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**Louisiana Land Reform in the Storms' Aftermath**  
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## Loyola Law Review Symposium

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## **Introduction**

The goal of planning is to anticipate and to guide. Anticipating is a best guess based upon an understanding of the past. Guiding is making a set of choices about the good for the future. Anticipating tends towards the empirical; guiding tends towards the normative. To engage in planning is to make judgments as we anticipate and as we guide. Our judgments are rarely perfect, not just because we are human, but because the past is only a rough predictor of the future and our conceptions of the good are caught in the constant tension of “Good for Whom?” Nothing focuses our attention as much as a disaster, for a disaster is the quintessential misjudgment about the anticipation and guiding at the core of our planning.

Hurricane *Katrina*, on August 29, 2005, was an overwhelming tragedy in the loss of life, the injuries, the illness, and the suffering. It was an unparalleled challenge to an American metropolis, with devastation and paralysis across eighty percent of the City of New Orleans. With the sister hurricanes *Rita* and *Wilma* following in a matter of weeks, over 1.2 million housing units were damaged across the Gulf Coast.<sup>1</sup>

The City of New Orleans and other affected communities in Louisiana, Mississippi, Alabama, and Florida, their residents and their leaders, responded courageously in the immediate triage of disaster response. They moved rapidly to restore, rebuild, and recreate their communities. They once again began planning by anticipating and guiding. This time, however, the anticipation of the future is informed by the recent past, and the guiding poses new sets of choices.

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<sup>1</sup> Office of Policy, Dev. & Research, U.S. Dept. of Hous. & Urban Dev., *THE IMPACT OF HURRICANES KATRINA, RITA AND WILMA ON THE GULF COAST HOUSING STOCK*, (2006), available at [www.huduser.org/periodicals/ushmc/spring06/USHML\\_06Q1\\_ch1.pdf](http://www.huduser.org/periodicals/ushmc/spring06/USHML_06Q1_ch1.pdf).

Land use planning since the early twentieth century tends to be two dimensional in nature in each of the functions of anticipation and guidance. In both contexts the assumption is that there are two variables: market conditions (the relative supply and demand for different uses) and governmental regulation of use through zoning. These may be amplified by other governmental requirements (housing and building codes) or by private land use controls (community associations), but the perspective remains just two dimensional – use governmental regulatory powers to guide anticipated market conditions. The experience of New Orleans both pre-*Katrina* and post-*Katrina* suggests the need for a third dimension in land use planning – that of controlling land for the future. In a manner first suggested by Professor Charles Haar in 1971,<sup>2</sup> the very process of anticipating and guiding needs to be enhanced by a land use structure that permits inventories of land to be held in reserve in order to respond to the shifts in market conditions and determinations of the social good. Land use planning in New Orleans would take very different form if a “land bank” could provide a third dimension.

The trilogy of hurricanes in the fall of 2005 was, unfortunately, only the first of the storms that dramatically reshaped the landscape of Louisiana. A second major storm hit the state and this time altered not the geographic landscape but its legal landscape, with equally far reaching results. Just a few months prior to Hurricane *Katrina* the United States Supreme Court had rendered its decision in *Kelo v. City of New London*.<sup>3</sup> Sustaining broad legislative deference to state and local government use of the power of

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<sup>2</sup> Charles M. Haar, *Wanted: Two Federal Levers for Urban Land Use – Land Banks and Urbank*, H. Comm. on Banking & Currency, Paper submitted to Subcomm. on Housing; Panels on Housing Production, Housing Demand, and Developing a Suitable Living Environment, 927-940 (June, 1971) [hereinafter Haar].

<sup>3</sup> 545 U.S. 469 (2005).

eminent domain, this decision fueled intense political reactions across the country. In Louisiana the legislature and the voters responded to *Kelo* by approving two constitutional amendments that significantly redefine the scope of the exercise of expropriation powers in Louisiana.

The combination of these Louisiana storms took place in a legal landscape already hampered by complex statutory schemes for dealing with vacant, abandoned, substandard and tax delinquent properties. For over four decades the Louisiana legislature has sought to address the problem of “blighted” properties with a myriad of statutes, but the net result is a system that has become even less efficient and effective in addressing the properties that harm residents, neighborhoods and communities. In a similar manner the state has continued to rely upon constitutional and statutory mechanisms for enforcing property tax liens against delinquent taxpayers that are a century old, creating a category of “adjudicated” properties that are largely out of the reach of redevelopment for years. Just as Louisiana has responded dramatically and courageously to address the human costs of the first storms, now is the propitious moment for the state to use the second storm as a catalyst for legal reform in the laws governing vacant, abandoned, substandard, and tax delinquent properties.

This article focuses first on the meteorological hurricanes and their context in terms of vacant and abandoned properties. The focus then shifts to the second storm, the post-*Kelo* constitutional amendments, and the confusion wrought by the new and conflicting definitions of “public purpose” that now underlie expropriation. Part III presents a broader perspective on how Louisiana has wrestled over the decades with blighted properties and the resulting chaos in definitions and approaches. Part IV turns

attention to tax lien enforcement procedures and to the possibilities of major reforms that could lead to an efficient and effective system. Part V presents the final piece in comprehensive land reform, land banking as a tool for dealing with vacant and abandoned properties.

## **I. The First Storms**

### A. The Pre-*Katrina* Context

Land use planning in the City of New Orleans did not begin with *Katrina* recovery, and it will not end when public utility services are restored throughout its geographic area. This planning is inherently a dynamic process, and to anticipate the future requires a sense of New Orleans in the months and years prior to *Katrina*. With its centuries of history and richness of culture, New Orleans in 2004 and 2005 was already struggling with the lack of coordinated urban planning.

In the spring of 2004, the City of New Orleans and the New Orleans Neighborhood Development Collaborative solicited the assistance of the National Vacant Properties Campaign to identify strategies to address more effectively blighted and abandoned properties throughout the city.<sup>4</sup> The reports of the National Vacant Properties

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<sup>4</sup> The National Vacant Properties Campaign was founded in 2002 by the Local Initiatives Support Corporation, the International City/County Management Association, and Smart Growth America. Its initial work in New Orleans took place between May 2004 and February 2005. Two reports were issued by the Campaign team composed of this author, Evelyn Brown, Lisa Mueller Levy, and Joe Schilling. The initial report was entitled *New Orleans Technical Assessment and Assistance Project – Draft Report*, October 28, 2004 (23 pages). The final report was entitled *New Orleans Technical Assessment and Assistance Report: Recommended Actions to Facilitate Prevention, Acquisition, and Disposition of New Orleans' Blighted, Abandoned, and Tax Adjudicated Properties*, February 21, 2005 [hereinafter *New Orleans Technical Assistance Report*]. Copies of each of these reports are on file with the author.

Campaign followed earlier reports recommending action on blighted and abandoned properties.<sup>5</sup> According to the 2000 Census, New Orleans had an estimated 27,000 vacant units (defined as unoccupied structures).<sup>6</sup> In 2000, its 485,000 residents<sup>7</sup> inhabited a city built for over 650,000 people, and the abandoned and blighted housing stock resulting from years of population decline was a significant factor in decreasing the quality of life in neighborhoods across the City. The City of New Orleans estimated in 2004 that there were roughly 7,000 properties that had been adjudicated to the City for failure to pay taxes. Despite the lack of consistent definitions and an accurate count of vacant, abandoned, and blighted properties in New Orleans, by any definition and any count, a significant challenge existed for the City even before the devastation caused by *Katrina*, *Rita*, and *Wilma*.

In hindsight, especially when the looking glass is through the prism of *Katrina*, it becomes much clearer that the two dimensions of market forces and government regulations combined in unfortunate ways to exacerbate the abandonment and deterioration of housing and neighborhoods in New Orleans. The decline in population and the decrease in the demand for housing have obvious correlations and are likely mutually causative in nature. What is less obvious, but equally correlated, is how the absence of marketable and insurable title to properties itself encouraged flight and

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<sup>5</sup> See, e.g., *Blueprint for a Greater New Orleans* (Committee for a Better New Orleans, October 2001); *Improving Housing Policy and Practice* (Mtumishi St. Julien, November 2001); *Blighted Housing Task Force Report* (Nagin Transition Team: R. Stephanie Bruno & Wayne Neveu, co-chairs, May 2002). Copies of each of these reports are on file with the author.

