So. 2d 1352 (La. App. 2d Cir.), cert. denied, 362 So. 2d 583 (La. 1978). In addition to the matters discussed in the text, the court also rejected claims that the transfer of jurisdiction violated the state statute giving the Monroe Utilities Commission management and rate authority for the city's public utilities, id. at 1359; that the agreement amounted to a donation of public property to a private corporation, id. at 1360; that the notice of the election was inadequate, id. at 1360-61; and that the proposition submitted did not comply with the title 33 requirements because it did not vest regulatory jurisdiction in the Commission "immediately" upon filing of the order declaring the election results with the Commission, id. at 1362-63.
reinvest regulatory authority in itself so long as the company operated the franchise granted by the agreement. The opponents argued that the city lacked the power to prohibit "the citizens of Monroe or their governing body from taking any action, including the calling of an election, to reinvest the city with regulatory power over the electric utility," but the second circuit took a more common-sense approach in interpreting the constitutional and statutory provisions governing the transfer. Since neither the constitution nor the statute expressly prohibited surrender of regulatory jurisdiction for a definite period of time, the court ruled that "[t]he authority to surrender or transfer regulatory power implies that it may be done for a specific reasonable period of time." This implication was sufficient to validate the city's action because it had not contracted away the right to reinvest regulatory authority "permanently" but had merely done so during the period of the franchise. Nor was the court willing to accept the opponents' characterization of the city's action as "a bartering away of the city's police power by contract, contrary to established law." Instead, it termed the agreement as "an exercise of the city's police power" that was "specifically authorized by the Constitution and by statute."

The opponents also contended that the city lacked authority to transfer regulatory authority to the Public Service Commission and offered three different rationales to support this contention: the transfer violated covenants in outstanding bonds; the transfer violated the statutory provision that no board or commission other than the local government has authority to set rates for a utility owned by a local government when the utility has issued revenue bonds; and the same statutory provision implicitly limited the authority to transfer rate-making control to the Public Service Commission. The court rejected the first two rationales on the ground

93. The city would no longer have any authority to control the rates after the sale was completed unless it had such authority to regulate privately owned electric utilities prior to the adoption of the 1921 constitution. See notes 69-73, supra, and accompanying text.
94. 360 So. 2d at 1358.
95. Id.; cf. Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9, 138 A.2d 402 (1958) (authority to provide sewage and sanitation implies right to contract for such services for a "reasonable time").
96. 360 So. 2d at 1358-59. Since the city would probably lack jurisdiction to regulate the rates after the final sale was completed, the practical impact was to effect a permanent transfer. See note 93, supra. Of course, after the sale was completed, the city could re-establish a new municipally-owned utility system; but it was unlikely to do so in the face of the cost pressures that prompted the original sale.
97. 360 So. 2d. at 1359.
98. Id.
that the plaintiff lacked standing to litigate the issue. According to the court, both the bond covenants and the statutory prohibition against transfer existed for the sole benefit of bondholders of the utility; and, since no bondholder sued as a plaintiff, the plaintiff in *Perry* lacked "standing or interest to assert a cause of action" based on either the statute  or the bonds.  

The court did address the merits of the argument that the city lacked statutory authority to transfer regulatory jurisdiction because the statutory provision forbidding other boards from setting rates implicitly limited the constitutional and statutory authorizations to transfer rate-making jurisdiction to the Public Service Commission, but the court ultimately rejected this contention as well. Acceptance of the opponent's interpretation would, the court said, "render the constitutional and statutory provisions virtually meaningless" because "[a]ny municipally-owned . . . utility system would almost certainly have outstanding revenue bonds."  

Noting that neither the constitution nor the statutory provisions contained any express limitation or prohibition, the court refused to imply one; to the contrary, it determined that "[h]ad any such limitation or prohibition been intended, it would have been included within the constitutional provision and statutes specifically dealing with the subject."  

The third objection raised by the opponents was that the election was invalid because it was not conducted in substantial compliance with title 45 procedures governing transfers of jurisdiction. Although the court agreed that the approval given to Proposition 4 did not suffice as substantial compliance with the title 45 procedures, it ruled that the election was nonetheless sufficient to transfer jurisdiction because the procedures followed in submitting Proposition 2 substantially complied with the title 33 requirements for a transfer of regulatory jurisdiction. The court expressly rejected the opponents' argument that, in establishing the title 45 procedures in 1975, the legislature intended to repeal the existing procedures in title 33. It discerned in the 1975 legislation "neither express nor implied language indicating an intention to repeal [the title 33 procedures]."  