<sup>6</sup> U.S. Census, GCT-H5. General Housing Characteristics: 2000, Data Set: Census 2000 Summary File 1 (SF 1) 100-Percent Data.

<sup>7</sup> U.S. Census, GCT-PH1. Population, Housing Units, Area, and Density: 2000, Data Set: Census 2000 Summary File 1 (SF 1) 100-Percent Data.

disinvestment. The lack of marketable and insurable title in New Orleans took three forms: (1) “heir property,” (2) property in noncompliance with housing and building codes, and (3) tax adjudicated property.

Relative to other urban communities, New Orleans in 2004 had a high percentage of residential properties “owned” by the same families over several generations. The ownership of this property passed down from one generation to the next usually without the benefit of probate and with the presence of potential clouds on title from unknown heirs. This “heir property” is most commonly found in lower income neighborhoods that do not confront the pressures and incentives of new construction and new mortgage financing which serve as triggers for re-examining title, and for correcting defects that would otherwise render title unmarketable and uninsurable.

The second hindrance to marketable and insurable title to properties in New Orleans which reinforces the negative ties between declining market demand and neighborhood deterioration is the inadequacy of statutory procedures for dealing with blighted property.<sup>8</sup> Most urban areas in the United States have housing codes or building codes that prescribe minimum standards for the condition of improvements. It also tends to be the case that code enforcement activities are reactive in nature, with public inspectors responding to complaints from neighbors rather than targeting neighborhoods or zones for systematic enforcement. When property owners fail to remedy code violations local governments may use their own funds to cure the defects or demolish the improvements. Governmental action to remedy code violations becomes prohibitively expensive in the absence of an efficient and effective means to force repayment of the

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<sup>8</sup> *See infra* Part III.

costs or a transfer of the property. In 2004, the year prior to *Katrina*, statutory amendments were enacted granting the City of New Orleans clearer authority to enforce a public lien for code enforcement expenditures as a senior priority lien on the property.<sup>9</sup>

The third legal barrier to an efficient system of insurable and marketable title is created by the system of property tax enforcement in Louisiana. Its property tax foreclosure laws are among the most complex, lengthy, and convoluted of any state in the country.<sup>10</sup> Properties sold at tax auctions are subject to multi-year rights of redemption and inevitably fail to convey marketable and insurable title because of the lack of judicial process and the inadequacy of constitutionally required notice to interested parties. Properties not purchased by private third parties at the tax auctions default to the local governments as “adjudicated” properties. They are then subject to even more statutory procedures and times period before they can be conveyed to third parties.

Land use planning in the face of declining market demand and inefficient and ineffective governmental regulations is a daunting task. When the responsibilities for addressing blight and decay and fostering potential redevelopment are spread across separate agencies, departments, and authorities, coherent planning is virtually impossible. In the years prior to *Katrina*, New Orleans was a city suffering from population decline and the lack of a functioning real estate market in many core neighborhoods. The City did possess a strong toolbox of methods for individuals and organizations to acquire surplus property for redevelopment, and reclaiming these properties was a high priority. The multitude of existing programs, however, had evolved into a maze of inconsistent programs guided by contradictory policies applied to differing definitions of applicable

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<sup>9</sup> LA. REV. STAT. ANN. §§ 13:2575(B)(2)(f), 13:2575(C) (2006).

<sup>10</sup> See *infra* Part IV.

property that could be acquired or transferred in fundamentally different ways for radically different purposes. The sheer complexity of these programs became a major barrier to a functioning market. The existing land acquisition and disposition programs and policies required potential developers to go through time-consuming and costly steps to acquire and develop tax delinquent, blighted, and adjudicated properties in the City. There were at least five different City programs that originated in four different agencies<sup>11</sup> to deal with property acquisition and disposition, and no central place to get information about properties, programs, or neighborhood plans. Further, while the City had selected seven strategic investment neighborhoods, there was no larger vision guiding and connecting these disparate programs and the investment they should stimulate. Ultimately, the structure and functioning of land use and redevelopment systems in New Orleans discouraged investment.<sup>12</sup>

#### B. The *Katrina* Response

The sheer magnitude of the devastation wrought by *Katrina* and her sister storms can never be fully grasped. Tragic deaths, displaced families, and destroyed communities change us all for generations, if not forever. The homes and the properties, the land and the land use, are symbols of both destruction and the possibility of re-creation. The three hurricanes damaged 1.2 million housing units across the Gulf Coast region with

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<sup>11</sup> The lead agencies in 2004 with authority or responsibility for aspects of land use included the Department of Housing and Neighborhood Development, the New Orleans Redevelopment Authority, the City Law Department, the New Orleans Affordable Housing Corporation, the Housing Authority of New Orleans, and the Finance Authority of New Orleans.

<sup>12</sup> These findings of the National Vacant Properties Campaign were presented to city agencies and community development corporations in the spring of 2005 and were scheduled to be presented to Mayor Nagin in September 2005 until *Katrina* redefined New Orleans.

Louisiana being the hardest hit. Almost one-third of all occupied housing units in Louisiana sustained some damage, and in metropolitan New Orleans, 182,000 housing units – 38.8% of *all* occupied housing units – sustained serious damage.<sup>13</sup> The number of vacant and abandoned housing units in New Orleans reached over 100,000.<sup>14</sup>

Within ten months of *Katrina*, the federal government had appropriated \$16.7 billion in emergency recovery funds for the Gulf Coast region.<sup>15</sup> Of this amount, an aggregate of \$10.4 billion was made available for recovery in Louisiana.<sup>16</sup> By mid-October, 2005, Governor Kathleen Blanco created the Louisiana Recovery Authority (LRA) as the lead state agency to administer recovery efforts and receive the federal funds.<sup>17</sup>

The primary recovery initiative of the LRA was *The Road Home*, the largest single-housing recovery program in United States history.<sup>18</sup> It anticipated using the \$10.4 billion in federal funds by allocating \$7.5 billion for homeowner assistance, \$1.6 billion for workforce housing, and \$1.7 billion for mitigation activities. Homeowners were eligible to receive up to \$150,000 in compensation, and could elect to pursue one of three

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<sup>13</sup> *The Impact of Hurricanes Katrina, Rita, and Wilma on the Gulf Coast Housing Stock*, U.S. Housing Market Conditions, 1<sup>st</sup> Quarter, 2006, U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, available at [www.huduser.org](http://www.huduser.org).

<sup>14</sup> New Orleans Redevelopment Authority, <http://www.noraworks.org>.

<sup>15</sup> In December 2005, Congress appropriated \$11.5 billion, and in June, 2006 it appropriated an additional \$5.2 billion in Community Development Block Grant Assistance. RESEARCH WORKS, November 2006, U.S. Dep't of Hous. & Urban Dev. Office of Policy Dev. & Research, available at [www.huduser.org](http://www.huduser.org).

<sup>16</sup> RESEARCH WORKS, October, 2006 & November 2006, U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, available at [www.huduser.org](http://www.huduser.org).

<sup>17</sup> The Louisiana Recovery Authority was initially created by Exec. Order KBB 2005-63 (2005) and subsequently codified by the state legislature. LA. REV. STAT. ANN. § 49:220.1 – 49:220.7 (2006). The Louisiana Office of Community Development is the state agency that essentially provides the administrative staff of the LRA. LA. REV. STAT. ANN. § 49:220.5.C(4) (2006).