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99. Id. at 1359-60.  
100. Id. at 1360.  
101. Id. at 1361.  
102. Id.  
103. The election on Proposition No. 4 did not substantially comply with the title 45 procedures because it was not called pursuant to a petition of the electors. Id. at 1362.  
104. Id.
favored and that they will not be resorted to except where the inconsistency is too clear and plain to be reconciled," the court concluded that the title 45 procedures "merely supplement" the title 33 procedures "by providing an additional method by which the citizenry can petition for an election transferring jurisdiction over a municipally-owned public utility to the Public Service Commission." The title 33 procedures remained, therefore, "in full force and effect"; and, since the election on Proposition 2 was conducted in substantial compliance with those procedures, the election permitted transfer of regulatory jurisdiction to the Commission.

The second circuit's resolution of the first two issues discussed above was largely unexceptional. The court wisely permitted a local government that has granted an operating franchise to a private utility to disavow its ability to reinvest regulatory jurisdiction in itself for the period of the franchise. Such a disavowal seems essential to induce a private company to accept the franchise because a local government protected by a long-term franchise agreement would have little incentive to allow the franchisee to raise rates to achieve an acceptable rate of return if it could reassume control over rates. Nor is such a disavowal of the reinvestment option inconsistent with the terms of the applicable constitutional or statutory provisions since neither contains any express language precluding a disavowal for a specific period of time. Moreover, the limited disavowal seems to satisfy the most logical explanation for the reinvestment option: to make transfers of jurisdiction more attractive to local governments. Since the transfer would not be permanent, the local governments might be more willing to give the Public Service Commission an opportunity to demonstrate its ability to set fair rates. Allowing disavowal for a reasonable period seems consistent with this purpose because it gives the private utility and the Commission the opportunity to make the new arrangement work but also protects the local government's ability to reassume control if it does not work. Although a sixty-year franchise period may seem unreasonable at first glance, it is the franchise period that the legislature has established as permissible for all local governments, and the court properly deferred to this legislative determination of what is a reasonable period for a utility franchise.

The claim that a city with outstanding revenue bonds cannot transfer regulatory jurisdiction to the Public Service Commission properly gave the second circuit little difficulty in Perry, but it does

105. Id.
106. Id.
call attention to a significant ambiguity in the statutes governing utilities owned by local governments. The court's decision concerning the Perry plaintiffs' lack of standing to raise the claims relating to bond covenants allegedly prohibiting transfer of regulatory jurisdiction was sound. The sole purpose of bond covenants is to protect the bondholders; and, if no bondholder objected to the proposed transfer, private citizens should not be allowed to force the city to honor covenants that the bondholders themselves have chosen not to enforce. The same argument applies to the statutory provision precluding any board or commission other than the local government from setting the rates for a utility with revenue bonds. That provision was apparently designed for the bondholders, and only bondholders should be allowed to complain if it is not followed.

The court gave no explanation of why it reached the merits of the third rationale for the city's alleged inability to transfer regulatory jurisdiction—the argument that the statutory prohibition against any other board setting the rates for a utility which has issued revenue bonds implicitly limits the constitutional and statutory authority to transfer jurisdiction.8 But having considered the substance of the claim, the court properly rejected it. As the court noted, the provisions expressly dealing with transfers contain no limitation for utilities with outstanding revenue bonds, and this omission supports the inference that the legislature meant to impose no such limitation. This inference is further strengthened by an examination of the practical consequences that flow from acceptance of the implied limitation. Since virtually all utilities issue revenue bonds to construct their facilities, implying the limitation advocated

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8 At least three arguments might be suggested to support the position that the plaintiff had standing to raise this issue: (1) As a taxpayer, see 360 So. 2d at 1358, the plaintiff might be adversely affected. Since utility revenues had traditionally supported the city's general fund, a decline in these revenues might increase his taxes. See Donaldson v. Police Jury of Tangipahoa Parish, 161 La. 471, 482, 109 So. 34, 38 (1926) (Taxpayers have the right to "resort to judicial authority to restrain their public servants from transcending their lawful powers, or violating their legal duties in any unauthorized mode which will increase the burden of taxation or otherwise injuriously affect the taxpayers or their property."); Cully v. City of New Orleans, 173 So. 2d 46, 49 (La. App. 4th Cir. 1965) ("[T]he fact that the taxpayer's interest might be small and not susceptible of accurate determination is not sufficient to deprive him of his right of action . . . nor in our opinion is it necessary to a right of action for him to show anything other than facts from which may be drawn the conclusion that his interests as a taxpayer or property owner are or may be adversely affected.") (Emphasis added.) (2) Assuming that the plaintiff was a utility subscriber, his interest in maintaining municipal control over future rate increases might be sufficiently distinct from the public at large to give him standing. (3) If the challenge to the city's authority is considered an "election contest," the plaintiff might qualify as a "person in interest" as that phrase is used in the election code. See LA. R.S. 18:1401 (Supp. 1976).
by the plaintiffs in *Perry* would have the effect of making the transfer provisions "virtually meaningless," a result that the drafters of the provision are unlikely to have intended. Furthermore, construing the statute to imply a limitation on the local government's *constitutional* authority to transfer regulatory jurisdiction would raise the serious question of whether the legislature had exceeded the powers given to it.\(^{109}\)

The most substantial issue raised in *Perry* was the claim that the title 45 procedures provide the sole method for transferring regulatory jurisdiction. The opponents of the sale argued that the 1975 legislation establishing the title 45 procedures implicitly repealed the existing procedures in title 33 and that the Monroe election did not, therefore, authorize the transfer because it did not substantially comply with the procedures established in title 45. The second circuit dismissed the claim summarily with a reference to the established rule that implied repeals are not favored and the conclusory assertion that the title 45 provisions "contain neither express nor implied language indicating an intention to repeal [the title 33 provisions]."\(^{110}\)

Unfortunately, a close examination of the statutory language fails to support the court's assertion. Section 1164 of title 45, which was enacted as part of the same 1975 statute establishing the procedures for transferring regulatory jurisdiction, provides that the statutory sections defining the regulatory power of the Public Service Commission do not apply to a public utility owned by a local government unless the appropriate electors have "manifested their approval" of the transfer of jurisdiction to the Commission as required by the constitution "in the manner provided by [the title 45 procedures]."\(^{111}\)

This language would appear to reflect an intention to make the title 45 procedures the exclusive means for transferring regulatory jurisdiction and would consequently have precluded the title 33 route followed by the city of Monroe. At a minimum, the issue merited more than the curt dismissal that the second circuit offered; the court should have explained why the quoted language was insufficient to manifest a legislative intent to prescribe the title 45 procedures as the exclusive means for a local government to transfer regulatory jurisdiction to the Commission.

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109. The constitution vests the "legislative power of the state" in the legislature. *La. Const.* art. III, § 1(A). The constitutional question raised by accepting the argument of the plaintiff in *Perry* is whether the state's legislative power includes the power to deny to local governments the authority to transfer regulatory jurisdiction that the constitution has granted to them.

110. 360 So. 2d at 1362.

In terms of specific result, the second circuit's decision probably achieves a just result because it allows the city of Monroe to follow a consultant's recommendation that was overwhelmingly endorsed by the local electorate. It does so, however, only by inattention to the details of the statutory language that governs transfers of regulatory jurisdiction. Moreover, it provides little guidance to other local governments that desire to follow Monroe's lead. Because the plaintiffs in Perry did not include a bondholder, the court was able to avoid the difficult problems of whether bond covenants or state laws designed to protect bondholders can limit a local government's ability to transfer regulatory authority. In future litigation, opponents of transfer are likely to raise the issues by the simple expedient of purchasing one or more of the utility's bonds.

The basic problem is, of course, the confusing maze of state statutes. The refrain is a familiar one: The legislature needs to undertake a comprehensive review of the statutes covering utilities owned by local governments and resolve the basic policy issues in a clear and decisive fashion. Until the legislature completes that assignment, the role the courts can play is rather limited. By developing sensitivity to fundamental objectives and precise analysis of the statutory language, they will generally solve specific problems in an acceptable manner, but they will be unable to eliminate the myriad ambiguities that exist throughout the statutory scheme.