<sup>18</sup> Louisiana Recovery Authority, <http://www.road2la.org/about-us>.

options available to them under the program: (1) they could remain in their homes and apply the compensation toward rebuilding, (2) they could convey their damaged property and relocate to another residence in Louisiana, or (3) they could convey their property and relocate to another state.<sup>19</sup> As initially designed, the Road Home Homeowner Assistance Program contemplated payments to individuals who elected to rebuild and remain in their homes with funds held in escrow and disbursed as approved construction proceeded, coupled with a covenant to remain in the home for at least three years following completion of reconstruction.<sup>20</sup> The Louisiana recovery legislation also authorized the creation of the Road Home Corporation as a nonprofit corporation acting under the direction of the LRA to acquire, hold, manage, and convey properties.<sup>21</sup>

Given the level of devastation and the availability of compensation it was anticipated that there would be a substantial number of homeowners who would elect the second or third options that were available – receipt of a payment from the LRA in exchange for conveyance of property interests to the LRA, or more specifically to the Road Home Corporation. In this vision, the Road Home Corporation would quickly become one of the largest landowners in southern Louisiana, and certainly in New Orleans, and would be able to function as the equivalent of a land bank, holding and conveying properties for strategic land use planning purposes. The LRA cautioned that funds might be limited if too many homeowners elected to sell.<sup>22</sup>

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<sup>19</sup> Louisiana Recovery Authority, <http://www.road2la.org/homeowner>. John A. Lovett, *Rebuilding a Region: Housing Recovery Efforts in the Wake of Katrina and Rita*, 20 PROB. & PROP. 49 (2006).

<sup>20</sup> Lovett, *supra* note 19, at 52.

<sup>21</sup> LA. REV. STAT. ANN. § 40:600.63 (2006).

<sup>22</sup> Lovett, *supra* note 19, at 53.

Two things, however, stood in the way of this land banking function. First, the overwhelming majority of the applicants for recovery assistance elected to receive compensation to rebuild and remain in their homes. Of the 103,227 completed assistance applications, 83.5% of the applicants chose to rebuild and remain.<sup>23</sup> The second event which rendered a land banking function for the LRA (or the Road Home Corporation) less likely was the decision by the federal government to insist that lump sum payments be made to applicants instead of transferring the assistance funds to escrow accounts, or disbursement accounts.<sup>24</sup>

The perhaps surprising decision by the majority of homeowners to rebuild and remain in New Orleans rather than relocate elsewhere, coupled with the governmental decision to provide cash assistance without requiring conveyances (or even the imposition of servitudes to ensure rehabilitation of the property), has the clear advantage of maximizing the delivery of cash assistance to affected parties. Unfortunately, these decisions do little to change the functioning of the two dimensional paradigm (market forces and governmental regulation), and miss the opportunity to move to a third dimension – that of land banking.

The infusion of cash will allow rebuilding to occur to the extent that construction capacity and the permitting process are capable of handling a significant volume of

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<sup>23</sup> Louisiana Recovery Authority, Road Home Program, *Weekly Detailed Statistics as of November 1, 2007*, available at <http://www.road2la.org/newsroom/stats.htm> (last visited Nov. 6, 2007). As of this date, the LRA had received 185,895 applications and held initial appointments with 160,268 applicants. The total benefit calculation for 137,385 applicants was \$8.996 billion. Closings had occurred for 66,314 applicants, with 846 closings pending.

<sup>24</sup> Louisiana Recovery Authority, *The Road Home Homeowner Policies* (Version 5.0, September 27, 2007), available at <http://www.road2la.org/homeowner/resources.htm#policies> (last visited November 6, 2007).

activity. In this sense it does invigorate market demand, but almost exclusively for those properties on which a homeowner elects to rebuild. In theory, the homeowner is required to remain on the property for a period of three years, but this is a covenant creating personal liability and is most likely not a covenant that burdens the land or that is binding upon purchasers. Homeowners are also expected to have “clear title” prior to closing,<sup>25</sup> which will exclude the overwhelming majority of possessors of “heir property” and most properties that fall within the multi-year time frame of tax adjudication.

As part of the recovery legislation, the Louisiana legislature enacted several amendments to the New Orleans Community Improvement Act, the basic legislation creating and empowering the New Orleans Redevelopment Authority (NORA).<sup>26</sup> The amendments increased the size of the Board of Commissions from seven to eleven, permitted requests for designation of specific properties as blighted to be submitted by community based organizations, and expanded its capacity for revenue bond financings.<sup>27</sup>

During the eighteen months that followed the flooding of New Orleans, a broad range of land use planning and urban redevelopment proposals were prepared, largely by public and private entities acting in cooperation with the City of New Orleans. The first set of proposals emanated from the “Bring New Orleans Back” Commission (BNOB) created by Mayor Nagin in October, 2005.<sup>28</sup> Its report, prepared with the assistance of the Urban Land Institute, recommended redevelopment only in certain portions of the

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<sup>25</sup> Louisiana Recovery Authority, *The Road Home Homeowner Policies* (Version 5.0, September 27, 2007), available at <http://www.road2la.org/homeowner/resources.htm#policies> (last visited November 6, 2007).

<sup>26</sup> LA. REV. STAT. ANN. § 33:4720.55 (2006).

<sup>27</sup> 2006 La. Acts 666.

<sup>28</sup> THE ROCKEFELLER FOUNDATION, *NEW ORLEANS: PLANNING FOR A BETTER FUTURE 3*, (2006), [http://www.rockfound.org/library/no\\_better\\_future.pdf](http://www.rockfound.org/library/no_better_future.pdf).

City. It received such widespread public criticism that it was not accepted. The second major plan resulted from a collaborative effort of the City of New Orleans and the Greater New Orleans Foundation – the “Unified New Orleans Plan.”<sup>29</sup> By the end of March 2007, the City designated seventeen specific “Target Recovery Zones” in different portions of the City, classified according to the level of destruction and the capacity for redevelopment.<sup>30</sup>

The devastation of these first storms to hit southern Louisiana in 2005 was unparalleled. Thankfully, so too has been the federal, state, and local responses. Once the flood waters receded, planning efforts for rebuilding and revitalizing began in earnest. Never fast enough, never comprehensive enough, never fair enough, the responses were still faster, more comprehensive and more far than many anticipated. What no one anticipated, however, was how a second major storm would overtake the State of Louisiana and create yet more obstacles to rebuilding and revitalizing.

## **II. The Second Storm**

The City’s first land use planning decision post-*Katrina* was to make fundamental decisions about where to rebuild and how to rebuild. It finessed the politically charged issue of whether to ban rebuilding in certain low-lying flood prone areas by proactively choosing “target zones” which included a range of neighborhoods, leaving unaddressed questions of areas in which rebuilding could not occur. Virtually all rebuilding and restoration initiatives, however, quickly confront the fundamental issue of ownership of

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<sup>29</sup> The Unified New Orleans Plan, <http://unifiedneworleansplan.com>. The final draft of the Unified New Orleans Plan was released in January, 2007.

<sup>30</sup> Press Release, City of New Orleans, Mayors Office of Comm’ns, City Announces First 17 Target Recovery Zones (March 29, 2007).

the individual parcels of property. If there were 27,000 vacant and abandoned properties prior to *Katrina* and over 100,000 such properties in its aftermath, such a huge inventory plays a key role in the success of any and all recovery efforts.

Market demand for redevelopment and reinvestment activities may be stimulated by increased financial resources made available through the LRA Road Home Homeowner Assistance Program, and local governmental regulations may facilitate access in the Target Recovery Zones. The New Orleans context, however, demonstrates how these two conventional approaches to land use planning are not sufficient as planning tools. The large inventory of properties lacking meaningful “ownership” remains a major barrier. The immediate post-*Katrina* recovery legislation failed to further the possibility of land banking as a third dimension to land use planning in New Orleans and unfortunately key legal actions simply complicated possible reform of the landscape.

#### A. The *Kelo* Reaction

Intense storms are rarely anticipated fully, and so with intense public reactions to Supreme Court decisions. Louisiana had both. Just two months prior to *Katrina's* landfall, the United States Supreme Court rendered its decision in *Kelo v. City of New London*.<sup>31</sup> In *Kelo* the Court sustained the use of eminent domain power for acquisition of non-blighted properties located within an economic redevelopment project. Though this decision did not alter existing federal constitutional doctrine,<sup>32</sup> a widespread public outcry arose resulting in new restrictions on the exercise of eminent domain in numerous

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<sup>31</sup> 545 U.S. 469 (2005).