**Land Use Planning**

The local government article of the 1974 constitution authorizes local governmental subdivisions to adopt zoning regulations "subject to uniform procedures established by law." A state statute confirms this power for municipalities and establishes procedures

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113. Article VI defines the term "local governmental subdivision" to include "any parish or municipality." LA. CONST. art. VI, § 44.
114. LA. CONST. art. VI, § 17.
116. The statute does not define the term municipality, nor is the term defined for the chapter of the Revised Statutes in which the statute is found. The most common definition for the term includes "any incorporated city, town, or village," see LA. CONST. art. VI, § 44(3); LA. R.S. 33:101 (1950), but certain portions of title 33 define municipality to encompass all political subdivisions including parishes and special districts. E.g., LA. R.S. 33:1321, 4251 (1950 & Supp. 1954). Assuming that the statute follows the common meaning of municipalities and thus excludes parishes, no general state statute establishes procedures for parish zoning, although parishes are given specific authority to create airport zones and special provi-
for them to follow in enacting and enforcing zoning restrictions. Both the constitution and the statute are silent, however, with respect to an issue that has frequently arisen in other areas of the country: the extent to which the state and its agencies must abide by local zoning ordinances. In City of New Orleans v. State, the

sions grant general zoning authority to certain parishes. See generally La. R.S. 2:381-90 (1950); 33:1236 (Supp. 1978); 33:4877 (Supp 1972); La. Const. of 1921, art. XIV, §

29. An unanswered question is whether the constitutional provision requires the state to adopt procedural legislation before a parish can exercise the zoning authority conferred by the constitution. See Murchison, Recent Environmental Developments Affecting Louisiana Petroleum Operations, 26TH INST. MIN. L. (1979).

117. In the absence of explicit statutory provisions directly addressing the problem, most state courts have generally concluded that state agencies do not have to comply with local zoning ordinances. See generally E. McQuillan, Municipal Corporations Zoning § 25.15 (3d rev. ed. 1976). Courts have offered at least three distinct rationales for this result: state sovereignty, the governmental nature of the state function, and statutory construction. Commentators have often criticized these decisions, especially those that have relied on the first two rationales, on the ground that they beg the pivotal question of what governmental interest should prevail in a conflict between the zoning authority of one political unit and the statutory authority of another. See, e.g., Comment, Governmental Immunity from Local Ordinances, 84 Harv. L. Rev. 869 (1971). The approach suggested in the text attempts to address that pivotal question by focusing on the precise authorization on which each political unit relies. Cf. Decatur Park Dist. v. Becker, 300 Ill. 442, 14 N.E.2d 490 (1938) (statutory authorization for park district to locate parks allows it to ignore a city zoning ordinance forbidding parks in residential areas). It is also consistent with recent decisions that seek to discern the legislative intent by balancing the local interest against the proposed state use. See, e.g., Rutgers v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972) (general statutory scheme indicated legislative intent that state university could not be restricted by local land use regulations). See also City of Temple Terrace v. Hillsborough Ass'n for Retarded Children, Inc., 322 So. 2d 571 (Fla. App. 1975), aff'd, 332 So. 2d 610 (Fla. 1976) (state immunity from zoning ordinance depends on the balance between the public interest in the proposed use and the interests protected by the ordinance).

118. 364 So. 2d 1020 (La. 1978). Justice Marcus filed a dissenting opinion in which he protested "[m]echanical application of an arbitrary rule in favor of the state [because] it could lead to inequitable results in some instances." 364 So. 2d at 1023 (Marcus, J., dissenting). To decide "which governmental interest should prevail" in such conflicts, he advocated a "judicial inquiry into the reasonableness of the state's action." Id. at 1024. In this inquiry, the court should consider a number of factors "including the type of facility or use intended by the state, the existing pattern of land use in the area, the effect of the activity on adjoining areas, public need for the facility, alternative locations for the facility, and alternative methods for providing the needed improvement." Id. Although Justice Marcus conceded that the court "might well conclude in this case that the state's interests should prevail," he dissented because he was "unwilling to say that such a result should obtain automatically in every instance of conflict." Id.

The approach of the dissenting opinion would be preferable to that advocated by the majority because it would consider the issue of conflict on a case-by-case basis. Nonetheless, it is not an optimum solution to the problem. By focusing on reasonableness rather than legislative intent, it would diminish the legislature's constitutionally established role as the appropriate decision-maker concerning the alloca-
Louisiana Supreme Court considered this question and held that municipal zoning ordinances do not restrict the state's use of its property in performance of a governmental function.

As authorized by the constitution and the state statute, the city of New Orleans adopted a municipal zoning ordinance, and an area that the ordinance zoned as "Two-Family Residential" contained Jackson Barracks, a state correctional facility that had housed a work release program since 1969. In 1976, the Department of Corrections chose Jackson Barracks as the site for a special medical unit for mentally disturbed prisoners. Following this action by the Department, the city filed suit seeking to have the state enjoined from using Jackson Barracks for the housing or treatment of convicted criminals.