<sup>32</sup> See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (determining that the “public use” clause of the Constitution is effectively co-terminus with the scope of the police powers of the government).

states across the county. In early 2006 the Louisiana legislature approved for submission to the voters a series of twenty different constitutional amendments, four of which pertained to hurricane protection.<sup>33</sup> Two of these amendments were directly in response to *Kelo*, and both received voter approval on September 30, 2006. One of the two *Kelo* amendments (amending La. Const. art. I, § 4(B)) places limits on the use of the power of expropriation.<sup>34</sup> The other amendment (amending La. Const. art. I, § 4(H)) places restrictions on the subsequent transferability of expropriated property.<sup>35</sup>

Prior to these constitutional amendments, redevelopment authorities generally, and NORA for the City of New Orleans, served as the lead entities in the exercise of expropriation of blighted properties. The passage of these amendments, however, raises serious questions for redevelopment authority expropriations. The amended § 4(B) creates a very specific list of the permitted purposes for which expropriation could be exercised, limiting it primarily to acquisitions for traditional public purposes such as transportation and public buildings. As amended, the constitution expressly prohibits using economic development or enhancement of tax revenues in determining a public purpose.<sup>36</sup> The acquisition of “blighted” properties for community redevelopment, which is traditionally the primary purpose of NORA’s activities, must now fall within the

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<sup>33</sup> See Press Release, Pub. Affairs Research Council of La., Guide to the Constitutional Amendments (September 8, 2006).

<sup>34</sup> 2006 La. Acts 851 (amending LA. CONST. art. I, §§ 4(B), 21(A), and adding art. VI, §21(D)).

<sup>35</sup> 2006 La. Acts 859 (adding LA. CONST. art. I, § 4(H). Because there was a third constitutional resolution, 2006 La. Acts 853 (amending LA. CONST. art. I, § 4(G)), the section originally designated 4(G) by Acts 859 was re-designated 4(H).

<sup>36</sup> LA. CONST. art. I, § 4(B)(3).

express constitutional authorization of expropriation for “the removal of a threat to public health or safety caused by the existing use or disuse of the property.”<sup>37</sup>

#### B. The Impact of the Constitutional Storm

The amendment to § 4(B) also contains an express prohibition on expropriations for predominant private use and on expropriation for subsequent transfers to private entities.<sup>38</sup> This presents the question as to what rights NORA has with respect to further disposition of such properties. If NORA uses expropriation to acquire property in order to remove “a threat to public health or safety caused by the existing use or disuse of the property,” is it barred from subsequently transferring this property to a new owner? A strict textualist interpretation is that this clause is found within the paragraph setting forth the definition of “public purpose” which appears to have been is the point of this amendment.<sup>39</sup> An expropriation for “public purpose” is limited by a prohibition of expropriations for use by or transfers to third parties. The problem with this strict textualist approach is that it creates the entirely anomalous situation where NORA can expropriate blighted properties, but never transfer them to any third party. An alternative policy-based interpretation of this amendment would construe the key word “for” in the limiting clauses as indicative of prohibited dominant purposes of the expropriation, and not as a limitation on subsequent use when the dominant purpose for acquisition is public health and safety. The grammatical structure of this clause supports this interpretation in that the threshold specification is that “property shall not be taken or damaged” is

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<sup>37</sup> LA. CONST. art. I, § 4(B)(2)(c).

<sup>38</sup> LA. CONST. art. I, § 4(B)(1). The prohibition on expropriations for use by or transfers to third parties expressly exempts expropriations for industrial plants, public ports, and pollution control facilities. LA. CONST. art. VI, § 21.

<sup>39</sup> LA. CONST. art. I, § 4(B)(2) provides that the limiting definition of “public purpose” in § 4(B)(2) refers to “public purpose” as used in § 4(B)(1).

followed by the two specific descriptions of “(a) for predominant use by any private person or entity, or (b) for transfer of ownership to any private person or entity”. In both instances the term “for” specifies two unacceptable justifications for taking or damaging property. In its normal and common meanings “for” is a preposition indicating “in order to,” or “with the purpose of.” When property is being expropriated because it is in the first instance a “threat to public health or safety,” its expropriation is justified on this ground and not in order to make it available for the predominant use by a private person or in order to transfer it to a private person.

The uncertainty with respect to NORA’s expropriated blighted properties is made even more confusing by the amendment which added § 4(H) to the Constitution. This amendment appears designed to permit the original owners to reacquire expropriated property. Conceptually the section is divided into two parts. The first part, consisting of the first subsection,<sup>40</sup> imposes a flat requirement that during a thirty year period following expropriation the government must offer to sell the property back to the original owner at fair market value before transferring the property to anyone else. The second part of this amendment, consisting of the next three subsections, describes the circumstances and conditions for defining and transferring property which is surplus of a project. The conceptual key to these three subsections is the concept of a “project” which was the justifying basis for the original expropriation, its completion, and then the disposition of property which is excess or surplus in no longer being needed for the “project”.

As applied to expropriations that are grounded in being a threat to public health or safety there are at least two possible interpretations. The first is that on its face § 4(H)

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<sup>40</sup> LA. CONST. art. I, § 4(H)(1).

does apply to all expropriations, regardless of the grounds that justify the expropriation. The clear problem with this interpretation is that it would mean that a city which seeks to expropriate a particular parcel of property because it is an imminent threat to public health or safety can do so under § 4(B)(2)(c) and then remove the cause of the threat. It would then, however, be required under § 4(H) to offer the property back to the former owner whose negligence and irresponsibility caused the problem in the first place. The negligent former owner would have the right to repurchase the property at “fair market value” without liability for the costs expended by the government in removing the threats to public health and safety. For example, if a tract of property has a dangerous abandoned structure on it which the city government demolishes at a cost of \$10,000, and also has delinquent properties taxes in the amount of \$5000, with a post-cleanup (and post-expropriation) fair market value of \$7000, the original owner can reacquire the property and reap a windfall – all at public expense.<sup>41</sup> Private property rights are not protected by rewarding those whose actions harm others.

A second possible interpretive approach to the interplay of § 4(H) and expropriations based on threats to public health or safety is to see the emphasis in subsections (2), (3) and (4) on “projects” and surplus property from such “projects” as being in essence a description of the overriding scope and purpose of this amendment.

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<sup>41</sup> This example assumes that the original owner did not receive any cash payment at the time of expropriation, as the payment for the value of the property taken was applied entirely against the tax liens and demolition liens. If the property did have net positive value at the time of the expropriation resulting in a cash payment to the owner, the windfall still accrues if for no reason other than the fact that removal of all liabilities and resolution of all title questions increases value. Any time the aggregate value of the removal of the liabilities and threats is greater than the fair market value at the time of resale, a windfall to the owner will result. If the fair market value of the property at the time of resale exceeds the total value of removal of all liabilities and threats, a windfall will not occur.

Such an interpretation would view § 4(H) in its entirety as an amendment addressing public “projects”, requiring that surplus property be offered back to the prior owner upon completion of the project. Under this interpretation the provisions of § 4(H) would simply not apply to expropriations justified on the grounds of removing threats to public health or safety,<sup>42</sup> but would apply to all other expropriations.<sup>43</sup> This interpretation would fully protect the rights of owners to regain surplus property. It would certainly create incentives for governments not to overestimate the property necessary for a public project and to avoid “surplus” property whenever possible. It would also, however, still leave the government the authority to expropriate property that threatens public health or safety and then use or dispose of such property as otherwise authorized by law.

The impact of this second storm on Louisiana as of yet remains uncertain, and additional constitutional theories may emerge to reconcile and interpret these recent amendments. What is clear is that these post-Kelo constitutional amendments have suddenly though perhaps inadvertently cast doubts upon the ability of the local and state governments to expropriate properties that are threats to public health or safety and return them to productive use. When the number of vacant and abandoned properties in New Orleans increased from 27,000 to over 100,000 in the fury of the hurricane, the constitutional storm simply undermines the ability of the government to remove the threats when owners decline to do so. Either definitive rulings of the Louisiana Supreme Court on the scope and application of the amendments, or additional constitutional

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<sup>42</sup> LA. CONST. art. I, § 4(B)(2)(c).

<sup>43</sup> LA. CONST. art. I, § 4(B)(2)(a), (b).

amendments clarifying the confusion, will likely be necessary before this storm is cleared.