In holding that the city could not force the state to comply with its zoning ordinance, the supreme court relied on the subsection of the local government article in the state constitution that provides "[notwithstanding any provision of this Article, the police power of the state shall never be abridged]." According to the court, this subsection "removes any doubt" concerning the effect of the statutory and constitutional provisions authorizing zoning by municipalities: "They do not abridge the police power of the State." The state's power "necessarily remains dominant" with the municipal police power "subordinate to that retained by the State." From these premises, the court leaped directly to its basic conclusion that "municipal zoning ordinances cannot control the State's use of its property in performing a governmental function," although the court emphasized that its decision was consistent "with the views voiced by the delegates to the Louisiana Constitutional Convention prior to adopting the provisions discussed herein" and with the "majority rule throughout the country."

City of New Orleans established a sound rule concerning the way that the 1974 constitution allocates power between the state and its local governments. The authorization for local governments to adopt zoning regulations is a particular illustration of the general

119. LA. CONST. art. VI, § 9(b).
120. 364 So. 2d at 1023.
121. Id.
122. Id.
principle in the local government article that the constitution itself should enable local governments to handle their affairs without the need for specific legislative authorization. But this broad grant of authority was not intended to immunize local governments from state control; the constitution preserved the concept of state supremacy in the provision preventing abridgment of the state's police power as well as in the limitation on local government powers in cases when the power was "denied by general law." Viewed as a whole, the local government article supports the supreme court's position that the state should prevail in a direct state-local conflict over land use controls.

Notwithstanding the soundness of this underlying rationale, the court's opinion in City of New Orleans deserves criticism for its implicit assumption that requiring a state agency to comply with a municipal zoning ordinance would always abridge the state's police power. In the specific case before the court, the assumption was probably justified because a 1977 Act had specifically authorized the use of Jackson Barracks as a correctional facility for certain categories of prisoners. But the assumption appears far less justified in cases where state agencies act without specific legislative direction concerning the lands they are to use in carrying out a general statutory mandate. To require the agencies to adhere to local zoning ordinances in such cases would not infringe on the concept of state supremacy, although it might lessen the policy-making role of the state bureaucracy. In fact, the contrary assumption—that state

124. The local government article does contain two sections that limit state power to affect the structure and organization of home rule governments and to change the salaries and working conditions of local government employees other than police officers and municipal firefighters. La. Const. art. VI, §§ 6 & 14; see Kean, Local Government and Home Rule, 21 Loy. L. Rev. 63, 69-70 (1975).
125. La. Const. art. VI, §§ 4, 5 & 7; see 1977-1978 Term, supra, note 14, at 851-52.
126. Indeed, this analysis suggests that the state should prevail whether one labels the function it is exercising as governmental or proprietary, since the 1974 constitution draws no such distinction in defining the respective powers of the state and its local governments.
127. 1977 La. Acts, No. 700, adding La. R.S. 15:893.1A(7). Interestingly, the legislation specifically forbade the assignment of mentally disturbed prisoners to Jackson Barracks; it did, however, expressly authorize a work release program at the barracks. The city argued that the statute's prohibition against housing or treating mentally disturbed prisoners at the barracks mooted its suit against the state, but the court disagreed. It concluded that the action was "still viable" because the city had sought broadly to "restrain the State from using its property as a correctional unit." 364 So. 2d at 1022.
128. In this connection, it is interesting to note that the 1977 legislation expressly
agencies should normally have to comply with local zoning ordinances—seems more consistent with the constitution's division of power and the zoning enabling act. Both the constitution and the statute recognize that local governments are the units normally responsible for land use controls, and they should be allowed the requisite authority to fulfill this responsibility except where the legislature has determined that paramount state objectives should prevail.

Admittedly, the approach suggested here might prove difficult to apply in some cases, for it would require careful analysis of different state statutes to ascertain the legislative intent. But the results of that analysis, preserving the respective roles of state and local governments in setting rational land use policies, should warrant the effort.

TORT LIABILITY

The 1978-79 term did not bring any startling decisions with respect to the 1974 constitution's waiver of governmental immunity in tort and contract cases, but the state's appellate courts did decide several cases that deserve brief attention. For one thing, the year witnessed the final decision on the merits in the lawsuit attempting to impose liability on the town of Boyce for the death of Merlin Honeycutt, who was killed by the Boyce town marshal. The trial court originally dismissed the suit on the ground that the town was not liable for the marshal's actions because he was an independent elected official over whom the town had no control, but the supreme court reversed that determination. After a trial on the merits following remand, the trial judge ruled "that at the time of the shooting [the marshal] was not, as a matter of fact, in the process of making an arrest but that he shot and killed Honeycutt as a result of a personal vendetta of long standing." In Honeycutt v. Town of Boyce (Honeycutt II), the third circuit affirmed this decision.