One of the reasons why the constitutional storm in the form of the post-*Kelo* amendments is so significant lies in the fact that Louisiana has for decades sought to address “blighted” properties in large measure through the use of expropriation powers. Navigating the maze of Louisiana law on “blight” can be as challenging as determining when a building on high ground is high enough, but both must be done.

### **III. Confronting Substandard and Blighted Properties**

The State of Louisiana and many of its major urban cities have devoted substantial effort over the past twenty-five years to finding ways to address properties and neighborhoods characterized by deteriorating housing conditions, high rates of vacancy and abandonment, and tax delinquency. Not long after the creation of the federal Model Cities Program<sup>44</sup> Louisiana began to enact statutes designed to address housing and community revitalization. The New Orleans Community Improvement Agency was first authorized by the legislature in 1968,<sup>45</sup> and in the early 1980s we see the first specific statutory attention being focused on what came to be termed “blighted” property.

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<sup>44</sup> Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. 89-754, § 703 (1966) (for the purpose of “serving the poor and disadvantaged people living in slum and blighted areas”).

<sup>45</sup> The statute creating the New Orleans Community Improvement Agency, 1968 La. Acts 170, was subsequently repealed and replaced by statutes pertaining to the New Orleans Redevelopment Authority. See LA. REV. STAT. ANN. § 33:2740.3 historical note. The statutory foundation for the New Orleans Redevelopment Authority is now LA. REV. STAT. ANN. § 33: 4720.55 et. seq. (2006). The Louisiana Housing Authorities statutes, as is true of most jurisdictions in the country, trace back to the 1930’s. 1936 La. Acts 275.

Over the next twenty-five years the Louisiana legislature seemed determined to find ways to address the problem of vacant, abandoned, blighted and adjudicated properties, but the primary way in which this was done was simply the addition of one new statute after another with little attention to overall statutory schemes, programs and policies. Lawyers, if not lawmakers, tend to delight in parsing complex definitions of arcane topics and in tracing intricate webs of interrelated statutes. The law of “blighted” property in Louisiana is the epitome of disjointed and disconnected statutes, with internal cross-references yet inconsistent definitions. The good intentions of each session of the legislature (for twenty-five years) in finding new ways to address “blighted” property has had the cumulative effect of periodically placing new types of bandages on the same wound – by placing the new bandage on top of the old – and never cleaning out the wound itself.

Today the term “blight” or some variation of it appears well over 85 times in Louisiana codified law – in two separate articles of the state Constitution and thirty different statutory sections. There are today at least six structurally independent and different definitions of “blight” or “blighted property” and significant overlap with the concepts of “abandoned” and “adjudicated” property, which themselves have partially overlapping usage.

To unravel the maze that has become the law of blighted property in Louisiana requires that one bear in mind three overarching themes. First, there are multiple differing statutory definitions of the term “blight” and the legal implications of this term are highly contingent on the legal and functional context. Second, there has been a tendency in recent decades for Louisiana law to seek to address the problem of “blighted”

property through two primary governmental powers: enforcement of delinquent ad valorem taxes (and adjudicated properties) and expropriation. Third, one of the more common methods used by local governments across the United States to deal with these properties is police power enforcement of housing and building codes or legally defined public nuisances. Such powers are present in Louisiana but are largely in the distant background of local government attempts to transform blighted properties into productive uses.

A. The Core Concept of “Blight”

“Blight” as an adjective describing property or as a noun encompassing property or neighborhoods with certain characteristics did not enter the vernacular of law until the 1950’s. Its first appearance in decisions of the United States Supreme Court occurred in the 1954 landmark case of *Berman v. Parker*,<sup>46</sup> sustaining the use of eminent domain in slum renewal programs. Prior to that time “blight” was used in its far more traditional contexts suggestive of a harmful act or event, or the spread of agricultural disease. One of the first references to blighted property in Louisiana law appears in a 1945 decision of the Louisiana Supreme Court addressing the question of appropriate valuation techniques in expropriation proceedings, and even then it expressed its discomfort with the lack of analytic precision by referring to it as the “so-called blighted area”.<sup>47</sup>

The earliest statutory reference to “blighted areas” appears to have been in the initial authorization for community redevelopment agencies.<sup>48</sup> The complete lack of definitional precision and analytic clarity is reflected in the broad range of constantly

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<sup>46</sup> 348 U.S. 26 (1954).

<sup>47</sup> *Housing Authority of New Orleans v. Gondolfo*, 208 La. 1065, 24 So. 2d 78 (1945).

<sup>48</sup> *See, e.g.*, 1968 La. Acts 215.

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shifting terms that tend to be used synonymously. We find in the laws references to “blighted housing property,”<sup>49</sup> “blighted property,”<sup>50</sup> “blighted districts,”<sup>51</sup> and “blighted residential areas.”<sup>52</sup> We also see statutory concerns over property that is “abandoned or blighted,”<sup>53</sup> areas that are “slum and blighted,”<sup>54</sup> and more generally “urban blight”<sup>55</sup> and “slums and urban blight.”<sup>56</sup>

Despite this lack of precision and relatively recent historical grounding, “blight” has specific constitutional status in Louisiana. It appears in three separate constitutional provisions, each with a slightly different context. One reference was added in 1996 and is express authorization for the donation of “abandoned or blighted housing property” by a local government to a nonprofit organization.<sup>57</sup> A second reference was added in 1998 and permits the waiver of tax liens on blighted property in connection with redevelopment of the property.<sup>58</sup> The third reference was the first one added – in 1995 – and is the most unusual one. This reference permits a shorter 18 month right of redemption from tax sales for property in New Orleans.<sup>59</sup> While the other two section references do not provide a definition of “blight”, this third reference expressly

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<sup>49</sup> *See, e.g.*, LA. CONST. art. VII, § 14(B)(6); LA. REV. STAT. ANN. § 33:4717.3 (2006).

<sup>50</sup> *See, e.g.*, La. Const. art. VII, § 14(B)(7).

<sup>51</sup> *See, e.g.*, LA. REV. STAT. ANN. § 33:106(B)(2) (2006).

<sup>52</sup> *See, e.g.*, LA. REV. STAT. ANN. § 40:582.2 (2006).

<sup>53</sup> *See, e.g.*, LA. REV. STAT. ANN. § 19:136 (2006).

<sup>54</sup> *See, e.g.*, LA. REV. STAT. ANN. §33:4625(B)(a) (2006). There is also a statutory section which expressly distinguishes “blighted areas” from “slum areas”. *See* LA. REV. STAT. ANN. § 40:572(1) (2006) (“ ‘Blighted Area’ means an area, other than a slum area, ....”).

<sup>55</sup> *See, e.g.*, LA. REV. STAT. ANN. §§ 33:2891.1, 33:4720.11, 33:4720.25 (2006).

<sup>56</sup> *See, e.g.*, LA. REV. STAT. ANN. §§ 33:4625(F)(6), 33:4720.52(A)(3) (2006).

<sup>57</sup> La. Const. art. VII, § 14(B)(6) (referring to “blighted housing property”).

<sup>58</sup> La. Const. art. VII, § 14(B)(7) (referring to “blighted property”).

<sup>59</sup> La. Const. art. VII, § 25(B)(2).

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incorporates a specific legislative definition of blight.<sup>60</sup> This raises the most unusual position that blight – for purposes of the 18 month right of redemption from tax sales in New Orleans – is constrained to properties as defined by the legislature in 1984 and it is otherwise beyond the authority of the legislature to alter that definition.<sup>61</sup>

Most of the usage of the concept of blight is found not in the state constitution but in a broad range of state statutes. The concept of “blight” (or some derivation of blight) is a central legal concept in Louisiana law in eight different contexts:

- (1) the shorter redemption period from tax sales in New Orleans;<sup>62</sup>
- (2) the criminal act of intentionally or “criminally negligent” causing or permitted property to become blighted;<sup>63</sup>
- (3) the expropriation power of redevelopment authorities;<sup>64</sup>

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<sup>60</sup> 1984 La. Acts 155. This Act provides in Section 1:

“For purposes of this Section, “blighted property” shall include those premises which have been declared vacant, uninhabitable, and hazardous by the Department of Safety and Permits of the city of New Orleans. In determining whether any premises are vacant, uninhabitable, or hazardous, the Department of Safety and Permits shall consider the following:

- (1) Any premises which because of physical condition are considered hazardous to persons or property;
- (2) Any premises declared to be a public nuisance;
- (3) Any premises declared to be a fire hazard; or
- (4) Any premises declared to be vermin infested or lacking in facilities or equipment required by the housing code of the city of New Orleans.