1. See note 127, supra.
2. Some of these difficulties are manifested in the cases cited in note 117, supra.
3. LA. CONST. art. XII, § 10.
5. Honeycutt v. Town of Boyce, 366 So. 2d 640, 641 (La. App. 3d Cir. 1978), cert. denied, 369 So. 2d 154 (La. 1979). The marshal, who had been convicted of murder for killing Honeycutt, testified at the trial that the relationship between the two men was one of "mutual hate" and that the two had often sought to have each other arrested in various disputes over the years. Baton Rouge, La., Morning Advocate, Jan. 19, 1978, § B, at 18.
sion on the ground that the trial court had not committed manifest error in its factual findings, and the Louisiana Supreme Court denied writs.

The third circuit’s decision in *Honeycutt II* is an unexceptional application of the principle that the trial court’s findings of fact are not normally to be disturbed when the findings have support in the record. It should, however, be limited to its unique facts; that is, situations in which the municipal law enforcement officer is not engaged in fulfilling his official duties when the misconduct occurs. It should not be read as limiting a municipality’s liability in situations where the officer uses unauthorized force to perform his law enforcement responsibilities.

Despite the supreme court’s 1977 decision in *Foster v. Hampton*, the identification of the governmental defendant that is responsible for injuries resulting from the actions of a deputy sheriff remains a potentially troublesome issue. In *Whatley v. State* a prisoner in the jail of East Baton Rouge Parish sued the state for injuries that allegedly resulted from a beating administered by a deputy sheriff, and the state filed a third party demand for indemnification against the city-parish government of Baton Rouge.

The trial court dismissed the third party demand on an exception of no cause of action, and the first circuit affirmed the dismissal as to the city but reversed with respect to the parish. Although the appellate court conceded that *Foster* exempted both cities and

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134. In affirming the trial court, the third circuit relied on *Canter v. Koehring Co.*, 283 So. 2d 716 (La. 1973). Since the third circuit’s decision in *Honeycutt II*, the Louisiana Supreme Court has clarified the *Canter* test but it has not altered the general principle that appellate courts should not normally overturn the factual findings of the trial court. See Arceneaux v. Dominigue, 365 So. 2d 1330 (La. 1978). For a discussion of the Arceneaux rule, see the civil procedure section of this symposium at pp. infra.

135. 352 So. 2d 197 (La. 1977). Cf. Boyer v. St. Amant, 364 So. 2d 1338 (La. App. 4th Cir.), cert. denied, 365 So. 2d 1108 (La. 1978) (statutory provision governing employer-employee relationships does not apply to deputy sheriff because the sheriff is not his employer). For an analysis of the *Foster* opinion, see 1977-1978 Term, supra note 14, at 871-79. Following the supreme court’s decision in *Foster*, the plaintiff in that case amended his petition to add the state as a defendant. In an opinion issued after the closing date for this year’s symposium, the first circuit ruled that the action against the state had prescribed because the original petition naming the deputy sheriff (i.e., the state’s employee) did not toll the statute of limitations as to the state. *Foster v. Hampton*, 372 So. 2d 657 (La. App. 1st Cir. 1979).

136. 369 So. 2d 1125 (La. App. 1st Cir. 1979).

137. Dictum in *Foster* suggests that the state is the employer of all deputy sheriffs in the state. 352 So. 2d at 201-02.
parishes from vicarious liability for the acts of deputy sheriffs,\textsuperscript{138} it overruled the exception of no cause of action as to the parish because of a statutory duty imposed on "[t]he governing authority of each parish" to "pass all by-laws and regulations they may deem expedient for the police and good government of all jails and prisons in the parish."\textsuperscript{139} The Parish of East Baton Rouge had never adopted any such rules and regulations, and the court found the third party demand sufficient to raise the question of whether, independently of the vicarious liability issue, "the Parish may have been guilty of fault in not adopting the required regulations."\textsuperscript{140}

\textit{Whatley} wisely deferred the difficult questions of whether the parish's failure to adopt regulations was fault, whether any such fault was causally related to the plaintiff's injury, and whether the parish owed a duty to the plaintiff to adopt regulations, until a more complete factual record was developed by the trial court. Moreover, the appellate court's opinion reflects a careful and accurate application of the \textit{Foster} rationale. \textit{Foster} merely forbids the imposition of vicarious liability on the parish for the action of a deputy sheriff. It does not preclude a finding of an independent basis for parish liability in situations in which the sheriff's office and the general governing authority of the parish are jointly responsible; analysis of the liability of the parish in those situations must await specific factual settings that clarify the respective responsibilities of the sheriff and the parish governing authority.

Perhaps the Louisiana Supreme Court's most significant decision involving tort liability of governmental defendants was \textit{Segura v. Louisiana Architects Selection Board},\textsuperscript{141} which held the state liable

\begin{itemize}
  \item \textsuperscript{138} In \textit{Foster}, the Louisiana Supreme Court refused to make a parish liable for the actions of a deputy sheriff, and the first circuit in \textit{Whatley} correctly ruled that a proper application of \textit{Foster} precluded the imposition of liability on the city as well:
  \begin{quote}
  The rationale of the decision is that the office of sheriff is a constitutional office pursuant to La. Const. 1974, Article 5, Section 27, which exists and functions independently of the parish governing authorities. We apply that same rationale and hold that cities are likewise not liable vicariously for the actions of deputy sheriffs.
  \end{quote}

  \begin{itemize}
  \item \textsuperscript{139} La. R.S. 15:702 (1950).
  \item \textsuperscript{140} 369 So. 2d at 1127.
  \item \textsuperscript{141} 362 So. 2d 498 (La. 1978). Chief Justice Sanders and Justice Dixon dissented. The chief justice filed a dissenting opinion in which he attacked the majority's approach as unwisely "free[zing] court costs' liability in the constitution, removing it from legislative authority." 362 So. 2d at 500 (Sanders, C.J., dissenting). Since "[t]he obligation to provide funds for the court has always been a legislative function," he concluded that "the legislature has the authority to exempt the state and its agencies from the payment of court costs and to finance the courts through other means." \textit{Id.} Nor did the chief justice interpret the 1974 constitution to change this rule. He argued
\end{itemize}
for court costs despite a statute attempting to eliminate the liability except for court reporting costs. The majority ruled the statute unconstitutional because the "[c]osts of court are part of the 'liability' to which a party cast in litigation is subject." Since the plaintiff was required to advance these costs to the clerks of the courts through which this litigation progressed," exempting the state from liability for these costs "would reduce the value of [his award] if he could not be reimbursed to that extent." Thus, the state would be "relieved of part of its liability," a result that the constitution did not intend. Although the case involved a judgment against the state, its rationale undoubtedly applies to local governments as well. In holding the governmental defendant liable for court costs advanced by the plaintiff in all cases but denying the plaintiff's request for attorney's fees because no statute authorized recovery, the Louisiana Supreme Court seems to be interpreting the 1974 constitution's waiver of tort immunity to require that governmental defendants be placed in the same posture as private litigants. The same attitude of treating governmental defendants like private litigants appeared to guide the two courts of appeal in two decisions that imposed strict liability on local governmental defen-

that the waiver of governmental immunity was not intended to affect the traditional rules regarding the financing of court; it was merely designed "to give constitutional status to the principle that the state is amenable to suits on contracts and for injuries to persons and property without first obtaining the permission of the Legislature." Id., citing Darville v. Associated Indem. Corp., 323 So. 2d 441 (La. 1975).

The dissent's defense of the principle of legislative control over court funding appears misguided. The majority opinion does not preclude the legislature from adopting a new method to provide funds for the courts. Its reach is more limited; since the legislature has adopted a system of financing courts that normally imposes costs on the losing party, Segura prevents it from exempting governmental defendants from that rule and imposing the costs on the prevailing party.

142. 362 So. 2d at 499.
143. Id. The court limited its holding to costs that have been advanced by the plaintiff:

If other costs not advanced or incurred by Segura are involved, the question whether clerks of courts, sheriffs and others can collect these costs from the State is not before us. Our concern is Segura's claim against the State for costs incurred and advanced by him through all phases of this litigation. He is entitled to a judgment against the State in that amount.

Id.
144. Id.
146. 362 So. 2d at 499-500. Limiting the right to recover attorney's fees to situations where a statute expressly authorizes recovery is a well-established Louisiana rule for private litigants. See Nassau Realty Co. v. Brown, 332 So. 2d 206 (La. 1976); Hughes v. Burguieres, 276 So. 2d 267 (La. 1973).
In *Durbin v. City of Baton Rouge*, the first circuit affirmed a judgment holding the city liable for damages the plaintiff suffered when a large tree limb fell onto her car. The court ruled that the strict liability rule of Civil Code article 2317 was applicable to the city; thus, the plaintiff's proof that the tree was rotted was sufficient to establish liability even though "there was no proof that the defect was apparent or that the city had notice of any defect." Although the court acknowledged the existence of "some economic justifications for exempting governmental agencies" from the rule of strict liability, it concluded that the task of formulating such exemptions was best left to the legislative process.