This statutory (and now constitutional) definition was originally an amendment to the Community Improvement Act of New Orleans, and is carried forward in substantially similar form as LA. REV. STAT. ANN. § 33:4720.59(B) (2006).

<sup>61</sup> This same constitutional section permits the shorter redemption period for “abandoned” property as well as “blighted” property. The constitution, however, defined “abandoned” with reference to a statutory section, LA. REV. STAT. ANN. §33:4720.12(1) (2006), rather than with reference to an Act. The contrast in the manner in which the two legal definitions are provided is striking.

<sup>62</sup> La. Const. art. VII, § 25(B)(2).

<sup>63</sup> LA. REV. STAT. ANN. § 14:107.3 (2006).

- (4) acquisitive prescription;<sup>65</sup>
- (5) the recently enacted Housing Preservation Act providing for the maintenance of local and state blighted property housing lists, and potential receivership actions;<sup>66</sup>
- (6) the powers of housing authorities and housing cooperation agreements;<sup>67</sup>

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<sup>64</sup> See, e.g., LA. REV. STAT. ANN. § 33:4625(P)(8)(i) (2006) (parish redevelopment authorities generally); § 33:4720.71(3) (2006) (New Orleans Redevelopment Authority).

<sup>65</sup> LA. REV. STAT. ANN. §9:5633 (2006).

<sup>66</sup> LA. REV. STAT. ANN. §40:600.33 (2006). This statute contains the following definition:

(4) "Blighted housing property" means (a) any residential housing property for which environmental remediation is required by state law, rule, or regulation and the condition of which is found or declared by the public officer to be harmful to the health or welfare, including the economic welfare, of the residents of the local governmental subdivision wherein the residential property is located, (b) any residential housing property that, as of the effective date of this Chapter, had been determined to be a blighted property or an adjudicated property by the local governmental subdivision, (c) any residential housing property that (i) is offered by a party in interest for inclusion on a blighted housing properties list and (ii) the current condition of which is declared by the local governmental subdivision to be below minimum habitability standards and unfit for human habitation, occupancy, or use, or (d) any residential housing property that (i) has not been legally occupied for eighteen months prior to the time a public officer makes a determination that the property has been vacant for such eighteen-month period and (ii) has been determined to be a public nuisance by the local governmental subdivision, except no residential housing property in an area impacted by Hurricane Katrina or Hurricane Rita which was occupied as of August 28, 2005, shall be included if the owner is eligible for and receives assistance under the Road Home Housing Program.

<sup>67</sup> LA. REV. STAT. ANN. § 40:572(1) (2006). This statute contains the following definition:

(1) "Blighted area" means an area, other than a slum area, where by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, submergence of lots by water or other insanitary or unsafe conditions, deterioration of site improvements, failure to install public utilities, diversity of ownership, tax

(7) the authority of local governments to donated blighted property;<sup>68</sup> and

(8) the tax adjudication of condominium units.<sup>69</sup>

Across these eight statutory contexts in which “blight” is a central concept there is strong similarity in definitions but it would be a serious error to think that there is a single definition is shared by all contexts. For purposes of these eight contexts there appear to be three core definitions of blight: (1) administrative determinations of blight; (2) blight for purposes of redevelopment authority activities; and (3) blight as related to adjudicated properties.

#### B. Administrative Finding of Blight

Louisiana law authorizes a local government administrative board, after notice to the owners and a hearing, to issue a finding that a parcel of property is in violation of a “public health, housing, fire code, environmental, and historic district ordinance.”<sup>70</sup> Grounded in the inherent police power of government to take actions to prevent harms, such a finding authorizes the levy of fines and penalties as well as affirmative remedial action by the local government itself with a corresponding lien on the property securing the fines, costs and penalties, and public expenditures.<sup>71</sup>

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delinquency, defective or unusual conditions of title, improper subdivision or obsolete platting, or any combination of such factors, the development of such blighted area, which may include some incidental building or improvements, into predominantly housing uses is being prevented.

<sup>68</sup> LA. REV. STAT. ANN. § 33:4720.26 (2006).

<sup>69</sup> LA. REV. STAT. ANN. § 9:1123.116(E) (2006).

<sup>70</sup> LA. REV. STAT. ANN. § 13:2575(B)(1) (2006).

<sup>71</sup> The lien has “super-priority” status as an encumbrance against the property, LA. REV. STAT. ANN. § 13:2575(C)(1) (2006), and under a 2007 amendment this administrative procedure is available to all local governments in Louisiana, 2007 La. Acts 193 (amending § 13:2575(B)(1) (2006)). The lien imposed as a result of the proceeding may be enforced in the same manner as judicial enforcement of a mortgage lien, 2007 La. Acts 115 (amending § 13:2575(C)(1) (2006)).

A common source of confusion arises as to whether these administrative proceedings are the same as an administrative determination of “blight” for other purposes. The basis for this confusion appears to stem from the separate statutory provision related to expropriations by the New Orleans Redevelopment Authority which defines “blighted property” as “lots which have been declared vacant, uninhabitable, and hazardous by an administrative hearing officer acting pursuant to R.S. 13:2575 and 2576 or other applicable law.”<sup>72</sup>

In order to avoid this confusion it is vital to understand that an administrative proceeding under § 13:2575 can serve two very different functions with radically different consequences. The first function is the straightforward exercise of governmental police power to enforce housing and building codes and otherwise address public nuisances. Such enforcement proceedings are intended to require the owner to remediate any code violations and, upon failure of the owner to do so, the government can take such remedial action as necessary. This initial function is not intended to result in an acquisition of the property by the government, and does not require the government to pay compensation to the owner of the substandard property. A code enforcement action results in the transfer of ownership of the property if and only if the fines, penalties and costs of remedial actions are not paid by the owner and the government enforces its lien against the property by a foreclosure sale.

The second function of the administrative proceeding is that it can serve as a determination of blight for purposes of permitting a redevelopment authority to proceed

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<sup>72</sup> LA. REV. STAT. ANN. § 33:4720.59(B) (2006). This administrative finding of blight is also a sufficient trigger for the exercise of “Quick-Take” expropriation. LA. REV. STAT. ANN. § 19:136.1(2) (2006).

with expropriation. Though this second function shares the goal of eliminating the substandard or harmful attributes of the property, it does so by forcing an involuntary transfer of ownership from the original owner to the redevelopment authority, with the attendant requirement that full compensation be paid as part of the expropriation.

Administrative proceedings under § 13:2575 are also the procedural trigger for the crime of “criminal blighting” of property,<sup>73</sup> though as in the case of redevelopment expropriation it is a sufficient but not a necessary prerequisite.<sup>74</sup> Similarly, acquisitive prescription within a three year period is possible for property declared blighted through this administrative proceeding.<sup>75</sup>

### C. Redevelopment Expropriation

It is in the context of the broad range of redevelopment laws that the concept of “blight” is both critical and fluid at the same time. Administrative determinations of “blight” pursuant to § 13:2575 appear to be sufficient for “Quick-Take” expropriation<sup>76</sup> and general expropriation by NORA,<sup>77</sup> but in both instances such a determination is neither a necessary nor the sole criteria. Curiously, the statute specifically authorizing blight expropriation by NORA predicated on a § 13:2575 finding also includes a list of additional factors that may be considered by the hearing officer.<sup>78</sup>

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<sup>73</sup> LA. REV. STAT. ANN. § 14:107.3 (2006).

<sup>74</sup> For purposes of the criminal statute, “blighted property” could be property declared to be a public nuisance under “any other applicable law”. LA. REV. STAT. ANN. § 14.107.3(A)(1) (2006).

<sup>75</sup> LA. REV. STAT. ANN. § 9:5633(A)(1) (2006).

<sup>76</sup> LA. REV. STAT. ANN. § 19:136.1 (2006).

<sup>77</sup> LA. REV. STAT. ANN. § 33:4720.59(B) (2006).

<sup>78</sup> LA. REV. STAT. ANN. § 33:4720.59(B)(1-4) (2006). This language was added to the statute in 1984. *See, supra* note \_\_ (18).

Entirely separate from the administrative determination of blight pursuant to §13:2575, both NORA and redevelopment authorities more generally have the statutory power to acquire “blighted” property by purchase or by expropriation. A separate statutory definition is provided in this context:

“Blighted area” means an area which by reason of the presence of a substantial number of slum, deteriorated or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use; but if the area consists of any disaster area referred to in R.S. 33:4720.57(G), it shall constitute a “blighted area”.<sup>79</sup>

The determination of whether an area is a “blighted area” or property is “blighted property” in the redevelopment powers requires as a general matter a determination by

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<sup>79</sup> LA. REV. STAT. ANN. §33:4720.71(3) (2006). A substantially identical provision appears in the Parish Redevelopment Law, LA. REV. STAT. ANN. § 33:4625(P)(8)(i) (2006), and in the specific statute for St. Charles Parish, LA. REV. STAT. ANN. § 33:4720.89 (2006).

the local governing body that the area is indeed blighted and such a finding is encapsulated in a community improvement plan.<sup>80</sup>

For purposes of blight expropriation by NORA it appears that there are at least four different statutory foundations: (1) an administrative proceeding for code enforcement;<sup>81</sup> (2) an administrative proceeding with additional factors to be considered;<sup>82</sup> (3) general parish redevelopment authority;<sup>83</sup> and (4) the specific NORA statute.<sup>84</sup> In addition to these references there is a broad “catch-all” authorization if the blighted nature of the property is determined by reference to “other applicable law.”<sup>85</sup>

One of the challenges facing Louisiana in the aftermath of both the *Katrina* storm and the post-*Kelo* constitutional amendment storm is to sort through the maze of definitions and functions for the concept of “blight”. The most common approach throughout the United States is to differentiate clearly the exercise of police power from that of eminent domain (or expropriation). Police power is inherent in the protection of public health, safety and welfare and is a sufficient basis to create minimum standards and to impose penalties for violations. Housing and building codes as well as land use planning more generally fall within this authority. Under the federal constitution the power of eminent domain is co-terminus with the police power, but this is not the case in Louisiana. By virtue of the recent constitutional amendments the power of expropriation is much more narrowly constrained to defined public purposes. All *statutory* definitions of “blight” when used for purposes of expropriation must now be reexamined and

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<sup>80</sup> See *e.g.*, LA. REV. STAT. ANN. §§ 33:4625(G), 33:4720.57(A) (2006).

<sup>81</sup> LA. REV. STAT. ANN. § 13:2575 (2006).

<sup>82</sup> LA. REV. STAT. ANN. § 33:4720.59(B) (2006).

<sup>83</sup> LA. REV. STAT. ANN. § 33:4625 (2006).

<sup>84</sup> LA. REV. STAT. ANN. § 33:4720.60 (2006).

<sup>85</sup> LA. REV. STAT. ANN. § 33:4720.55(A)(5) (2006).

reevaluated in light of the new constitutional constraints. It is entirely possible that the “blight” foundation of expropriation for the past forty years has been replaced by these post-*Kelo* amendments. If “blight” is the same as “removal of a threat to public health or safety” then expropriation continues to be authorized. If, however, a goal of blight elimination cannot be grounded in such threat removal or the narrow list of public purposes it will remain vulnerable to a constitutional challenge.

#### **IV. Tax Adjudicated Properties**

Property tax foreclosure laws in Louisiana are among the most complex, lengthy, and convoluted of any state in the country. As was true of a large number of jurisdictions throughout the United States in the twentieth century,<sup>86</sup> Louisiana continues to follow a tax foreclosure – or tax adjudication – process which does not involve a judicial proceeding or a judicial ruling on the finality of a tax sale. Tax delinquent property is auctioned at a public nonjudicial sale and is subject to a constitutional three-year right of redemption.<sup>87</sup> Property located in the City of New Orleans is subject only to an eighteen-month redemption period<sup>88</sup> if it is classified as abandoned<sup>89</sup> or blighted,<sup>90</sup> but unfortunately the definitions of abandoned or blighted are underinclusive with respect to the inventory of tax delinquent properties and are not consistent with one another. Properties not sold at a tax sale for the minimum bid of taxes, costs, and interest are

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<sup>86</sup> See Frank S. Alexander, *Tax Liens, Tax Sales and Due Process*, 75 IND. L.J. 747 (2000).

<sup>87</sup> LA. CONST. art. VII, § 25(B).

<sup>88</sup> LA. CONST. art. VII, § 25(B)(2).

<sup>89</sup> LA. REV. STAT. ANN. § 33:4720.12 (2006) (“abandoned” is defined as tax adjudicated to a local government, vacant, and not lawfully occupied).

<sup>90</sup> LA. REV. STAT. ANN. § 33:4720.59 (2006) (“blighted” is defined as vacant, uninhabitable, or hazardous).

automatically transferred to the parish or municipality,<sup>91</sup> but physical possession of the property requires yet another action.<sup>92</sup>

Even more problematic than the length of the redemption period (which runs only from the date of recording of a tax sale deed) is the fact that full notice as required by the federal constitution<sup>93</sup> to property owners of the potential loss of the property is not given until the expiration of the redemption period.<sup>94</sup> Because there is no judicial ruling on the adequacy of the tax sales as part of the adjudication process, additional legal proceedings usually in the form of a quiet title action are essential in order to render title to property marketable and insurable.<sup>95</sup> As a consequence, property that is tax delinquent usually remains immune from forced transfers or investment by third parties for years after the date of the initial delinquency.

The reports of the National Vacant Properties Campaign in early 2005 identified a dozen possible statutory amendments which would increase the efficiency and effectiveness of the tax adjudication process. With the crush of other legislative initiatives post-*Katrina*, none of these recommendations has been enacted though several have been introduced.<sup>96</sup>

The Louisiana legislature recently recognized that the present statutory scheme for acquiring, managing and disposing of adjudicated properties held by local

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<sup>91</sup> LA. REV. STAT. ANN. §§ 47:2186, 47:2251 (2006). Direct acquisition of tax adjudicated properties by the City of New Orleans is governed by LA. REV. STAT. ANN. § 47:2254 (2006).

<sup>92</sup> LA. REV. STAT. ANN. §§ 33:2862, 47:2185 (2006).

<sup>93</sup> LA. CONST. art. VII, § 25(C).

<sup>94</sup> See *Jones v. Flowers*, 547 U.S. 220 (2006); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

<sup>95</sup> LA. REV. STAT. ANN. § 47:2228 (2006).

<sup>96</sup> See, e.g., H.B. 516, 2006 Reg. Sess (La.).

governments results creates an inefficient and ineffective process. By concurrent resolution it charged the Louisiana Law Institute to prepare and report of “recommendations relative to organizing and improving the procedures for the sale of tax adjudicated properties.”<sup>97</sup> Through 2006 and 2007 the Adjudicated Property Committee held numerous working sessions on its draft report, which is anticipated to be presented to the legislature in 2008.

Meaningful reform of the tax foreclosure process in Louisiana will require far more than amending a few statutory provisions to improve the quality of notice provided to interested parties. Significant reform would address three core key features of the current system: (1) the constitutional redemption period; (2) the time and method for providing constitutionally required notice, and (3) the concept of “adjudicated properties”.

The three year constitutional redemption period lies at the heart of the current problems of inefficiency in the property tax enforcement system. The optimal situation would be a constitutional amendment revising the current language<sup>98</sup> to provide simply that the “property sold shall be redeemable for a period of time as established by general law.” The resolution for such a constitutional amendment could be tied to the conditional enactment of a statute creating a three year redemption period. This approach would be consistent with a desire to effect no change in major underlying rights. It would, however, preserve the ability of the legislature to address this in the future.

At present notices of tax sales and termination of redemption rights are required to be provided on multiple occasions, often to slightly different groups of parties having

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<sup>97</sup> 2006 La. Regular Session, House Concurrent Resolution No. 69.

<sup>98</sup> La. Const. art. VII. § 25(B).

interests in the underlying property. A far more efficient and effective system would be to provide constitutionally adequate notice to all parties at one time, whether that be at the time of the tax sale or at the termination of the redemption period.