Although a 1978 decision of the third circuit had refused to apply the strict liability principle of article 2317 to governmental defendants, that court was willing in *Romero v. Town of Welsh* to hold a municipality strictly liable under article 667 for damages a property owner suffered as the result of an overflow of sewage from the sewer system owned and operated by the municipality. The court began its analysis with the principle that "[w]hen a municipality or governing body undertakes the responsibility of constructing drains and sewers, it has a duty to provide for the adequate disposal of accumulated water and sewage" and cited numerous cases holding municipalities liable for failure to perform this duty. Although an early decision of the Louisiana Supreme Court had relied on the doctrine of res ipsa loquitur to establish a municipality's negligence where sewage had backed up into

147. 366 So. 2d 1020 (La. App. 1st Cir. 1978).
148. La. Civ. Code art. 2317 provides in part: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody." The leading recent decision defining the reach of the article with respect to private owners of trees is *Loescher v. Parr*, 324 So. 2d 441 (La. 1975). See generally Comment, *Does Louisiana Really Have Strict Liability Under Civil Code Articles 2317, 2318 and 2321*, 39 LA. L. REV. 207 (1979). A 1977 decision of the first circuit had applied the strict liability principle of article 2317 in a case involving the state Department of Highways, American Road Ins. Co. v. Montgomery, 354 So. 2d 656 (La. App. 1st Cir. 1977), cert. denied, 356 So. 2d 430 (La. 1978), but the third circuit had ruled that article 2317 did not apply to governmental defendants. Gallien v. Commercial Union Ins. Co., 353 So. 2d 1127 (La. App. 3d Cir. 1977), cert. denied, 354 So. 2d 1379 (La. 1978).
149. 366 So. 2d at 1021.
150. *Id.* See also American Road Ins. Co. v. Montgomery, 354 So. 2d 656 (La. App. 1st Cir. 1977), cert. denied, 356 So. 2d 430 (La. 1978).
152. 370 So. 2d 1286 (La. App. 3d Cir. 1979).
153. *Id.* at 1289.
plaintiff's home, the third circuit chose to rely on "[m]ore recent jurisprudence" that "has based responsibility on strict liability under [Civil Code article] 667." Following the lead of the fourth circuit, the court held the municipality "to strict liability for any damage incurred by a property owner due to the overflow of sewage [from a municipal sewer system] into a home or business," even when the plaintiff offered no proof that the municipality had been negligent in the maintenance of the sewer system.

The decisions in Romero and Durbin seem consistent with the spirit of the waiver of liability in the 1974 constitution. The waiver extends generally to cases involving injury to persons or property; thus, it seems reasonable to apply all tort principles applicable to private litigants, whether based on negligence or strict liability, to governmental defendants. While one may reasonably argue against the wisdom of such a broad waiver, the decision is one that is appropriately reserved for the political process in a democratic society, and the inclusive language of the constitutional provision suggests that the political processes have currently struck the balance in favor of a broad waiver.

Because Romero involves the operation of a sewer system, it raises the further question of whether the operation of such a peculiarly governmental enterprise is an activity that calls for unique principles of tort liability. The Louisiana appellate courts have been sensitive to the need for tempering governmental liability with respect to activities that have no counterpart in the actions of private individuals, but that concern is applicable here. The duty for which Romero imposed liability is not a narrow one limited to the property owners whose property is connected to the municipal sewer system; it does not create the risk of unlimited liability to the


157. 370 So. 2d at 1289.

158. See, e.g., Perret v. City of Westwego, 364 So. 2d 1070 (La. App. 4th Cir. 1978) (city's failure to create a housing board of appeals as authorized by local ordinance did not render the city liable for damages allegedly suffered by individual citizens); Dufrene v. Guarino, 343 So. 2d 1097 (La. App. 4th Cir.), cert. denied, 343 So. 2d 1069 (La. 1977) (negligent fire inspection of private business would not render city liable to patron subsequently injured in a fire at the establishment).
general public. Moreover, the effect of the decision is to spread the risk of a sewer backup among all users of the system by making damages from a backup a cost that the system must bear, and that seems an efficient risk distribution policy.