The entire concept of “adjudicated” property is not constitutionally grounded but is instead a statutory creation. It is a term that applies only to the property which is transferred to the local governments when no third party tenders the minimum bid at the original tax sale. The statutory treatment of “adjudicated properties” however, is far more cumbersome and restrictive than are the rights of the original purchasers at tax sales. The statutes, in effect, significantly limit and restrict the ability of local governments to return these properties to productive use. The most efficient approach be to eliminate entirely the concept and terminology of “adjudicated” property. The simplest way to eliminate this concept, and the approach followed in a number of other jurisdictions, is to provide that in the event that a bid equal to or greater than the minimum bid at a sale is not tendered by a third party, then the party shall be deemed sold to the Parish in which the property is located for a price equal to the minimum bid (but no cash payment is required of the Parish). The Parish, or political subdivision, would become the “tax sale purchaser”, and would have the same rights and the same duties as any other tax sale purchaser.

Reform of the tax foreclosure system is a necessary element of land reform in Louisiana, and is tied closely to the challenges posed by “blighted” properties that are eligible for expropriation, or subject to enhanced code enforcement proceedings. Reforms in these areas will increase the potential for returning vacant, abandoned, substandard and tax delinquent properties into productive use but it the private market

may lack the capacity to absorb a significant inventory of these properties at any given time. To meet this concern, one additional tool is needed in Louisiana land reform – that of land banking.

## **V. Land Banking as Affirmative Planning**

The third dimension of land use planning is the concept of using a governmental entity to acquire, manage, and hold properties for both short and long term strategic uses in the face of contractions and expansions of normal market demands for real property. As originally proposed in 1971, a land bank would serve to acquire parcels of property to be held for future strategic uses, such as public buildings, open greenspaces, or specific uses not accomplished by normal market conditions.<sup>99</sup> The underlying belief was that the interplay of government regulations and market conditions would not adequately meet public priorities. By creating a “bank” to own and control a fluctuating stock of real property assets, the government could both soften the adverse effects of market contractions and expansions and achieve targeted public goals.<sup>100</sup>

In the decades since they were first proposed, land banks have been created in five major urban areas in the United States (St. Louis, Cleveland, Louisville, Atlanta, and Flint) and in numerous smaller communities.<sup>101</sup> The primary focus of these land banks has been to acquire vacant, abandoned, and tax delinquent properties which, prior to the land bank acquisition, were a major detriment and liability to the surrounding properties

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<sup>99</sup> See Harr, *supra* note 2.

<sup>100</sup> Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 140, 143-44 (2005).

<sup>101</sup> Frank S. Alexander, *Land Bank Authorities: A Guide for the Creation and Operation of Local Land Banks* (April 1, 2005), available at <http://www.lisc.org/content/publications/detail/793>.

and neighborhoods. By definition, these properties produce no tax revenues and only harm the larger community. In acquiring ownership and control of these properties, the land bank can immediately move to rehabilitate or demolish the offending structures and stabilize the neighborhood. With broad disposition authority, the land bank can also engage in strategic transfers to accomplish specified public purposes such as the development of affordable housing.

As a city confronted with weakening market demand and declining population prior to *Katrina*, New Orleans already confronted a surplus of residential housing and a large stock of vacant, abandoned, and tax adjudicated properties. The central recommendation of the National Vacant Properties Campaign was the creation of a land bank in New Orleans to acquire, control, and strategically convey these properties.<sup>102</sup>

What was true before *Katrina* became a necessity in its aftermath. The number of vacant and abandoned properties increased five-fold, and the population further declined by fifty percent. Two potential entities emerged, either of which could have served as a land bank. The Road Home Corporation, as the real estate owning affiliate of the LRA, could have acquired large numbers of parcels in exchange for its assistance payments. However, the public preference to remain in New Orleans and rebuild and the governmental policy not to require transfers of ownership left the LRA and the Road Home Corporation as funding agencies rather than real estate managers. Though the inventory acquired by the Road Home Corporation may be less than originally anticipated, it could still be the source of several thousand parcels of property for local government ownership, control, and disposition.

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<sup>102</sup> See *New Orleans Technical Assessment and Assistance Report*, *supra* note 3.

The second possibility for a land bank in New Orleans is NORA. Mayor Nagin anticipated that NORA would become “the depository for swaths of wrecked residential property.”<sup>103</sup> There are four potential sources of real property which could be acquired by NORA at little or no cost: (1) transfers of property acquired by the Road Home Corporation, (2) expropriations, (3) tax adjudicated properties, and (4) acquisition of properties as a result of city enforcement of public demolition liens and nuisance abatement liens. Additionally, if funds are available, NORA could acquire properties through direct market purchases.

The combination of homeowner expectations and governmental policies indicate thus far that the Road Home Corporation will not be a dramatic source of properties for NORA. Expropriations may be a viable source of the inventory, but this is contingent on both the availability of funds to pay compensation and achieving clarity through judicial rulings or supplemental legislation on the impact of the 2006 post-*Kelo* amendments to the Louisiana Constitution.

Tax adjudicated properties are the single strongest source of an inventory for NORA’s land banking activities. To be effective, however, the inventory must have insurable and marketable title and new procedures must be made available through legislative amendments and local government operating policies. A major reform of the property tax enforcement system in Louisiana could significantly assist in the conversion

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<sup>103</sup> Frank Donze, *Low-Profile Agency Gains Blight-Bust Powers: Unlikely Agency Key to Rebirth*, NEW ORLEANS TIMES-PICAYUNE, Oct. 11, 2006.

of abandoned tax delinquent properties from liabilities into assets for the entire community.<sup>104</sup>

When a property owner ultimately elects to abandon his or her property even after receipt of disaster assistance, it becomes the responsibility of the local government to take action to demolish the improvements when appropriate in order to protect public health and safety. On February 1, 2007, the City Council of New Orleans amended its local ordinances to strengthen the ability of the City to demolish structures.<sup>105</sup> If the City of New Orleans expends funds to demolish structures pursuant to this ordinance, it can place a lien on the property for the amount of the expenditures and then enforce the “super-priority” status of that lien pursuant to state law, forcing a sale of the property to a third party or its direct acquisition by the City.<sup>106</sup>

## **Conclusion**

Storms reveal our weakest points. Louisiana has been hit by two storms which together lay bare the inefficient and ineffective structures for confronting large inventories of abandoned, substandard and often tax delinquent property. Such storms also present a new clarity of vision on the avenues for change. The first step in Louisiana land reform is to resolve the impact of the “second storm” and the constitutional questions about the appropriate exercise of expropriation. Second, Louisiana will need to revise significantly its reliance on multiple definitions of “blight” and shift to much

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<sup>104</sup> Such a transformation is precisely what occurred with the enactment of a comprehensive tax foreclosure reform in Michigan and the subsequent enactment of the Michigan Land Bank Act. *See* Alexander, *Land Bank Authorities*, *supra* note 101.

<sup>105</sup> New Orleans, La., Ordinance 22499 (Feb. 1, 2007) (adding Section 26-264 (redesignated as 26-263)).

<sup>106</sup> LA. REV. STAT. ANN. §§ 13:2575(B)(2)(f), 13:2575(C) (2006).

higher standards of code enforcement generally. Third, major reform of tax foreclosure laws generally, and the law of adjudicated property in particular, is long overdue. Fourth, local governments need to be given the capacity to engage in land banking functions as one way of moderating the dramatic shifts of supply and demand.

Land use planning presents the challenge of normative guiding with empirical anticipation. The interplay of market conditions and governmental regulations may be well intentioned, but rarely possesses the flexibility to adjust to sudden changes or unanticipated needs. A land bank authority is designed to moderate market demand and public needs by acquisition of excess supply when demand falls, or provision of supply for targeted purposes in the face of high demand and insufficient resources.

Louisiana, and most importantly the City of New Orleans, presented a strong case for the role of a land bank prior to *Katrina*, *Rita*, and *Wilma*. With these storms, followed by the constitutional amendment storm, Louisiana needs all of the tools that are possible in order to engage in the land use planning appropriate for recovery and rebuilding.